

/EVDM

IN THE NORTH GAUTENG HIGH COURT, PRETORIA
(REPUBLIC OF SOUTH AFRICA)

Case Number: 13842/10

DELETE WHICHEVER IS NOT APPLICABLE	
(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES / NO
(3)	REVISED.
29/10/2012.	
DATE	SIGNATURE

REGISTRAR OF THE NORTH GAUTENG HIGH COURT, PRETORIA
PRIVATE BAG/PRIVAATSAK X67 JUDGE'S SECRETARY
2012 -10- 29
REGTERS KLERK PRETORIA 0001
GRIFFIER VAN DIE NOORD GAUTENG HOE HOF, PRETORIA

In the matter between:

THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS APPLICANT
and

EMEKA HYICENTH MADUMELA RESPONDENT

JUDGMENT

Delivered on: 29 October 2012

POTTERILL J,

- 1 The applicant, the National Director of Public Prosecutions ["NDPP"] is in terms of section 48 of the Prevention of Organised Crime Act No 121 of 1998 [hereinafter referred to as the POCA] applying for a forfeiture order of:

- “1.1 a 2003 Volkswagen Polo with registration number DRG 212 MP and vehicle identification number CDG997S (**the Polo**);
- 1.2 a 2005 Toyota Tazz with registration number DXJ 052 MP and vehicle identification number GDC245S (**the Tazz**);
- 1.3 Cash money to the amount of R4650.00 (four thousand six hundred and fifty rand) (**the cash 1**);
- 1.4 a 2001 Hyundai Elantra with registration number DSG 061 MP and vehicle identification number FYV437W (**the Elantra**);
- 1.5 Cash money to the amount of R1747.50 (one thousand seven hundred and forty seven rand and fifty cents) (**the cash 2**);
- 1.6 a 2004 BMW 120IM sedan with registration number DXJ 056 MP and vehicle identification number DMM690S (**the BMW**);
- 1.7 Cash money to the amount of R20 500.00 (twenty thousand five hundred rand) (**the cash 3**)”

[hereinafter referred to as “the property”]

An order for the preservation of the abovementioned property was granted by this court on 10 March 2010.

- 2 The applicant alleged that the property is liable for forfeiture as it was used as *instrumentalities* [s1 of POCA] to facilitate the criminal offences of illegal dealing in and/or possession of prohibited dependence producing substances in contravention of the provisions of the Drugs and Drug Trafficking Act, 140 of 1992 [Schedule 1 to the POCA-offences] and/or contravening the provisions of the Prevention and Combating of Corrupt Activities, Act 12 Of 2004 [schedule 1 to the POCA offences] or are the *proceeds of such unlawful activities* [s1 of POCA]. This is accordingly an application in terms of Chapter 6 of POCA which provides for forfeiture of the proceeds of and instrumentalities used in crime that is not based on conviction or differently put on wrongdoers. It is property

based; it may be invoked even when there is no prosecution. The applicant must prove this application on a balance of probabilities.

- 3 The respondent denied that the property was used as instrumentalities to facilitate the criminal offences referred to or were the proceeds of such offences. The respondent at this stage in the proceedings also claimed that he obtained the property legally and for value and that he neither knew nor had reasonable grounds to suspect that the property constituted the proceeds of crime or had been an instrumentality in an offence ["innocent owner defence"]. In terms of section 37 of POCA proceedings in an application for forfeiture of property are civil in nature and subject to the rules of evidence applicable in civil proceedings. The respondent must thus on balance of probabilities satisfy me of his innocent owner defence. **[National Director of Public Prosecutions and Another v Mohamed NO and others 2002(4) SA 843 (CC) par16-17]**
- 4.1 As for the first stage procedure it was argued on behalf of the respondent that there were no facts to support the averred instrumentality or proceeds of unlawful activities because Nel's affidavit relied upon in the forfeiture application in its entirety constituted hear-say evidence. The affidavit should be struck out resulting in no forfeiture application before me and it should be dismissed with costs.
- 4.2 The applicant used in support of its notice of motion for preservation the affidavits of N J van Zyl, and Eulanda Geldenhuys with confirmatory affidavits of Laubscher, Denner, Blom, Mahlatji, Nkosi, Modiba and Mulder. A further affidavit of Nel was filed in support of the forfeiture application. Nel also filed a replying affidavit to the opposing affidavit of the respondent. In opposition to the forfeiture order the respondent filed an opposing affidavit in which he set up a general background with certain facts and then he responded to only the affidavit of Nel in support of the forfeiture affidavit.
- 4.3 It was conceded by counsel for the respondent that the affidavits and annexures to the affidavits pertaining to the preservation order is part and

parcel of the forfeiture application. This conceded general proposition is made specific *in casu* in the notice of motion for forfeiture which read as follows:

*"Take further notice that the affidavits of Nicoline Nel **and Eulanda Geldenhuys and all annexures thereto, as well as all affidavits and annexures filed in support of the preservation of property order** granted by this Honourable Court on 10 March 2010 under the same case number, will be used in support hereof."****[(my emphasis)]***.

In paragraphs 23 and 24 of Nel's affidavit to the forfeiture application she stated as follows:

"The applicant refers this Honourable Court to the documents and annexures filed in support of the preservation application, filed under the same case number. The papers filed in support of the present application continue from those filed in support of the preservation application and the latter papers are accordingly incorporated herein.

*The facts upon which the applicant relies in support of this application are set out in the **affidavits of Nicolaas Johannes van Zyl and Geldenhuys and the annexures attached thereto, as well as the confirmatory affidavits that were all filed in support of the preservation application.**"*

(my emphasis)

In paragraph 24 of the respondent's opposing affidavit the respondent answered as follows to the above mentioned paragraphs 23 and 24 of Nel's affidavit:

*"I take note of the contents hereof, but wish however to emphasise that I have been **advised that I need answer to all these affidavits, which I will do in due course** in the remainder of my opposing affidavit stated hereunder, to which the Honourable Court is with respect referred."* ***[my emphasis]***

4.4 It is common cause that the respondent never answered to any other affidavits as he knew and was obliged to do. The respondent's submission that the only affidavit in support of the forfeiture application is that of Nel is thus factually incorrect, ill-founded and is rejected.

5.1 In her affidavit Nicoline Nel set out that she is an advocate and a Deputy Director of Public Prosecutions and authorized to bring this application.

"2 *I depose to this affidavit as Nicolaas Johannes van Zyl, who deposed to the founding affidavit in the preservation application in terms of section 38 of POCA, has been transferred to Cape Town and is not available to do so.*" [par. 2]

3 *The facts herein contained are **derived from documentation at my disposal and so, unless otherwise stated or the context indicates otherwise, within my personal knowledge** and to the best of my belief true and correct.*"[my emphasis]

In answer to par 3 the respondent in his opposing affidavit par 17 stated the following:

*"I take note of the contents hereof, but will it however be argued by my legal representatives, of which I have been advised that it would appear that the affidavits attested to by Nicoline Nel is derived from documentation at her disposal and that the contents of her whole affidavit **might therefore amount to hearsay evidence** which is inadmissible in an application like the current one, and falls to be stricken from the record."* [my emphasis]

In her replying affidavit Nel denied that her affidavit constituted hear-say evidence.

5.2 This point taken by the respondent is opportunistic for the reasons set out hereunder. Nicolaas Johannes van Zyl, the transferred Deputy Director of Public Prosecutions in the founding affidavit to the preservation order stated in par.2 of the founding affidavit as follows:

"The facts deposed to are derived from both the documentation at my disposal and from my personal knowledge and believe and are both true and correct unless I state to the contrary or the facts or context indicate otherwise."*[my emphasis]*

Eluanda Geldenhuys, a captain in the South African Police Services (SAPS) organised crime unit in paragraph 2 of her affidavit attested to as follows:

"The facts deposed to herein are with my personal knowledge, or are derived from documentation at my disposal and so within my personal knowledge and belief unless I state to the contrary or the facts indicate otherwise."*[my emphasis]*

- 5.3 In the very nature of a forfeiture application an affidavit from a deponent from the Director of the NDPP or a duly designated employee is required [sect 48 of POCA]. Both the deputy directors of the NDPP have relied on documents to gain personal knowledge of the matters, more so Nel due to the transfer of van Zyl.

Furthermore, again from the very nature of the application; unless the employees of the NDPP assume the active functions of the members of the SAPS in investigating, arresting etc, they will have to rely on documentation and information from other sources to depose to an affidavit. *In casu* all the relevant members of SAPS filed affidavits confirming the contents of specific paragraphs set out in the affidavit of Geldenhuys. The documents are *inter alia in casu* police dockets and documents relevant to the seizures. The Geldenhuys affidavit is the affidavit setting out in detail how and under what circumstances the seizures of the cash and vehicles took place. It is startling that despite the Geldenhuys affidavit also relying on documents for personal knowledge this is not attacked as constituting hearsay evidence. Neither is the van Zyl affidavit attacked on this basis; demonstrating how ill-considered this argument was. There was no attempt in the opposing affidavit or in argument praying that specific paragraphs of the affidavit be struck out as constituting hear-say evidence; presumably because no foundation could be laid as to specifically what evidence constituted hear-say. In fact the respondent's affidavit expressed his own reservations by stating "[it] ***might therefore amount to hearsay evidence.***" There is no evidence pertaining to

instrumentality or other essential evidence tendered as proof in the affidavit of Nel not supported by affidavits of persons with first-hand knowledge of the facts or documents. The respondent did not place any of the documents in dispute except in giving them another interpretation.

- 6 It was argued on behalf of the respondent that the respondent's opposing affidavit set up a *bona fide* factual dispute necessitating the court to refer the matter for oral evidence.
- A summary of the affidavit of Captain E Geldenhuys and the other affidavits sets out the applicant's factual matrix as follows in the affidavit of Nel:

"6.1.1 The respondent is a Nigerian National identified by the members of the SAPS as a major illicit drug dealer in Nelspruit and surrounding areas. The respondent is the owner of the café called the "The Woodpecker Take Aways". Intelligence sources indicated that the respondent heads a local syndicate under cover of the café. He employs several "runners", also mostly illegal immigrants who do the actual selling of the drugs.

6.1.2 "His modus operandi appears to be that drugs are ordered telephonically on cellular telephone numbers and then delivered to clients by the runners, who ostensibly work at the Woodpecker, in vehicles owned by the respondent. He himself rarely, if ever, does actual deliveries. The runners almost invariably possess several cellular telephones[25.3]

6.1.3 All the vehicles that from the subject matter of this application belong to the respondent and were bought and paid for in cash. In addition, he owns a further three vehicles, also all bought and paid for by the respondent in cash.[25.4]

6.1.4 On 13 January 2007 the Nelspruit SAPS held a formal police operation against the respondent in terms of section 252A of the Criminal Procedure Act 51 of

1977. They used a police reservist, constable Nadene Denner (**Denner**) as a police agent who phoned the respondent on his cellular telephone and ordered cocaine to the value of R500 from the respondent. A person with the name of "Thulani" delivered the cocaine to her. He introduced himself as "the brother" of the respondent who had sent him to sell the drugs to her. "Thulani" used the Polo to deliver the drugs to her and after the transaction drove away with the vehicle. This incident took place prior to the respondent having acquired the Woodpecker.[25.5]

6.1..5 On 25 November 2008, in the very same morning hours, constables Johannes Jacobus Blom (**Blom**) and Selby Tshepo Morema Malatji (**Malatji**) of the Nelspruit SAPS Flying Squad stopped the Tazz with three occupants inside. Daniel Madumela (**Daniel**), a Nigerian citizen and apparently the brother of the respondent, was the driver of the Tazz. Blom and Malatji searched the three occupants of the Tazz and found a substantial amount of money in the possession of each occupant. Daniel had the cash 1 amount in his wallet. The two police officials searched the Tazz, but did not find anything suspicious in the vehicle. Blom however noticed that Daniel was very nervous and kept his hands near his groin area. He asked Daniel if he could search him and Daniel said "not now." Blom said that he must then go along to the police station where they would properly search him and took Daniel by his arm. Daniel pushed him away and ran off, but was chased and caught by the two police officials. Blom immediately searched him again and found a plastic bag in the front part of his pants. Inside the bag Blom found sixteen small white knotted plastic pieces which he identified as a manner in which drug dealers wrap the illicit drugs for

sale to their clients. The contents of the sixteen knotted plastic bags were later forensically analysed as cocaine.[25.6]

6.1.6 *The respondent subsequently made an affidavit to the Nelspruit police where he alleged that he had given the Tazz to Daniel, his brother, for business purposes and to use to drive from his home to his work at the Woodpecker Restaurant. The cash 1 that had been found by the police in Daniel's possession is the "sales or takings of 24 November 2008." [25.7]*

6.1.7 *On 5 December 2008 captain Nkosi (**Nkosi**), constable Mbokane (**Mbokane**) and sergeant Mangeti Phineas Modiba (**Modiba**) of the Nelspruit SAPS Flying Squad were busy with patrol duties in Nelspruit. They saw the Elantra and decided to stop and search it. The Elantra however refused to stop and a high speed chase ensued between the vehicle and the police. While in pursuit of the vehicle, they noticed that the driver threw a small plastic bag out of the window. The driver, Steve Meze (**Meze**) an illegal Nigerian foreigner, eventually stopped. The police returned to the spot where Meze had thrown the plastic bag out of the window and found the bag that contained five small knotted plastic bags that each contained a powdery substance that subsequent forensic analysis established to be cocaine. The police also found the cash 2 in the possession of Meze.[25.8]*

6.1.8 *The respondent's lawyers subsequently wrote a letter to the Nelspruit SAPS Branch Commander. In this letter they confirmed that both Daniel and Meze were employed by the respondent at "The Woodpecker Store" situated in*

Nelspruit. The respondent avers that he never gave Daniel or Meze permission to commit any offence with the Tazz and the Elantra and "he does not want to suffer for an offence he did not commit or knew about it." They demanded the return of the two vehicles into the possession of the respondent, but the police did not release the vehicles.[25.9]

6.1.9 On 13 November 2009 inspector Rudolf Johan Frederick Mulder (**Mulder**) of the SAPS Crime Intelligence Collection Unit (Counter Narcotic Intelligence Branch) in Pretoria arrested a major suspected drug dealer, one Wisdom Uchechukwu Uwah (**Uwah**) at the Komatipoort border post on drug related charged. Uwah was attempted to smuggle a big consignment of cocaine (approximately 2.5kg, with a street value of R1.875 million) into South Africa. (Uwah was unaware that the drugs had in fact already been seized from the courier sent by him to fetch it from Guyana, South America, by officials there.)[25.10]

6.1.10 The respondent subsequently attempted to bribe Mulder to release Uwah and had the cocaine that he believed had been seized by Mulder, to him. He arranged a meeting with Mulder at a guest house in Nelspruit. He used the BMW to drive to the guest house and handed the cash 3 to Mulder in return for the release of Uwah from police custody and the return of the consignment of cocaine. After the respondent handed the cash 3 to Mulder, Mulder arrested him for contravening the provisions of the Drug Act and contravening the provisions of the Prevention and Combating of Corrupt Activities Act, Act 12 of 2004. The respondent appeared in the Nelspruit regional court on the

mentioned charges and the criminal case against him was subsequently remanded to 18 June 2010.[25.11]

6.1.11 The respondent is the registered owner and title holder of the BMW".[25.12]

6.1.12 As referred to above, the respondent has a further three vehicles on his name that he bought for cash, namely an Opel Corsa, a Toyota Corolla and a Toyota Conquest Tazz."[25.13]

6.2 The respondent left the affidavit of Geldenhuys unanswered despite his acknowledgment in his opposing affidavit that he was advised that he needs to answer thereto.[par 24] In paragraphs 46.1 and 46.2 of his opposing affidavit he referred to the Geldenhuys as follows:

"I have been privied[sic] to the affidavit deposed to by Eulanda Geldenhuys on 21 February 201, and again wish to reiterate that I have in detail already answered to the contents thereof, as it was repeated in the founding affidavit of Nicolone Nel.

Inasmuch as the contents of the affidavit of Eulanda Geldenhuys are in conflict with the factual allegations of my own opposing affidavit, and these papers, it is denied."

6.3 The respondent did not put up a *bona fide* factual dispute. He knew he was obliged to respond to the detailed Geldenhuys affidavit consisting of *inter alia* 32 detailed pages relating to the seizures of the property, other vehicles registered in the name of the respondent, his criminal record and pending civil court matter pertaining to the Tazz and the Elantra. There is no "catch-all" principle in our substantive or procedural law entitling a respondent to state that where factual allegations are in conflict with his allegations it must be interpreted as a denial by the respondent of the facts. It is not open to a respondent to merely make one bold denial and then argue it constituted a *bona fide* dispute of fact rendering it fit for referral to oral evidence.

6.4 In Nel's affidavit she summarized the facts as set out in the Geldenhuys affidavit from paragraph 23 onwards. The respondent elected to answer to this summary of facts. In respondents affidavit he apparently denied that he is a Nigerian national. He admitted that he was the owner of the vehicles and of the Woodpecker restaurant. He also admitted that he had a previous conviction for dealing in drugs and was sentenced to 10 years imprisonment. He also has a previous conviction for escaping was and sentenced to 30 months imprisonment. He denied that he was involved with a syndicate selling drugs. He denied that he employed runners or that he personally did any deliveries of drugs to clients. He stated that he bought two vehicles cash but paid all the other vehicles off in instalments.

He elected not to answer to paragraphs 25.5 of Nel's affidavit setting out that a person called Thulani was driving his Polo vehicle on 13 January 2007 and that person was delivering drugs (cocaine) to Constable Denner. He also declined to answer to par 25.6 setting out that on 25 November 2008 one Daniel was in the respondent's Tazz and was found with 16 small white knotted plastic pieces with cocaine in them. This Daniel had R4650.00 cash on him that was also seized. He admitted that Daniel was his brother. He admitted that Daniel could use his Polo vehicle for business purposes and to drive from Daniel's home to the Woodpecker where he employed Daniel. The R4650 was the "*sales or takings of 24 November 2008.*"

To the facts that on 5 December 2008 three members of the flying squad stopped his Elantra after a high speed chase he answered that he had no knowledge thereof and did not admit it to be correct. The driver was Steve Mez[Meze] also an illegal Nigerian. He admitted that he did employ Meze "*at some point in time*" but he never authorized him to deal in drugs or had knowledge that he was dealing in drugs. Meze had thrown five small knotted plastic bags with cocaine therein out of the window of the Elantra. The cash amount of R1747.50 was also found on Meze.

On 13 November 2009 Inspector Mulder[Mulder] arrested Widsom Uwah on drug related charges; he was attempting to smuggle approximately 2.5kg of cocaine from South America to South Africa. The respondent arranged a meeting with Mulder at a guesthouse in Nelspruit. The respondent drove in the

BMW to this meeting where he tried to bribe Mulder with R20 500 cash to release Uwah from police custody and to return the consignment of cocaine. Mulder arrested him and the matter is pending in the Regional Court Nelspruit. He boldly denied that he tried to bribe Mulder without giving any facts as to what the money was to be used for and what the purpose of the meeting at the guesthouse was.

In reply to the affidavit of Denner he simply denied the correctness thereof in as far as they are in conflict with his opposing affidavit.

He made the same averment pertaining to the affidavit of Van Zyl.

- 6.5 On the crux of the matter as set out in the Geldenhuys affidavit there is simply no reply. This affidavit was so specific in detail that it begged for an answer, yet there was none. To the summary of the facts in Nel's affidavit the answering affidavit only set up bald or blanket denials. It is ill-founded and bad in law to submit that there was a genuine dispute of fact; *"A real, genuine and bona fide dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed. ..When the facts averred are such that the disputing party must necessarily possess knowledge of them and be able to provide an answer or (or countervailing evidence) if they be true or accurate but, instead of doing so, rests his case on a bare or ambiguous denial the court will generally have difficulty in finding that the test is satisfied."* – **JA in Wightman t/a JW Construction v Headfour (Pty) Ltd and Another** 2008 (3) SA 371 (SCA) a ALL SA 512 at par 13

It was argued that the respondent did in his opposing affidavit aver that he had receipts for the sales of his hair products and tax returns for the Woodpecker and referring the matter to oral evidence would afford him an opportunity to put these facts before the court. This argument must be rejected as being bad in law because a matter is not referred to oral evidence in the hope to create a dispute it must be created on the papers before me. In his opposing affidavit it was averred that these documents would be handed up at the hearing but no documents were at court to be handed up.

The argument that a real and genuine bona fide dispute of fact was created is so without merit on the facts and in law that it deserves no further comment.

- 7 The next question to be answered is whether the applicant on a balance of probabilities have proven that the property was used as instrumentalities to facilitate the criminal offences of illegal dealing in and/or possession of prohibited dependence producing substances in contravention of the provisions of the Corruption Act, and/or the proceeds of such offences.
- 7.1 Section 1 of POCA defined "*instrumentality of an offence*" as "*any property which is concerned in the commission or suspected commission of an offence*" set out in schedule 1 of the Act. In **National Director of Public Prosecutions v R Cook Properties (Pty) Ltd; 37 Gillespie Street Durban (Pty) Ltd and Another; Mothiellal Seevnarayan** 2004(2) SACR 208 (SCA) in par 31 the court concluded that instrumentality of an offence "*must, in our view, be interpreted so that the link between the crime committed and the property is reasonably direct, and that the employment of 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 reasonable direct role in the commission of the offence. As the term 'instrumentality' itself suggests (albeit that it is defined to extend beyond its ordinary meaning), 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.*"
- 7.2 On the undisputed facts set out above pertaining to the Polo-, Tazz- and Elantra vehicles I find that the vehicles were used as instrumentalities in committing drug related offences. The respondent's vehicles were used by family and/or friends of the respondent for the transportation of drugs, i.e. the employment of the property is direct to the commission of the offences. No explanation was proffered by the respondent why his brother or employees had the vehicles at that time of night and what work commitment they were fulfilling. The vehicles facilitated the trafficking in drugs. The vehicles were instrumental

in the distribution of the drugs for sale and not merely incidental to the commission of the offences.

- 7.3 The R20 500 seized at the meeting at the guesthouse was instrumental in committing the offence of bribery with the purpose to facilitate the distribution of cocaine. The R20 500 was used as an instrumentality in the commission of the corruption offences. The respondent put up no version as to why the R20 500 was present at this meeting and from where this money was generated. He stated in general in support of his "innocent owner" defence that the Woodpecker Restaurant and Take Away is a lucrative business and that his average income from this restaurant is between R40 000 and R50 000 per month nett. He also averred that he sold Top Virgin Hair Products from which he derived an income of between R30 000 and R40 000 per month. The tax statements and VAT payments as well as *"each and every receipt of the hair products [par 10.7]"* were not attached to the papers and were not available at court. The applicant proved on a balance of probabilities that the R20 500 was used as an instrumentality in committing an offence.

- 7.4 Proceeds of crime is defined in POCA as *"any property or any service advantage, benefit or reward which was derived, received or retained, activity carried on by any person, and includes any property representing property so derived."*

Property is *"money or any other movable, immovable, corporeal or incorporeal thing and includes any rights, privileges, claims and securities and any interest therein and all proceeds thereof."*

The two stashes of cash found when seizing the Tazz and Elantra represented the proceeds of the respondent's unlawful drug activities. The cash 1 was seized from the respondent's brother's wallet and cash 2 from Meze. There is no evidence from Meze or the respondent's brother that the money did belong to the respondent as income generated through the Woodpecker or the sale of hair products. In both situations drugs were found and on all the surrounding circumstances the applicant has proven on a balance of probabilities that the cash was the proceeds of the illicit drug offences. There were no facts set up by the respondent that prevents the applicant from being granted a final order;

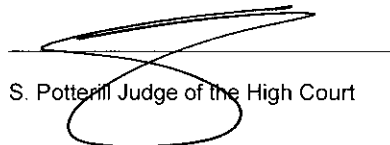
Plascon Evans Paints (Pty) Ltd v Van Riebeeck Paints (Pty) Ltd 1984(3) SA 623 (A).

- 7.5 It is common cause that the BMW vehicle was bought from Dennis Motors Sales CC in Pinetown for R130 000. Whether he bought it in two instalments in cash or one instalment in cash does not affect the probabilities; he could afford to pay R130 000 cash within 60 days. It is also not in dispute that the applicant bought 5 vehicles during the years 2008-2009. It is also not in dispute that the applicant bought the Elantra and Tazz cash. It is not in dispute that he owned 7 vehicles and bought them in this period. I have to agree with the applicant's submissions that in the light of the respondent's history in the illicit drug dealing business it is probable that all four the seized vehicles were bought with the proceeds of crime. The version of the applicant is uncontested in that the respondent did not attempt to set out with what lawful income he bought the BMW and the other vehicles.
- 8 Counsel on behalf of the respondent did not argue that the respondent did on a balance of probabilities prove his 'innocent owner' defence; he instead relied on proportionality. This is no surprise because the respondent did not in his opposition bring an application in terms of section 48(4)(1)(b) of POCA for the exclusion of his alleged interest regarding the property and it needs no further address-**The National Director of Prosecutions and E J van der Merwe and Another** Case no A338/2110 in the Western Cape High Court par 18.
- 9 In performing the proportionality enquiry I have to consider the following relevant factors;
- 9.1 *"Whether the property is integral to the commission of the crime;*
 - 9.2 *Whether the forfeiture would prevent further commission of the offence and its social consequences;*
 - 9.3 *The availability of the innocent owner defence;*
 - 9.4 *The nature and use of the property; and*
 - 9.5 *The effect of the forfeiture of the property on its owner".-Prophet and The NDPP 2007(6) SA 169 (CC) par 58.*
- This enquiry always entails a weighing up of the severity of the interference

with individual rights to property against the extent to which the property was used for the purposes of the commission of the offence.

The property was integral to the commission of the offences. The vehicles were used as means of transporting the drugs for dealing therein. The cash was the proceeds of these crimes. The forfeiture of the property would impact on the *modus operandi* of the respondent in him using runners in his vehicles to commit the offences. The owner still has three other vehicles and the effect of the forfeiture does not leave the respondent without transport or means. I find the forfeiture of the property to be proportional.

10 I accordingly make the attached order "X" an order of court.



S. Potterill Judge of the High Court

Matter heard on: 22 October 2012

Delivered on: 29 October 2012

Attorney for the Applicant:

THE STATE ATTORNEY
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167 ANDRIES STREET
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REF: 1307/2010/Z52

Attorney for the Respondent:

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c/o COUZYN HERTZOG & HORAK
321 MIDDEL STREET
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PRETORIA
REF: KOTSOKOANE/RM/SHA19/0214

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29/11/12

- 1.1 a 2003 Volkswagen Polo with registration number DRG 212 MP and vehicle identification number CDG997S;
 - 1.2 a 2005 Toyota Tazz with registration number DXJ 052 MP and vehicle identification number GDC245S;
 - 1.3 Cash in the amount of R4 650.00 (four thousand six hundred and fifty rand);
 - 1.4 a 2001 Hyundai Elantra with registration number DSG 061 MP and vehicle identification number FYV437W;
 - 1.5 Cash in the amount of R1747.50 (one thousand seven hundred and forty seven rand and fifty cents);
 - 1.6 a 2004 BMW 120IM sedan with registration number DXJ 056 MP and vehicle identification number DMM690S and
 - 1.7 cash in the amount of R20 500.00 (twenty thousand five hundred rand).
- 2 An order is granted in terms of the provisions of section 50 of the Prevention of Organised Crime Act 121 of 1998 (**the POCA**) declaring forfeit to the State the property mentioned in paragraph 1 above, presently subject to a preservation of property order granted under the above case number on 10 March 2010.
- 3 The Registrar of this Court or the State Attorney's office, upon the Registrar's request, is directed to publish a notice of this order in the Government Gazette as soon as practicable after the order is made.

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- 4 The property shall vest in the State upon the granting of the order.
- 5 The appointment of a *curator bonis* is dispensed with.
- 6 Upon the expiry of 45 days after notice of this order is published in the Government Gazette, Mbali Nhlangothi, a duly authorised employee of the Asset Forfeiture Unit, is authorised to:
 - 6.1 Assume control of the property and take it into her custody;
 - 6.2 Sell all the vehicles mentioned above at best, either by public auction or private treaty;
 - 6.3 Sign all documentation necessary to effect the sale, transfer and registration of the mentioned vehicles and
 - 6.4 Pay the proceeds of the sale of the mentioned vehicles, less any commissions and incidental expenses occasioned by the sale and all the cash amounts mentioned in paragraph 1 above into the Criminal Asset Recovery Account established under section 63 of the POCA, account number 80303056 held at the South African Reserve Bank, Vermeulen Street, Pretoria.
- 7 Any person whose interest in the property concerned is affected by the forfeiture order, may within 20 days after he or she has acquired knowledge of such order, set the matter down for variation or rescission by the Court.

BY ORDER OF THE COURT

REGISTRAR OF THE ABOVE HIGH COURT

DATE: