IN THE HIGH COURT OF SOUTH AFRICA
(ORANGE FREE STATE PROVINCIAL DIVISION)

Application No.: 2710/2004

In the case between:

THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	APPLICANT

and

FREDDIE JANSEN	FIRST RESPONDENT
LIZIWE XOLISWA JANSEN	SECOND RESPONDENT

CORAM: MALHERBE JP

HEARD ON: 17 FEBRUARY 2005

JUDGEMENT: MALHERBE JP

DELIVERED ON: 17 MARCH 2005

On 12 August 2004 applicant obtained an *exparte* preservation order in terms of section 38(2) of the Prevention of Organised Crime Act (Act 121 of 1998) relating to the following property:

i) A Ford Sierra motor vehicle with registration number BKL761FS;

ii) A Volkswagen Jetta motor vehicle with registration number CCH061FS;

iii) A .38 Special Rossi revolver with serial number AA757772;

iv) R25 159,22 cash;

v) A computer monitor (including speakers), a digital camera, a laminator, a hydraulic jack, a bicycle and a Motorola cell phone.

It was, and still is, applicant's case that this property was an instrumentality of an offence listed in Schedule 1 of the Act (i.e. robbery) or the proceeds of unlawful activities as envisaged by the said subsection (2).

It is common cause that this property was found by the South African Police in the possession of first respondent and two of his co-accused (Motiki and Khan) on 9 and 12 January 2004 during their investigation of an armed robbery at Absa Bank, Zastron on 6 December 2003.

It is also common cause that the said bank at Zastron was robbed of approximately R258 400,00 by armed men on 6 December

2003 and that first respondent, Motiki and Kahn were implicated in this robbery (together with 4 bank officials). First respondent and Motiki were identified as two of the robbers at an identification parade and they, as well as Khan, were implicated by one of the Bank officials who turned State witness (Gert Whittles). The police visited first respondent's house on 9 January 2004 and seized the said Volkswagen Jetta and revolver and all the property set out in paragraph (v) *supra*. This property was in "a fairly new condition". On the same date Motiki was arrested and was found in possession of the Ford Sierra and various items that linked him with the robbery. On 12 January 2004 Kahn was arrested and R16 000,00 cash in new banknotes were found in his safe.

Applicant now applies in terms of section 48(1) of the Act for an order forfeiting to the State all the property listed above that is subject to the said preservation order. In order to succeed in this application applicant has to convince the Court on a balance of probabilities that the property is or was an instrumentality of the robbery or the proceeds of the robbery.

Service of the preservation order was duly effected upon respondents and Motiki and Kahn and the order was also published in the Government Gazette in terms of the Court Order. Applicant's attorneys reached an agreement with the attorneys acting for Johnnie's Used Cars at Aliwal North from which Motiki bought the Ford Sierra on 9 December 2003 for R18 000,00 and paid R10 700,00 in cash. In terms of this agreement the seller consents to a forfeiture order on the understanding that the car in question will be sold by public auction and the nett proceeds of the sale will be paid to him. There is no appearance on behalf of Kahn. Only Mr. and Mrs. Jansen (first and second respondents) oppose this application. Their answering affidavits were prepared by themselves. They appeared in person and presented their arguments themselves: Mr. Jansen through an interpreter and Mrs. Jansen in English.

On 18 December 2003, i.e. some 12 days after the robbery, both respondents visited Te-Vrede Motors in Bloemfontein where second respondent purchased the Volkswagen Jetta Motor car for R24 200,00. She paid the purchase price in cash by means of banknotes of various denominations that she carried in her handbag. The owner/salesman who sold the car to her declares in his affidavit that she requested him not to register the car in her name but to arrange for it to remain registered in the name of the previous owner. He declined to do so.

Second respondent admits purchasing the car on 18 December 2003 for cash but denies the alleged request regarding the registration. According to her the purchase price formed part of an amount of R54 000,00 which she had saved from previous business ventures, in other words, that she acquired the car legally. She also admits purchasing the various other items seized by the Police on 9 January 2004 on the same date in Bloemfontein and paying cash for them. The invoices attached to the founding affidavit reveal that she paid R1 297,95 for the laminator and cell phone and R575,90 for the hydraulic jack and various small items. I understand her to admit paying cash on 18 December 2003 for all the property which the Police confiscated at the home of the respondents on 9 December 2003. I quote from her affidavit:

> "In December 2003 as I was cleaning the kitchen drawer I saw one of my Menu's which were Laminated. I got the idea that if I could do a laminating Business I could make money and I could never run out of clients. In every house there are about two to four children and almost every adult has a Certificate from School, University, Work

Achievements etc. and these Certificates they acquire need protection from accidental spilling of water, folding of Certificates and bending at the edges. Also in every house there are photo's, which had been taken on special occasions who, needed to be enlarged and framed.

Now considering my plan of action if I got 30 – 40 Certificates a day from house to house 5 times a week I would make sale of about R3 000,00 and R4 000,00 a month and if I got 10 Photos a day to enlarge in a month I would make sales of about R8 000,00 a month. This combined would make sales of about R12 000,00 a month if I charged, R5,00 to laminate a Certificate and R40,00 to enlarge a Photo. This motivated me and decided to start this business and to accomplish my plan was to use my Savings to purchase the above, mentioned property which the Police took.

On the 16 December 2003 I informed my husband of my plans and told him that on the 18 December 2003 I would be going to Bloemfontein to purchase the property I am going to use to start the Business next year January 2004. He asked me where would I get Money to Purchase the above, mentioned property. I then showed him an old DSTV DECODER, which he had bought at an auction. Inside the DECODER was my savings of R54 000,00. I used to hide this Decoder in the clothes cabinet in the bottom drawer, which I would stack with Novels, as my Husband does not read books. I did not Buy the above, mentioned property as luxuries I bought it for business purposes.

On the 18 December 2003 I went to Bloemfontein with my Husband and Child. We did window shopping for cars when I saw a car that I wanted at Te Vrede Motors in Bloemfontein I told the Salesmen that I am interested in the Volkswagen Jetta with registration number CCH061FS....

The rest of my Savings I spent around December 2003 in the hope of starting a New Business the following year of 2004."

In his affidavit first respondent admits his participation in the armed robbery but claims that he did so under duress. According to him he did not use his .38 revolver to hold up the bank employees but a toy gun that he bought shortly before the robbery. In argument, however, he consented to the forfeiture of the genuine revolver mentioned in the papers. He claims to have received only R10 000,00 of the booty and also claims that second respondent bought the Volkswagen Jetta and other property with her own funds.

As far as the motor vehicles are concerned, applicant relies on an affidavit by Gert Whittles in which he says that neither first respondent nor Motiki owned a car before the robbery. It is significant that the respondents do not deny this allegation. It means that they bought their first car shortly after the robbery and paid a large amount in cash for it. On the same day second respondent went on a shopping spree in Bloemfontein and spent substantial amounts of cash on the computer monitor, digital camera etc. mentioned above. Her explanation of where the cash came from and, especially, where it was stashed away, is most unconvincing and improbable. It is just too much of a coincidence that everything started to fall into place during the time of the robbery: She cleaned the kitchen drawer and came across an old menu that was laminated. This discovery started a train of thought about a new business venture that would yield large profits. Fortunately her savings of R54 000,00 had remained intact and safely hidden away in an unlikely place despite various unsuccessful attempts to establish a business between November 2002 and September 2003. Second respondent is not an unsophisticated woman. She is the author of the answering affidavit and was definitely not at a loss for words during her address in Court. In my view it is far more probable that second respondent possessed substantial amounts of cash during December 2003 as a direct result of first respondent's participation in the bank robbery, in other words, that the cash was part of the stolen money. This stolen money purchased the Volkswagen Jetta and the other goods that were found in respondent's possession. Therefore this property constitutes the proceeds of unlawful activities. The same conclusion obviously applies to the Ford Sierra car and the cash set out in the preservation order.

In the result I find that applicant has proved on a balance of probabilities the requisites for a forfeiture order as prayed.

The amended draft order set out on pp. 2, 3 and 4 of this application further contains the customary provisions relating to the powers and duties of the *curator bonis*, the publication of this order and the costs of the application. These provisions are all in order.

Counsel for applicant has the contact details of respondents and has undertaken to let them know when judgement in this matter will be delivered.

An order is granted in terms of the amended draft order on pp. 2, 3 and 4 of the application.

J.P. MALHERBE, JP

Counsel for the applicant: Amanda Maree
Instructed by the
State Attorney

BLOEMFONTEIN

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