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**IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN**

Reportable: NO
Of Interest to other Judges: NO
Circulate to Magistrates: NO
CASE NO: 3295/2022

In the matter between:

NATIONAL DIRECTOR OF PUBLIC PROSECUTION
Applicant

And

JACOBUS GERHADUS FOURIE 1st Respondent

VETVEE BOERDERY (PTY) LTD 2nd Respondent

In re: A John Deere 6225 tractor with registration number HJT [...] 2 trailers seized on 24 and 26 March 2022 and held under Vrede CAS 897/03/2022

**IN AN APPLICATION FOR FORFEITURE OF PROPERTY ORDER IN TERMS OF
SECTION 48 OF THE PREVENTION OF ORGANISED CRIME ACT NO 121 OF
1998**

HEARD ON: Matter disposed of without oral hearing in terms of section 19(a) of the Superior Court Act 10 of 2013.

JUDGMENT BY: MHLAMBI, J

DELIVERED ON: 24 DECEMBER 2024

APPLICATION FOR LEAVE TO APPEAL

Introduction

[1] This is an opposed application for leave to appeal against the whole judgment which I granted on 25 April 2024 when the applicants' forfeiture application was dismissed with costs. The grounds of appeal are stated as follows:

1. That the honourable court erred.

- 1.1 In finding that the Applicant failed to prove that the railway line was not *res derelictae*, the Respondents had a duty to submit evidentiary evidence of this fact. Transnet in an affidavit claimed ownership of the railway line, which negates the defence of *res derelictae*.
- 1.2 In failing to provide reasons why the evidence of Transnet regarding its ownership over the railway line was rejected.
- 1.3 In finding that the railway line was abandoned.
- 1.4 In finding that the Respondents by moving the railway line 200 metres away from its original location meant that there was no intention to permanently deprive the owner of ownership.
- 1.5 In finding that there was insufficient evidence on the papers to make a finding on the issue of the ownership of the railway line.
- 1.6 In failing to call for oral evidence in circumstances, where the court deemed it necessary to have done so for the determination of ownership.
- 1.7 In disregarding the fact that forfeiture proceedings are application proceedings that are prescribed by Prevention of Organised Crime Act 21 of 1998 (POCA) as opposed to proceedings where the Applicant has an election between proceeding by way of an application or action.
- 1.8 In failing to accept that the evidence supported the possibility of conviction on competent verdicts listed in schedule 1 of POCA.

- 1.9 In failing to make a ruling on the servitude that existed over the farm where the railway line ran.
 - 1.10 In failing to consider that a public servitude is not subject to prescription.
 - 1.11 In using the criminal law standard of beyond reasonable doubt to conclude on the charges instead of the civil standard.
 - 1.12 In failing to consider the Respondents' failure to obtain permission from Transnet before removing the railway line.
 - 1.13 In failing to consider the fact that the railway line once uprooted and removed, could not be reinstalled, thus making its removal and deprivation of its use permanent.
 - 1.14 In finding that for the property to constitute an instrumentality of offences, it had to be adapted, where there is case law to the fact that the manner in which a property is used can make it an instrument of an offence.
2. That another court could reasonably have come to a different conclusion than the one reached by the Court a quo; and
 3. That the Applicant has reasonable prospects of success on appeal.
- [2] Section 17(1)(a) of the Superior Courts Act provides that leave to appeal may only be given where the judge concerned is of the opinion that the appeal would have a reasonable prospect of success or there is some other compelling reason why the appeal should be heard including conflicting judgments on the matter under consideration.
- [3] All the grounds in the application for leave to appeal and the arguments in the applicant's heads of argument have been succinctly dealt with in the judgment. The issues raised in the heads of argument are grouped under the headings ownership of the railway lines, *res derelictae* and abandonment; intention to permanently deprive Transnet, oral evidence, Chapter 6 POCA Proceedings,

Schedule 1 POCA offences, an instrumentality of an offence referred to in Schedule 1. The applicant then concluded that there was a reasonable prospect of success on appeal to the full bench.

- [4] The applicant submitted in its heads of argument that should the appeal court find that the rail lines were the property of Transnet, then it will be called to find that there was an intention by the first respondent to permanently deprive Transnet of the rail lines because the respondents' defence of *res derelictae* and abandonment clearly showed that the first respondent intended to appropriate the rail lines for his use.¹ The transportation of the rail lines was insignificant. The fact that the first respondent claimed *res derelictae* and abandonment, albeit wrongly, showed that he intended to deprive Transnet of ownership permanently.²
- [5] The respondent pointed out, and correctly so, that it was common cause, even assuming that Transnet owned the derelict pieces of the rail line, which was disputed, Transnet had failed to exert its ownership in the property for 30 years and abandoned the rail line. The applicant deliberately withheld from the court D/W/O Van Zyl's affidavit that these railway lines were still on the farm when he visited the scene sometime after the alleged commission of the crime.
- [6] The applicant contended that 'finding lack of ownership led to the courts finding that no schedule 1 offences were committed. It is the applicants view that that finding was wrong in law and that the appeal court will certainly come to a different decision. Should that be the case, then the appeal court will likely find that schedule 1 POCA offences were committed and in particular theft, damage to essential infrastructure or their competent verdict of malicious injury to property which is a schedule 1 POCA offence or even attempted theft.'³ No such finding was made in the judgment.

¹ Para 13.

² Para 14.

³ Para 19.

[7] Having considered the application as a whole, I am of the view that there is no reasonable prospect that a court of appeal would come to a different conclusion. The application for leave to appeal should fail.

[8] I, therefore, make the following order:

ORDER:

The application for leave to appeal is dismissed with costs which shall include the employment of counsel on scale C.

MHLAMBI, J

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