

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No: 5759/2009

In the matters between:

FIKIZOLO NORMAN KHOSANA

1st Applicant

LOUIS KHOSANA

2nd Applicant

ALVARO PEDRO MACAMO

3rd Applicant

M L KHOSANA

4th Applicant

and

**NATIONAL DIRECTOR OF PUBLIC
PROSECUTIONS**

Respondent

In re:

ONE MERCEDES BENZ ML with registration DPV 967 NW;

ONE NISSAN HARDBODY with registration CZS 993 FS;

**R204 000,00 in cash that was seized by the South African
Police Service on 13 February 2007 and held under Welkom
CAS 312/02/2007;**

CORSA BAKKIE with registration SXT 819 GP;

**HAGOTH FLATS situated at 152 Harlem Street, Dagbreek,
WELKOM**

HEARD ON:

21 APRIL 2011

JUDGMENT BY:

KRUGER, J

DELIVERED ON:

30 JUNE 2011

- [1] The four applicants ask that the preservation of property order (the preservation order) granted against them *ex parte* under section 38 of the Prevention of Organised Crime Act 121 of 1998 (POCA) on 26 November 2009 at the behest of the respondent, the National Director of Public Prosecutions (“the NDPP”) be set aside, alternatively that paragraph 20.4, which directs the applicants to state on oath in their notice of intention to oppose the making of a forfeiture order whether the property concerned is an instrumentality of an offence or the proceeds of unlawful activities and the basis for such defence, be set aside. Section 39(5)(c) of POCA calls upon the respondent to set out in an affidavit the basis of the defence upon which the respondent intends to rely in opposing the granting of a forfeiture order, there is no reference in it to proceeds or instrumentality.
- [2] The property concerned comprises (1) a Mercedes Benz vehicle (2) a Nissan vehicle (3) R204 000,00 cash (4) Hagoth Flats in Harlem Street Welkom. In its 39(1) Notice to the applicants, the NDPP also refers to a Corsa bakkie, but in the Answering Affidavit it says that is an error, the Corsa bakkie was returned to Second Applicant.

A. EX PARTE APPLICATION

- [3] The first ground upon which the applicants seek to have the preservation order set aside is because it was obtained *ex parte* and in camera.

On 13 February 2007 the first and second applicants were arrested and charged with offences relating to dealing in unwrought precious metals, money laundering and other charges. The facts are set out as follows in Mr Ploos van Amstel's Supplementary Heads of Argument:

“18.

On or about 13 and 14 February 2007 the Mercedes Benz ML vehicle with registration DPV 967 NW, the Nissan Hardbody vehicle with registration number CZS 993 FS, the Corsa bakkie with registration number SXT 819 GP and the amount of **R204 000,000** in cash, all of which are subjects of the present application, were seized and held by the South African Police Services under Welkom CAS 312/02/2007, pending the finalisation of the criminal trial, and remain so seized.

19.

The current whereabouts of the property is as follows:

- (a) the Mercedes Benz ML is currently in the Welkom SAPS 13 store;
- (b) the Nissan Hardbody is currently in the Welkom SAPS 13 store;
- (c) the Corsa bakkie has been returned to the first applicant;
- (d) the **R204 000.00** was booked into the Klerksdorp Organised Crime Unit's SAPS 13-register under reference number SAP 13/31/2007."

[4] On 6 August 2007 the first applicant's attorney addressed a letter to the Director of Public Prosecutions in Bloemfontein:

"Direkteur van Openbare Vervolging
Privaatsak X20506
BLOEMFONTEIN
9300

Menere

**NORMAN KHOSANA / MOONTLIKE BESLAGLEGGING
VAN BATES**

Ons tree op vir Norman Khosana 'n besigheidsman van Welkom wie in die afgelope paar maande 2 (TWEE) keer in verskillende sake deur die Polisie gearresteer is welke sake nou altwee uitgestel is na 11 September 2007 in die Landdroshof Welkom. Klaarblyklik gaan die sake en moontlik ook nog ander sake saam gevoeg word en die sake dan verwys word na die Hooggeregshof waar ons kliënt en verskeie ander beskuldigdes gaan teregstaan op

Klagtes, onder andere Rampokkery, Geldwassery ens. Die inligting is aan ons verskaf deur die Staats Aanklaer en die Polisie betrokke by die ondersoek van hierdie en die ander sake.

Dit het nou ook onder ons kliënt se aandag gekom dat die Beslagleggings Eenheid van voorneme is en al besig is om 'n Aansoek voor te berei vir die beslaglegging van ons kliënt se bates.

Ons het opdrag om u daarop te wys dat ons kliënt bereid is om sy volle samewerking te gee, bereid is om 'n Onderneming te gee dat hy nie enige bates te gelde sal maak nie.

Soos u weet is ons kliënt 'n Besigheidsman en sou daar op die bates beslaggelê word sal dit nie net 'n groot ongerief nie maar ook 'n geweldige groot verlies aan inkomste beteken. Ons wil u dan uitnoui om eerder met ons in verbinding te tree ten einde samesprekings te hou in 'n poging om hierdie aangeleentheid op 'n meer gepasde wyse op te los.

Ons het ook opdrag van ons kliënt om u daarop te wys en te versoek dat u nie 'n *ex parte* aansoek in die verband moet bring nie, en indien u van voorneme is om voort te gaan met die Aansoek vir die beslaglegging op sy bates, dat so 'n aansoek op kliënt of dan ons beteken word ten einde hom die geleentheid te bied om die aansoek te opponeer indien nodig.

Ons wag dan om van u te hoor.”

- [5] In its Opposing Affidavit the NDPP says that the telefax could never have been forwarded to the asset forfeiture unit. The NDPP takes the stance that it is not obliged

“to accept the word of a person such as the first respondent as to his future conduct”.

It is clear that the telefax was in fact received by the Asset Forfeiture Unit. Applicants attach to their Replying Affidavit a letter dated 15 August 2007, from the Asset Forfeiture Unit, signed by Advocate Amanda Maree, who is at present working and living in Abu Dhabi:

“Re: Norman Khosana/Moontlike Beslaglegging Van Bates

In reply to your letter dated 06/08/2007, I would like to inform you that the case that you have referred to has not been received by our unit; therefore the request is premature.

I trust you will find this in order.

Yours faithfully

Amanda Maree

Asset Forfeiture Unit (AFU)

Bloemfontein”

- [6] What Ms Maree did with the letter asking that no *ex parte* application be brought is not clear. There seems to be no system in the office of the Asset Forfeiture Unit making provision for future or anticipated applications. It would not be difficult to create a general file dealing with future or anticipated applications, or to create a system to avoid a situation like the present. The applicants accept that the deponents to the Answering Affidavit and Supporting Affidavits had no knowledge of the letter and that there was no intention by them personally to mislead the court. The authorities are clear on the duty of disclosure on an applicant in an *ex parte* application.
- [7] For the NDPP Mr Budlender submits that the NDPP is entitled to proceed *ex parte* in a section 38 application for a preservation order with reference to **NATIONAL DIRECTOR OF PUBLIC PROSECUTION AND OTHERS** 2003 (4) SA 1 (CC) para [27], [33] and [51]. Mr Budlender also points out that the first applicant does not say he would have opposed the application if he had been given notice of it and he does not say the application caused him prejudice.

- [8] In my view the conduct of the NDPP does not amount to intentional misleading, but the NDPP, as institution, cannot simply ignore a letter sent to it and say it cannot be traced. A system should be put in place to deal with situations where letters are sent to the NDPP before it has launched an application.

B. CHAPTERS 5 AND 6 OF POCA

- [9] The main thrust of the application is that the NDPP is not entitled to bring civil forfeiture proceedings under Chapter 6 of POCA while a criminal trial is pending, because restraint and confiscation orders under Chapter 5 of POCA provide the appropriate relief where a criminal trial is pending. Counsel requested leave to file supplementary Heads of Argument on this topic, and both filed comprehensive and helpful submissions.

Applicants' contentions

- [10] Mr Ploos van Amstel, for applicants, sets out the chronology:
- 12 February 2007** search and seizure warrants issued under section 21 of the Criminal Procedure Act 51 of 1977.

13 February 2007 first and second applicants arrested and arraigned in the magistrates' court at Welkom.

13 and 14 February 2007 the two motor vehicles and cash seized and held by the Police at Welkom, where the items still are.

22 February 2007 first applicant released on bail.

6 August 2007 first applicant's attorneys requested to be informed of possible application for a preservation order under Chapter 6.

15 August 2007 Asset Forfeiture Unit acknowledged receipt of the request.

19 March 2009 High Court set aside the search warrants. The High Court directed that the Nissan vehicle and the R204 000 cash remain in police custody. The Mercedes vehicle did not form part of the warrants and remained in police custody.

21 August 2009 Criminal trial commenced and ran intermittently.

26 November 2009 Preservation order granted under section 38 of POCA in the present matter.

7 December 2009 Preservation order and Notice of the intended forfeiture application served on applicants.

22 December 2009 Applicants filed a notice of their intention to oppose the proposed forfeiture application.

10 February 2010 application for rescission of the preservation order lodged.

11 March 2010 Forfeiture Application lodged by NDPP without service on any of the applicants, for a default forfeiture order in respect of two vehicles, the cash and the flats.

17 March 2010 applicants gave notice of their intention to oppose the forfeiture application.

Apparently the forfeiture application is being held in abeyance pending the adjudication of the present rescission application.

[11] The grounds are set out as follows by Mr Ploos van Amstel:

“66.

The question for adjudication raised on behalf of the applicants is whether it is permitted and constitutional to have civil and criminal proceedings for forfeiture run concurrently where the subject matter of the proceedings in the civil application and in the criminal trial is similar.

67.

It is common cause that there are criminal proceedings pending against the applicants, the subject matter of the alleged criminal conduct being the very conduct the preservation application was premised on.

68.

The issue now raised include whether the NDPP was entitled to obtain any order at all.

69.

It is submitted that the proceedings under Chapters 5 and 6 of the POCA are two separate, parallel but distinctive aims and remedies.

70.

It is submitted that both proceedings have a civil application but the one a criminal and the other a civil design.

71.

The present application involves Chapter 6 of the Act, of which sections 48 and 50 form part, and which provides “**civil forfeiture**” as opposed to “**criminal forfeiture**” which is, in turn, regulated by Chapter 5.

72.

In contradistinction to Chapter 5, which provides for orders directed at persons convicted of criminal offences, Chapter 6, which is headed **“civil recovery of property”**, makes provision for orders to be made for the forfeiture of property which is tainted because it is linked to the commission of crime either because it is proved, on a balance of probabilities, to be **“an instrumentality of an offence”** referred to in Schedule 1 of the Act or because it is proved, according to the same standard of proof, to be **“the proceeds of unlawful activities”**.”

Mr Ploos van Amstel submits:

“111.

It is submitted that the provisions of the Criminal Procedure Act and Chapter 5 of the Prevention of Organised Crime Act make adequate provision for the forfeiture of the instrumentality of an offence and the proceeds of lawful activities in criminal proceedings and that the procedure in Chapter 6 of the POCA should be applied only for civil forfeiture where no criminal proceedings are contemplated or pending.”

“116.

It is contended that the utilisation by the NDPP of the civil procedure in terms of Chapter 6 of the POCA for civil forfeiture under circumstances where the applicants are the accused in a part heard criminal trial, makes serious and irreparable inroads, invasions, violations and challenges into the applicants' fundamental rights entrenched in the

Constitution and constitutes an unreasonable and unjustifiable limitation of the following rights of the applicants enshrined in the Bill of Rights:

- 116.1 the right of a person who is arrested for allegedly committing an offence, to remain silent (section 35(1)(a));
- 116.2 the right of an accused person who has been arraigned, to remain silent and not to testify during the criminal proceedings (section 35(3)(h));
- 116.3 the right of an accused person not to be compelled to give self-incriminating evidence (section 35(3)(j));
- 116.4 the right of an accused person to be presumed innocent until proven guilty beyond reasonable doubt (section 35(3)(h));
- 116.5 the right of an accused person to a fair trial (section 35(3));
- 116.6 the right of access to courts (section 34);
- 116.7 the right not to be arbitrarily deprived of property (section 25);
- 116.8 the right to privacy (section 14);
- 116.9 the right to dignity (section 10);
- 116.10 the right to equality (section 9)."

"119.

In contradistinction to a restraint order in terms of Chapter 5 (wherein the rights of an accused person not to be compelled to make any confession or admission that could be used in evidence against him, are respected) **section 39** under Chapter 6 in respect of preservation orders stipulates that the basis of a respondent's defence must be

disclosed in the form of an affidavit which shall be delivered to the NDPP.”

“121.

Section 39(5) violates:

- (a) the right of a person who is arrested, to remain silent (section 35(1)(a));
- (b) the right of an accused person who has been arraigned, to remain silent and not to testify during the criminal proceedings (section 35(3)(h)); and
- (c) the right of an accused person not to be compelled to give self-incriminating evidence (section 35(3)(j))

by providing as follows:

39(5) ‘An appearance under sub-section (3) shall contain full particulars of the chosen address for the delivery of documents concerning further proceedings under this Chapter and shall be accompanied by an affidavit stating –

- (a) full particulars of the identity of the person entering the appearance;**
- (b) the nature and extent of his or her interest in the property concerned; and**
- (c) the basis of the defence upon which he or she intends to rely in opposing a forfeiture order or applying for the exclusion of his or her interests from the operation thereof.’”**

“129.

There can be no doubt that considerable pressure and undue duress are being exerted upon the applicants (the accused) to give their versions in respect of the allegations of criminality under oath in an affidavit. Should the applicants do so, this at the very least provides material for cross-examination and an advance disclosure of the applicants' case in the criminal proceedings where up to now, they have exercised their right to silence. If the applicants do not give their version, this will be a potential aspect for cross-examination, criminal sanction and a forfeiture order by default.”

Respondent's contentions

[12] In response to Mr Ploos van Amstel's submissions Mr Budlender contends that the applicants' argument is based on a number of false premises. It cannot be said that the NDPP is not entitled to bring proceedings under Chapter 6 because he can obtain the same relief under Chapter 5. The remedies which are available through a forfeiture order under Chapter 6 are fundamentally different from the remedies available under Chapter 5. Mr Budlender points out that the applicants' contention that the court considering an application for a preservation or forfeiture order has no discretion to grant or refuse the order if the statutory requirements are met, is incorrect, and in support he refers

to PROPHET v NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS 2007 (6) SA 169 (CC) par [58].

[13] Chapter 6 of POCA is not reasonably capable of the interpretation that it excludes the power of the NDPP to make a Chapter 6 application if the respondent is the accused in a pending criminal case. It can therefore not be “read down” to achieve that result. He concludes that it follows that if Chapter 6 does bring about a breach of the right of silence. According to him, applicants’ remedy is an order declaring Chapter 6 inconsistent with the Constitution and invalid to that extent, and “reading in” words so as to make Chapter 6 not applicable to cases where the respondent is the accused in a pending criminal trial. No such relief is sought in this case.

[14] On a plain reading of Chapters 5 and 6 the application of Chapter 6 is not excluded where the respondent is the accused in a pending criminal trial. The power to grant a preservation and forfeiture order under sections 38 and 48 is not qualified so as to exclude their operation when there are

criminal proceedings pending. Further, Chapters 5 and 6 establish different prerequisites and different remedies.

[15] By bringing the proceedings for a preservation order where criminal proceedings are pending, there is no breach of the Bill of Rights. As to the right to remain silent, civil proceedings may create pressure to testify, but there is no compulsion. The potential of divulging harmful information in civil proceedings is not in conflict with the accused's right to remain silent (**NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS v PROPHET** 2003 (6) SA 154 (C) para [9] and [10]).

[16] Regarding the right to property, the courts in a preservation or forfeiture order application will consider proportionality. In answer to the Applicants' contention that their right to equality is breached by the fact that the preponderance of probabilities is used as test in Chapter 6, whereas in the criminal trial the test is proof beyond a reasonable doubt, Mr Budlender says that the Constitution does not require any particular incidence or form of the onus in civil proceedings.

[17] If the use of Chapter 6 proceedings for a preservation order constitutes a breach of the Bill of Rights the following steps should be taken in the argument:

- (i) Construe the legislation so as to be consistent with the constitution (e.g. “reading down”) and if that is not possible:
- (ii) Find the statute unconstitutional and if possible read words in or leave some words out, so as to achieve consistency with the constitution.

[18] A court has no power to afford to any law a meaning that it cannot reasonably bear (**WARY HOLDINGS (PTY) LTD v STALWO (PTY) LTD AND ANOTHER** 2009 (1) SA 337 (CC) par [106]).

[19] As to the contention that the NDPP must use the “least invasive” procedure, Mr Budlender points out that there is no legal principle which requires the NDPP to use one constitutionally compliant procedure rather than another.

C. CONCLUSION

[20] I agree with Mr Budlender that in the application for a forfeiture order, the applicants can ask that the Chapter 6 proceedings be stayed until the court has decided their guilt or otherwise. An application for the stay of the civil proceedings (at the stage when a preservation order was in place and the court was considering the granting of a forfeiture order) was made in **NATIONAL DIRECTOR OF PUBLIC PROSECUTORS v PROPHER** (*supra*) para [7] – [11], and refused.

[21] On a plain reading of POCA Chapter 6 proceedings are not excluded where criminal proceedings are pending. In some cases criminal proceedings will follow where there have been Chapter 6 proceedings, and where the court has already considered the granting of a forfeiture order at the start of the criminal proceedings, and the version of the accused on instrumentality and proceeds will be a matter of record. There has been no suggestion that a trial following upon the consideration of a Chapter 6 application for forfeiture would be constitutionally unfair.

[22] In the application for the forfeiture order, the applicant's can either set out facts why the property is not an instrumentality of the offence or the proceeds of unlawful activities or remain silent.

[23] If the applicants remain silent, the forfeiture order will probably be granted. If the applicants wish to respond, they can say, as first applicant has already done, that the flats were bought many years ago, before the alleged offences were committed, and could not have been any instrumentality of any offence with which he is charged, and were also not bought with the proceeds of unlawful activities. As to the two motor vehicles, the applicants can deny that they were instruments or proceeds.

[24] The applicants might have been precipitous to launch the present application to set aside the preservation order. The preservation order is an interim order; it is to be followed by a request for a forfeiture order, which will be final in effect, finally forfeiting the property to the state (section 56(2) of POCA).

[25] The court considering the forfeiture application will consider whether the constitutional rights of the applicants have been breached, and decide the forfeiture application accordingly, or possibly order that the forfeiture application be stayed until the criminal proceedings have been terminated. Similarly the court dealing with the criminal trial will consider whether the use of any evidence there – e.g. the applicants' affidavits in the preservation or forfeiture proceedings – would make the trial unfair as contemplated in section 35 of the Constitution, and will consider excluding the content of such affidavits under section 35(5).

[26] With regard to applicants' prayer that paragraph 20.4 of the preservation order be struck out, the applicants are not compelled to disclose any evidence in their notice of intention to oppose under section 39(5) of POCA. Paragraph 20.4 of the notice of the order served on the applicants does not create a duty which the applicants cannot ignore.

D. COSTS

[27] The conduct of the NDPP falls short of what a court is entitled to expect of a litigant. First, as to the *ex parte* nature

of the proceedings, the NDPP should have systems in place so that the present applicants could have been notified. The facts are that the vehicles and the money were in police custody when the application was brought. A *caveat* could have been entered in the Deeds Office by consent in respect of the flats. It is difficult to see what prejudice the NDPP would have suffered had there been notice.

[28] The fact that the NDPP applied for a forfeiture order by default because the applicants were one day late in noting their defence causes one to raise the eyebrows. A plaintiff is not entitled to default judgment where the notice of intent to defend is out of time. In terms of the rules of court the plaintiff is entitled to apply to have the late notice set aside as an irregular proceeding, but normally the late filing will be condoned especially if it is only a day out of the time as here, and the matter will take its normal course.

[29] In the circumstances the NDPP, although successful in its defence of this application, should be deprived of its costs.

E. ORDER

[30] The application is dismissed. No order as to costs is made.

A. KRUGER, J

On behalf of the applicants:

Adv. C. Ploos van Amstel SC
Instructed by:
Honey Attorneys
BLOEMFONTEIN

On behalf of the respondent:

Adv. G. M. Budlender SC
Instructed by:
State Attorney
BLOEMFONTEIN