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Circulate to Magistrates:	YES / NO
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IN THE HIGH COURT OF SOUTH AFRICA
NORTHERN CAPE DIVISION, KIMBERLEY

Case No: 2486/2016
Heard on: 21/04/2017
Delivered on: 02/06/2017

In the matter between:

**THE NATIONAL DIRECTOR OF PUBLIC
PROSECUTION**

APPLICANT

AND

P. D. P.

RESPONDENT

JUDGMENT

MAMOSEBO J:

- [1] The applicant, the National Director of Public Prosecutions (the NDPP), is seeking an order confirming the interim order (rule nisi) issued out of

this court on 18 November 2016 in terms of s 38 of the Prevention of Organised Crime Act, 121 of 1998 (POCA), in respect of a Renault Megane motor vehicle with registration numbers and letters [C...]. The respondent, Mr P. D. P., and the natural guardian of the minor in whose name the vehicle is registered, Ms C. J., opposed the confirmation of the rule nisi and urge for its discharge.

The background leading to the seizure of the property

- [2] On 31 July 2015 the Kakamas police officials, under the command of Colonel Boetie De Bruin, had set up a road block on the N14 between Keimoes and Kakamas, about 13 kilometers outside Kakamas. The respondent was the driver of the vehicle and was in the company of four passengers. The vehicle approached the road block around 13h00 from the direction of Keimoes.
- [3] Col De Bruin stated that he noticed a black plastic bag being thrown from the vehicle when it was about 500 meters from the road block. It fell on the gravel shoulder of the road next to the tarred road. Col De Bruin asked W/O Jacobus Andreas to collect the black plastic bag and to ascertain its contents.
- [4] The vehicle proceeded to the stopping point where the respondent was met with an enquiry by Col De Bruin on what was thrown out of the vehicle. The window of the vehicle on the driver's side was open. The respondent denied throwing anything out of the window and stated that it might have been one of the passengers who did that. Following from the respondent's response Col De Bruin enquired from the four passengers whether anyone of them threw anything out of the window. They all

denied it. They confirmed that they had hitched a ride from the respondent from Upington to Kakamas and did not know him before then.

- [5] W/O Andreas arrived at that point in possession of the black bag which was opened in the presence of the respondent and his passengers. Contained in that plastic bag were 7 small plastic bags containing mandrax tablets. Col De Bruin claims that the driver and his passengers seemed nervous and uncomfortable at that stage. The respondent stated that he could see that the contents in the bag were mandrax tablets. The five men were arrested and the mandrax tablets were confiscated and later counted in their presence at the police station. There were 344 tablets in number with an estimated value of R17 200.00. The tablets were later analysed by W/O Maria Msesi at the SAPS forensic laboratory and found to contain methaqualone which is listed in Part III of Schedule 2 of the Drug and Drug Trafficking Act, 140 of 1992. All suspects were arrested for possession of drugs but the criminal charges were subsequently withdrawn by the public prosecutor, evidently because doubt must have existed as regards who in fact possessed or owned the illegal substance.
- [6] It is trite, however, as explained by Ackermann J in *National Director of Public Prosecutions and Another v Mohamed NO and Others* 2002 (2) SACR 196 (CC) at 204c that Chapter 6 of POCA provides for forfeiture of the proceeds of and instrumentalities used in crime; it is not conviction-based and may be invoked even where there is no prosecution.
- [7] The case that Adv van Dyk for the applicant is trying to make out is that since the vehicle was used by the respondent to transport the drugs it was used as an instrumentality in the commission of an offence and as a consequence the *rule nisi* ought to be confirmed. Counsel submitted that

the fact that the vehicle was registered in the name of his minor child is merely a smokescreen. However, on the day of the arrest it was not used in any of the child's interests or wellbeing.

- [8] In his opposition the respondent contended that the vehicle was bought for his minor daughter and denied its use in any commission of an offence on 31 July 2015. According to him the contents of the black bag were thrown from a white Toyota Cressida travelling in front of his vehicle that was also stopped at the road block. He says the occupants in his vehicle were unknown to him as he had offered them a lift. He denied that he told Col De Bruin that it must have been one of his passengers who threw the bag out of the vehicle. He maintains that he suggested to Col De Bruin to preserve the bag in order to lift fingerprints therefrom for investigative purposes. He says he did not know that the tablets recovered at the roadblock were mandrax tablets. He further denies that the vehicle was used as an instrumentality of an offence.
- [9] Ms C. J., the minor child's guardian and mother, filed an affidavit as an interested party opposing the application for confirmation of the rule. She confirmed that the vehicle is registered in her 6-year old daughter's name and that it was bought by the respondent as a gift for the child on 29 May 2015. She averred that the vehicle is utilised for "parental responsibilities" of the child. Since seizure of the property they have been using public transport
- [10] The issue that falls for determination is whether the property was an instrumentality of an offence and if it was, whether it is liable for forfeiture.

[11] Section 1 of POCA defines instrumentality of an offence as:

“Any property which is concerned in the commission or suspected commission of an offence at any time before or after the commencement of this Act, whether committed within the Republic or elsewhere.”

[12] In **Brooks v NDPP** (855/16) [2017] ZASCA 42 (30 March 2017) at para 58 Ponnann JA’s remarks are instructive:

“[58] The correct interpretation of the concept ‘instrumentality of an offence’ in the context of POCA was considered by the Constitutional Court in Prophet [Prophet v National Director of Public Prosecutions 2006 (2) SACR 525 (CC); 2007 (6) SA 169 (CC)]. As Van Heerden AJ explained in Mohunram [Mohunram & another v National Director of Public Prosecutions & another (Law Review Project as Amicus Curiae) 2007 (4) SA 222 (CC), in considering the meaning of the phrase ‘an instrumentality of an offence’ the Constitutional Court in Prophet adopted the interpretation accepted by the Supreme Court of Appeal in a trilogy of cases. Van Heerden AJ added:

*‘In the first of those cases, Cook Properties [National Director of Public Prosecutions v RO Cook Properties (Pty) Ltd; National Director of Public Prosecutions v 37 Gillespie Street Durban (Pty) Ltd & another; National Director of Public Prosecutions v Seevnarayan 2004 (2) SACR 208 (SCA)], Mpati DP and Cameron JA said that “(i)t is clear that in adopting this definition the Legislature sought to give the phrase a very wide meaning”. They held, however, that in order to ensure that application of the forfeiture provision does not constitute arbitrary deprivation of property in violation of s 25(1) of the Constitution “...the words ‘concerned in the commission of an offence’ must ... be interpreted so that **the link between the crime committed and the property is reasonably direct, and that the employment of the property must be***

functional to the commission of the crime. By this we mean that the property must play a reasonably direct role in the commission of the offence. In a real or substantial sense the property must facilitate or make possible the commission of the offence. As the term ‘instrumentality’ itself suggests ... the property must be instrumental in, and not merely incidental to, the commission of the offence. For otherwise there is no rational connection between the deprivation of property and the objective of the Act: the deprivation will constitute merely an additional penalty in relation to the crime, but without the constitutional safeguards that are a prerequisite for the imposition of criminal penalties.’

In other words, the determining question is

“...whether there is a sufficiently close link between the property and its criminal use, and whether the property has a close enough relationship to the actual commission of the offence to render it an instrumentality.”

- [13] When dealing with such an application the focus is not on the state of mind of the owner, but rather on the role the property plays in the commission of the crime. See ***National Director of Public Prosecutions v RO Cook Properties (Pty) Ltd; National Director of Public Prosecutions v 37 Gillespie Street Durban (Pty) Ltd & Another; National Director of Public Prosecutions v Seevnarayan*** 2004 (2) SACR 208 (SCA). The ***Cook Properties*** case has also confirmed the principle at page 239g para 21 that POCA is designed to reach far beyond organised crime, money laundering and criminal activities in that it also applies to individual wrongdoing.

- [14] I must interpose and state that counsel for the respondent had argued that Moseneke DCJ had pronounced in ***Mohunran v NDPP (Law Review Project as Amicus Curiae)*** 2007 (2) SA 145 (CC) at para 115 that POCA

does not extend to individual wrongdoing. Moseneke DCJ pronounced at para 117e as follows:

“I specifically leave open the decision whether the scope of the Act is designed to reach beyond racketeering, money laundering and criminal gang activities and apply to cases of individual wrongdoing.”

Counsel therefore misconstrued what the DCJ stated. He clearly left the issue open and based on our precedent system the SCA has now pronounced on the matter.

- [15] The question that further falls for determination is whether a functional relation between the vehicle and crime has been established.
- [16] The respondent’s explanation about the black plastic bag is telling. First he had said that it must have been jettisoned by one of his passengers and later somersaulted and said it was thrown from a white Toyota Cressida travelling in front of his vehicle. Why would the police not have accosted the driver of the white Cressida if that is the case? Based on the trite principle in ***Plascon- Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*** 1984 (3) SA 623 (A) at 634E-635C the respondent’s responses in respect of the origins of the plastic bag are untenable and are rejected merely on the papers.
- [17] Although the respondent and his passengers lied about the plastic bag it was still incumbent upon the NDPP to prove possession thereof. In the end it is immaterial whether or not the vehicle was registered in the name of the child.
- [18] It is very unusual and highly suspicious why a motor vehicle could be registered in the name of a six (6) year old child. The child was of an age

where she could not drive a car or acquire a driver's licence. The registration in the child's name therefore seems to have been done for sinister motives. Be that as it may, a court cannot act on suspicions even if such suspicions are strong. The respondent must therefore be given the benefit of the doubt.

- [19] Section 25(1) of the Constitution of the Republic of South Africa, 108 of 1996 stipulates that:

*(1) No one may be deprived of property except in terms of law of general application **and no law may permit arbitrary deprivation of property.***"

- [20] According to **Cook Properties** at para 18 the inter-related purposes of Chapter 6 include: (a) Removing incentives for crime; (b) Deterring persons from using or allowing their property to be used in crime; (c) Eliminating or incapacitating some of the means by which crime may be committed, and (d) Advancing the ends of justice by depriving those involved in crime of the property concerned. At least (b) and (d) have a penal aspect.

As stated by Nkabinde AJA in **National Director of Public Prosecutions v Parker** 2006 (3) SA 198 (SCA) at 206G para 16:

".....It is necessary, when making a determination whether property is an instrumentality of an offence, to look at the broader picture of instrumentality."

- [21] If the evidence before me that the vehicle belongs to the minor child is correct then a *curator ad litem* should have been appointed for her because an order forfeiting her presumptive vehicle to the state would be inimical to her best interests. See **Brooks v NDPP** (855/16) [2017] ZASCA 42 (30 March 2017 at para 79.

[22] The application must fail for two reasons: First, that there is no clear nexus between the illegal transportation of the mandrax tablets and secondly because no curator ad litem was appointed for the child to protect her best interests.

[23] This is a typical case where the state should not be mulcted in costs because it had a good reason to bring this application to court. There are also very strong indications that the respondent's hands are not clean and should not derive any benefit from this situation.

[24] As a result, the following order is made:

- 1. The application is dismissed and the rule *nisi* is discharged.**
- 2. Each party must bear its own costs.**
- 3. The mandrax tablets are ordered to be forfeited to the state in terms of s 31(1)(b) of the Criminal Procedure Act, 51 of 1977 as amended.**

MAMOSEBO J

NORTHERN CAPE DIVISION

Appearances:

For the applicant :	Adv L Van Dyk
Instructed by:	The State Attorney, Kimberley
For 1 st and 10 th respondents:	Adv A Eillert
Instructed by:	Hugo Mathewson & Oosthuizen Inc.