Reportable:	YES / **NO**
Circulate to Judges:	**YES** / NO
Circulate to Magistrates:	YES / **NO**
Circulate to Regional Magistrates:	YES / **NO**

IN THE HIGH COURT OF SOUTH AFRICA
(NORTHERN CAPE DIVISION, KIMBERLEY)

Case No: **1979/2013**
Date heard: **09/10/2015**
Date delivered: **16/10/2015**

In the matter between:

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS Applicant

and

PHENYO EDWIN KATONG 1st Respondent

MOTLHANKAOTSILE HENDRICK KATONG 2nd Respondent

***Coram*: Olivier J**

JUDGMENT

Olivier J:

[1]. This is an application in terms of section 50 of the **Prevention of Organised Crime Act**[1] ("*POCA*"). The applicant, the National Director of Public Prosecutions, applies for an order forfeiting to the State a Nissan Maxima vehicle ("*the vehicle*") on the basis of it having been the instrumentality of an offence referred to in

[1] 121 of 1998

Schedule 1 to POCA, as envisaged in subsection (a) of section 50(1) of POCA.

[2]. It is common cause that the vehicle, at the time driven by the first respondent, Mr Phenyo Edwin Katong, was stopped by police in Kakamas and that they found altogether 3.042kg of dagga in the vehicle. The dagga was in six black bags, which in turn were inside another bag.

[3]. The vehicle was seized and the first respondent was charged with the contravention of section 4 of the **Drugs and Drug Trafficking Act**[2] (*"the Drugs Act"*), and more specifically with having been in possession of the dagga. He pleaded guilty and he was convicted on this basis. He was sentenced to a fine of R8 000.00 or two years imprisonment, half of which was conditionally suspended.

[4]. The applicant then successfully applied for a provisional preservation of property order[3]. When that order lapsed, a fresh preservation order was granted. The present application for forfeiture was ultimately lodged. It is opposed by the first respondent, as well as by the second respondent, Mr Motlhankaotsile Hendrick Katong, who is the father of the first respondent.

[5]. The respondents' version is that, although the vehicle is registered in the name of the first respondent, it actually belongs to the second respondent, and that the second respondent had been

[2] 140 of 1992
[3] In terms of section 38 of POCA

unaware that the first respondent was going to drive to Kakamas and was going to place dagga in the vehicle. Both respondents are from Manthe Village, Taung Station, North West Province, although the second respondent during the week resides in Rustenburg, where he works.

[6]. The respondents in any event deny that the vehicle had been an instrumentality of the first respondent's offence, and they furthermore argue that forfeiture of the vehicle would in the circumstances in any event be disproportionate to the first respondent's offence.

[7]. The first question to be considered is whether the applicant has, on the totality of the evidence, proved on a balance of probabilities that the vehicle was an instrumentality of the offence committed by the first respondent[4]. If not, the application would on this basis alone fail and it would be unnecessary to consider the issue of proportionality.

[8]. Both possession of[5] and dealing in[6] dagga would qualify as offences envisaged in Item 22 of Schedule 1 to POCA, read with section 13 of the Drugs Act. The applicant's case appears to be that the first respondent possessed the dagga for the purposes of dealing. Mr Somaru, the deponent for the applicant, states that the vehicle was chosen and used for "*in particular*" the offence envisaged in section 5 of the Drugs Act.

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[4] Section 50(1)(a) of POCA
[5] See the provisions of section 4 of the Drugs Act
[6] See section 5 of the Drugs Act

[9]. In his affidavit Captain GTP Robertson furthermore stated that there had at the time been a number of syndicates in the Northern Cape Province that were involved in illegal drug dealing and whose *modus operandi* were to use so-called runners to transport the drugs in motor vehicles. He did not, however, go as far as to say that the first respondent had according to the police been such a runner.

[10]. Robertson claimed the value of the dagga to have been R15 210.00.

[11]. It is common cause that the retail value of the vehicle is R44 500.00 and the trade value R33 000.00.

[12]. The first respondent's version is that he had used the vehicle to drive to Kakamas to visit his girlfriend. There he purchased the dagga for R1 500.00. He denies Robertson's allegation regarding the value of the dagga. He states that he bought the dagga for his personal use and that it would have been enough for him for about a year.

[13]. It is trite that, where an applicant seeks final relief, factual disputes will be approached on the basis that the respondent's version will be accepted[7], unless it is "*far-fetched and clearly untenable*"[8]. As regards whether it has been proved that the first respondent's possession of the dagga was for the purposes of dealing, the contents of his statement in terms of section 112(2) of the **Criminal Procedure Act**[9] are ambiguous. He stated that he pleaded guilty "*to*

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[7] Compare **Staatsdiensliga van Suid-Afrika en Andere v Minister van Waterwese** 1990 (2) SA 440 (NC) at 443G

[8] **Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd** 1984 (3) SA 623 (A) at 635C

[9] 51 of 1977

the charge of dealing and or possession of dagga", even though the charge was, as already mentioned, only for illegal possession. He admitted to having been found in possession of the dagga, but he never unequivocally admitted being guilty of dealing in the dagga or of possessing the dagga for such purposes.

[14]. The prosecutor had not only charged the first respondent with only a contravention of the provisions of section 4 of the Drugs Act (in other words possession *simpliciter*), but also went on to accept a plea of guilty to that charge. I think it can safely be assumed that, had there been evidence implicating the first respondent in dealing, this would not have happened.

[15]. When the dagga was discovered the first respondent admitted possession thereof. He did not at that stage make any admission to the effect that his possession was part of dealing, or was for such purposes. In this application he denies having been involved in dealing in the dagga. His explanations for how he came to be in possession of the dagga, and about his intentions with the dagga, are not in my view "*far-fetched*" or "*clearly untenable*".

[16]. The deponent for the applicant has not in reply taken issue with the first respondent's explanation that he had actually gone to visit his girlfriend and had then bought the dagga for his personal use (as opposed to having gone to Kakamas as a so-called runner). The first respondent's averment in this regard is not so much as referred to in reply, and the submission that "*in so far as I do not deal with each and every allegation, these allegations… must be taken to be*

denied" does not amount to a proper challenge of the first respondent's explanation[10].

[17]. The value of the dagga is relevant when the probability of the first respondent's explanation is considered. It is in my view not far-fetched that he may have bought dagga to the value of R1 500.00 for his personal use, especially when regard is had to his undisputed evidence that he had a monthly income of approximately R3 000.00 and that the dagga would have lasted him for about a year.

[18]. Had the value of the dagga been R15 210.00 it may have affected the probability of the first respondent's explanation. It would arguably have been unlikely that the first respondent would have been able to purchase dagga with a value of R15 210.00 for only R1 500.00 and, if not, that he would have spent such a substantial amount to buy a year's supply of dagga for himself.

[19]. Robertson did not take the trouble to explain how the figure of R15 210.00 was arrived at[11]. In fact, he did not even explain why his opinion in this regard would be admissible evidence[12]. Even when his allegation regarding the value of the dagga was unequivocally denied and challenged, and when the applicant was faced with the averment that the dagga had actually been bought for R1 500.00, no further evidence in this regard was tendered.

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[10] Compare **De Lange c Presiding Bishop for the time being of the Methodist Churh of South Africa and another** [2015] 1 All SA 121 SCA para [19]

[11] Compare **Pricewaterhousecoopers Inc v National Potato Co-Operative Ltd** 2015 JDR 0371 (SCA) para [53]; **Jacobs and Another v Transnet Ltd t/a Metrorail and Another** 2015 (1) SA 139 (SCA); **S v M** 1991 (1) SACR 91 (T) at 100 C-D; **Louwrens v Oldwage** 2006 (2) SA 161 (SCA) para [27]

[12] Compare **Law of Evidence**, Schmidt & Rademeyer, para 17 2; **Mkhize v Lourens and Another**, 2003 (3) SA 292 (T) at 298; **RHM Agencies CC v Pharazyn**, 2010 JDR 0989 (KZP)

[20]. Needless to say, the applicant also never tendered any evidence from which it could be inferred that the first respondent had been acting as a so-called runner.

[21]. The first respondent has therefore not been shown to have possessed the dagga for the purposes of dealing in it.

[22]. As already pointed out the simple possession of dagga, even for own use, would have constituted an offence as envisaged in Item 22 of Schedule 1 to POCA. The next question to be considered would then be whether the vehicle had been an instrumentality of the offence of possession of the dagga.

[23]. There is no evidence that the use of the vehicle would have been required for the purposes of the possession of the dagga, or even to transport the dagga. It weighed a little more than 3 kilograms. There is no evidence that the size of the six bags would have made it impossible for the first respondent to carry them. In fact, they were found inside another bag, on the floor of the vehicle.

[24]. The first respondent's evidence that the purpose of his visit to Kakamas had actually been to visit his girlfriend, is uncontested. There is no evidence that he would not have been able to purchase this quantity of dagga where he resided, or in Kuruman (To which he was on his way back when the vehicle was stopped).

[25]. On the totality of the available evidence it is quite possible, and even likely, that the purchase of the dagga in Kakamas had been purely coincidental to the first respondent's visit to his girlfriend.

The same would then obviously apply to the presence of the dagga in the vehicle. The vehicle would then have been used for the transportation of the first respondent back to Kuruman, and the presence of the dagga in it would have been completely coincidental thereto.

[26]. There was no indication that the first respondent's driving of the vehicle with the dagga in it was part of a "*pattern of sustained activity*"[13].

[27]. In my view the applicant did not on a balance of probabilities establish "*a functional relation*" between the vehicle and the possession of the dagga, in the sense that the vehicle did "*play a part, in a reasonably direct sense*" in the first respondent's possession of the dagga[14]. The vehicle was not the "*means by which*" the dagga was possessed by the first respondent[15] and it did not "*in a real or substantial sense facilitate or make possible*" the possession of the dagga[16].

[28]. This makes it unnecessary to consider the issue of proportionality. I will, however, say that the forfeiture of an asset with a retail value of R44 500.00 would on the face of it have been disproportionate to the possession of dagga worth R1 500.00.

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[13] Compare **National Director of Public Prosecutions v Parker** 2006 (3) SA 198 (SCA); **Mohunram and Another v National Director of Public Prosecutions and Another (Law Review Project as *Amicus Curiae*)** 2007 (4) SA 222 (CC) para [52]

[14] **National Director of Public Prosecutions v RO Cook Properties (Pty) Ltd**; **National Director of Public Prosecutions v 37 Gillespie Street Durban (Pty) Ltd and Another; National Director of Public Prosecutions v Seevnarayan** 2004 (2) SACR 208 (SCA) paras [21] and [32]

[15] **National Director of Public Prosecutions v Patterson and Another** 2001 (2) SACR 665 (C)

[16] **Prophet v National Director of Public Prosecutions** 2005 (2) SACR 670 (SCA) para [17]

[29]. Usually costs would follow the result. In the present matter the position is, however, complicated by the fact that the second respondent got himself involved in the application by opposing it on the basis of being the real owner of the vehicle (and having been unaware of what the first respondent was going to do with it).

[30]. The applicant's case was that the vehicle belonged to the first respondent, because it was registered in his name and because he himself had bought it. On this basis the second respondent would not have had any business opposing the application and would not have been entitled to his costs.

[31]. The respondents' version was that the second respondent over a period of time withdrew money from his bank account and that he then gave the first respondent the cash to buy the vehicle. According to them the vehicle was registered in the first respondent's name because only he had a driver's licence, which was a requirement to obtain insurance on the vehicle[17]. Their intention, however, according to them was that the vehicle would belong to the second respondent. The first respondent would be the primary driver of the vehicle and it would be used to transport members of their family, and to take the second respondent to his workplace.

[32]. In substantiation of this version reference was made to a copy of a bank statement of the second respondent. The statement does

[17] It does not appear whether they did eventually represent to an insurer that the first respondent was the owner of the vehicle, which would on the face of it on their version have constituted fraud.

reflect frequent withdrawals of differing amounts over a period of time.

[33]. The first problem, however, is that the total amount of the cash withdrawals reflected in respect of the period preceding the date of the purchase of the vehicle would not have been enough to pay the purchase price of the vehicle.

[34]. Secondly the statement reflects a continuation of such frequent withdrawals of money even after the purchase date, when it would no longer have been necessary to make withdrawals to pay for the vehicle, which of course raises the question whether the earlier withdrawals had really been for the purposes alleged by the respondents.

[35]. The third problem is that neither of the respondents explained why this *modus operandi* would have been followed and why the second respondent would not instead have left the money safely in his bank account until such time as it was needed to purchase the vehicle.

[36]. It is furthermore uncontested that, when the vehicle was seized, the first respondent told Constable Mouton that the vehicle was his, and in his section 112(2) statement he once again referred to the vehicle as his. This has not been explained by either of the respondents.

[37]. In the circumstances the respondents have in my view failed to show[18] that the second respondent had a sufficient interest in these proceedings to have intervened as a respondent[19].

[38]. Mr Olivier, counsel for the respondents, conceded that he could not on the evidence responsibly argue that it should be found that the second respondent is the owner of the vehicle, but he submitted that there is no real dispute about the fact that the vehicle was also used for the transport of, *inter alia*, the second respondent and that the latter would on this basis have had an interest in the outcome of this application. In my view this would however, if the vehicle belonged to the first respondent, not have constituted an interest sufficient for the second respondent to be entitled to oppose the application on this basis alone.

[39]. This would mean that the second respondent had no *locus standi* to join the proceedings and in the circumstances he would not in my view be entitled to his costs.

[40]. On the other hand I see no reason why the second respondent should be liable for any of the costs of the applicant. There is no indication that his intervening as a respondent led to any costs which would not in any event have been incurred on the first respondent's version.

[41]. As far as the first respondent's costs are concerned, he not only made common cause with the second respondent's version, but in

[18] **Gross and Others v Pentz** 1996 (4) SA 617 (A) at 632C - E
[19] Compare **National Director of Public Prosecutions v Van der Merwe and Another**, 2011 (2) SACR 188 (WCC) para [9]; **The National Director of Public Prosecutions v Mazibuko**, 2008 (2) SACR 611 (N)

fact devoted a substantial part of his answering affidavit to it. This of course had to be dealt with by the applicant in reply. In doing so the first respondent contributed to the applicant's costs in respect of an issue unsuccessfully raised and supported by the first respondent.

[42]. In my view the fair result in the circumstances would be that each party bears its own costs.

[43]. In the premises the following order is made:

THE APPLICATION FOR FORFEITURE IS DISMISSED.

C J OLIVIER
JUDGE
NORTHERN CAPE DIVISION

For the applicant:	**Adv N P Khoza** **(Office of the State Attorney)**
For the first and second respondents:	**Adv A D Olivier**
Instructed by:	**Hugo Mathewson & Oosthuizen** **(JO/KBV8/00030)**