

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, MAKHANDA)**

Case No: CA 104/2022

In the matter between:

**MANTELLA TRADING 522 CC t/a
DESIGNER LIGHTING**

Appellant

and

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS

Respondent

APPEAL JUDGMENT

DAWOOD J:

Introduction

[1] The appellant, Mantella Trading 522CC trading as Designer Lightning (*Mantella*), sought leave to appeal against the judgment of Rugunanan J where he granted judgment in favour of the respondent, National Director of Public Prosecutions (*NDPP*) in the following terms: -

“(i) The property in the amount of R1 380 000 (one million three hundred and eighty thousand rand) is declared forfeited to the state.

(ii) Mr Khayaletu Ncula who was appointed at preservation stage is hereby directed to forthwith deposit the aforesaid property in the amount of R1 380 000 (one million three hundred and eighty thousand rand) into the Criminal Asset Recovery Account number 8[...]held at the Reserve Bank.

(iii) The respondent shall pay cost of the application.”

[2] *Mantella*’s application for leave to appeal that was brought in the court *a quo* contained *inter alia* the following grounds of appeal: -

(a) That the court *a quo* failed to apply the proportionality test.

(b) That the court *a quo* misdirected himself in finding that Mantella should have applied for an exclusion in terms of section 52 of the Prevention of Organised Crime Act 121 of 1998 (POCA) and that Mantella has the *onus*.

(c) That the court *a quo* misdirected himself in the application of the rule in *Plascon-Evans*.

(d) That the court *a quo* misdirected himself in finding that the sum of R1380 000 paid to the respondent by Victory Ticket was the proceeds of unlawful activities because it constituted part and parcel of the sum of R5895 000.00 paid by BCMM to Victory Ticket and should have found that R688 560 was the property of *Mantella*.

(e) That the court *a quo* failed to have any adequate or proper regard to the findings and judgment of Smith J regarding the limitation of the forfeiture order to the extent to which *Mantella* profited from the sale.

[3] The court *a quo* based on the aforesaid application for leave to appeal, granted *Mantella* leave as follows:

“The respondent (*Mantella*) be and is hereby granted leave to appeal to the Full Court of this division against the proportionality findings made by this

court in its judgment and order handed down on 8 April 2021.” (own emphasis)

The court a quo restricted the basis of *Mantella*’s appeal to the proportionality findings only. This court accordingly is called upon to exclusively deal with the proportionality findings as this is the only issue that was made the subject matter of the appeal. The parties were accordingly obliged to restrict their arguments to this aspect.

[4] *Mantella*’s counsel attempted to convince this court to hear arguments on inter alia the issue of unlawfulness and the other points that were part of the *Mantella*’s application for leave to appeal. This approach cannot be countenanced in the present circumstances having regard to *inter alia* the following: -

- (a) Those matters were raised in the application for leave to appeal.
- (b) Leave was not granted on those issues, despite the same being raised.
- (c) *Mantella* could have sought leave to appeal from the Supreme Court of Appeal on those issues if it intended to pursue those issues and believed that it had reasonable prospects of success on appeal in respect of those additional issues.
- (d) *Mantella* instead addressed this court in respect of those issues claiming in its *viva voce* argument that it was entitled to do so in terms of Rule 49 (b), when asked on what basis it claimed on entitlement to argue those issues.
- (e) This approach would not only be prejudicial to the NDPP, who came to court to argue a case of proportionality, but would also make a mockery of the relevant procedure pertaining to appeals.
- (f) A party cannot simply ignore the order granted which restricts its appeal to one point and choose to nonetheless argue all the other issues that

had been pertinently raised in its application for leave to appeal but for which he was not granted leave.

(g) This approach would defeat the purpose of following the procedure of obtaining leave to appeal from the judge whose judgment a party wishes to appeal against.

(h) There is a safeguard provided for a party who is dissatisfied with that refusal, or in this case, restriction of the issues on appeal.

(i) *Mantella* is not prejudiced by this court not considering the additional points.

(j) It had redress available in the form of applying for leave to appeal to the Supreme Court of Appeal, which it chose not to follow.

(k) *Mantella's* proposed approach would undoubtedly give rise to a dangerous precedent, if permitted, since a party would be at large to argue any, and every point whether leave was granted or not on those issues, to the prejudice of the other party and in total disregard of the rules of court.¹

(l) *Mantella* has advanced no cogent reasons why this court should entertain any argument on any other aspect save for that of proportionality.

[5] This court accordingly will only deal with the issue of proportionality and accept the findings of the court a quo on other aspects. The court found as follows with regard to the issue of whether or not the monies were proceeds of unlawful activity: -

“I am satisfied that the Applicant (NDPP) has discharged the onus of establishing that the amount paid to the respondent (Mantella) constitutes the proceeds of unlawful activities ...”

¹ *Harlech-Jones Treasure Architects CC and Others v University of Fort Hare* 2002 (5) SA 32 (E) at para 56.

Legal position

[6] *Jafta* J writing for the majority of the Constitutional Court in *Botha's*² case extensively dealt with POCA and the procedure to be followed and found *inter alia*: -

(a) That the proceeds of unlawful activities did not and could not constitute property as envisaged in section 25 (1) of the Constitution;³

(b) That he sees the issue with regard to proportionality differently from the first judgment which concluded that a proportionality exercise which is applicable in respect of instrumentality of an offence equally applies to forfeiture of proceeds of an unlawful activity.⁴

(c) ... That Ms Botha had no right in the money paid ...there can be no talk of deprivation of a right in property.⁵

(d) He concluded by saying "All of the foregoing reasons illustrate the inappropriateness of applying the proportionality analysis in the case of a forfeiture of proceeds of crime in circumstances where the person from whom the proceeds taken does not have any interest which is lawfully recognised".⁶
(own emphasis)

[7] Applying the above dicta in *Botha's* case to the facts of this case it is evident that: -

(a) The sum of R1 380 000 that was paid to Mantella by Victory Ticket was from the proceeds of the R5 985 000 that was unlawfully paid to Victory Ticket.

² *National Director of Public Prosecutions v Botha N.O. and Another* [2020] ZACC6.

³ *Botha* above at para 121.

⁴ *Botha* above at para 122.

⁵ *Botha* above at para 127.

⁶ *Botha* above at para 131.

(b) That the court *a quo* found that the said amount paid to *Mantella* indeed constitutes the proceeds of unlawful activities.

(c) The court *a quo*'s finding of unlawfulness is binding on this court, as already indicated in the context that this appeal is solely to be determined on the issue of proportionality.

(d) *Mantella* accordingly does not have an interest in the sum of R 1 380 000 that is lawfully recognised.

[8] This court accepts the unchallenged findings of the court *a quo* that the amount paid to *Mantella* is indeed proceeds of crime. The court *a quo*'s reliance on *Botha* in respect of the inappropriateness of employing the proportionality analysis cannot be faulted. The *dicta* in *Botha* above finds application in the circumstances. There can be no application of the proportionality test in light of the fact that the forfeiture was sought and granted on the basis of the monies being the proceeds of unlawful activities and accordingly *Mantella* had no interest thereto which is legally recognised.

[9] In the circumstances the following order is made:

(i) The appeal is dismissed with costs.

F B A DAWOOD
JUDGE OF THE HIGH COURT

I agree.

A GOVINDJEE
JUDGE OF THE HIGH COURT

I agree.

T MADYIBI
ACTING JUDGE OF THE HIGH COURT

Heard: 23 July 2024

Delivered: 25 September 2024

Appearances

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