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**THE HIGH COURT OF SOUTH AFRICA
MPUMALANGA DIVISION, MBOMBELA MAIN SEAT**

CASE NO: 540 / 2024

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED.

DATE **22 April 2025**

SIGNATURE

In the matter between:

**THE NATIONAL DIRECTOR OF PUBLIC
PROSECUTIONS**

APPLICANT

And

LIVIA TRANSPORT (PTY) LTD

RESPONDENT

And

CASE NO: 5817 / 2023

LIVIA TRANSPORT (PTY) LTD

APPLICANT

And

MINISTER OF POLICE

RESPONDENT

J U D G M E N T

RATSHIBVUMO DJP:

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email. The date and time for hand-down is deemed to be on 22 April 2025 at 09H00.

[1] Introduction

The two applications before the court were heard together because they involve the same property to wit, a Scania Truck with registration number C[...] together with the two trailers with registration numbers J[...] and J[...] (the property). The property is currently being held by the South African Police Services (the SAPS) at the SAP 13 storage, under Nelspruit CAS No. 113/10/2023. The property belongs to Livia Transport, in whose name it is registered.

[2] Under case No. 5817/2023, Livia Transport launched an application for the return of the property (*rei vindicatio*) on 14 December 2023. The application is opposed by the Minister of Police, who is the respondent. Under case No. 540/2024, an *ex parte* application was launched by the National Director of Public Prosecutions (the NDPP) on 08 February 2024, seeking an order for preservation of the property in terms of section 38(1) read with section 74(1)(a) of the Prevention of Organised Crime Act, No. 121 of 1998 (POCA). On the same date, a *rule nisi* order was granted in favour of the NDPP, calling on Livia Transport, the Respondent therein, to show cause as to why the order should not be made final.

[3] Subsequent thereto, the court made a *rule nisi* final in the absence of the Respondent. This was however rescinded on 10 May 2024 on application by the Respondent. The rescission of judgment was granted by agreement between the parties. The *rule nisi* was as such extended further until the hearing of this application. The application before Court is therefore for an order making a *rule nisi* final, whereas the Respondent is opposed to it. An order discharging a *rule nisi* was as such sought by the Respondent.

[4] Background.

Facts leading to these applications are largely common cause. On 06 October 2023 at around 01h00, members of the SAPS were called to a scene, where they found Fidelity Security officers having stopped a truck pulling the trailers described above, along the N4 highway between the Alkmaar and Sabie off-ramps. When it was stopped, it was being driven by Mr. Malungelo Mhlengethwa (Mhlengethwa). Fidelity Security officers searched the said truck and found that it was loaded with the railway tracks and saddles which were covered by blue tarpaulin. When members of the SAPS arrived, they found the truck and trailers still loaded with this consignment. Mr. Marco Basson (Basson) from the Fidelity Security indicated to the police that he believed that the consignment was stolen and that it belonged to Transnet. He also indicated that they could be part of the railway tracks stolen from Sabie, which case is still under investigations under Graskop CAS No. 02/02/2023.

[5] When members of the SAPS confronted Mhlengethwa, he displayed softcopies of documents on his cell phone, giving the impression that he had the authorisation from the Department of Public Works and Komatiland Forest to transport that consignment. The documents purported to authorise a certain Mr. Nkosi (Nkosi) to remove the railway tracks from Komatiland Sabie. Basson who seemed to have been close to the Graskop investigations referred to above, informed the police that the documents Mhlengethwa was displaying on his cell phone, were found to be fraudulent in that case. Mhlengethwa also informed the police that he was delivering the railway tracks to Gauteng where they were to be sold. He was then arrested for theft and/or possession of suspected stolen property. The truck and the trailers were impounded as instruments used in the commission of a crime.

[6] Further investigations by the police revealed that Mr. Gilbert Masuku of the Department of Public Works, whose names and details appear on the letter presented by Mhlengethwa to the police, distanced himself from its contents. While all other details such as the contact details were his, he denied that the said letter was written by him. He also disputed that the signature appended thereto, was his. He also denied having ever met or known Nkosi whom the letter purported to give authority to remove the railway tracks.

- [7] In another statement, Mr. Warren Williams who is employed by SAFCOL/Komatiland Forests, claimed that the letter purportedly authorising Nkosi to remove the railway tracks from Bergvliet Plantation was forged. He further averred that he was the only person authorised to grant permits for that area and that he could not have issued a permit for the removal of the railway tracks as they do not belong to SAFCOL/Komatiland, but to Transnet. He did not know Mr. Sabelo Dlamini who was reflected as the author of that letter. He also did not know Nkosi whom the letter purported to give the authorisation to remove the railway tracks.
- [8] Further statements were obtained from Mr. Agatta Ngomane and Mr. Moses Mahlangu (Mahlangu) who work for Transnet. From their statements, they affirm that Transnet does not sell its railway tracks to private persons or companies even if they could be obsolete and decommissioned. They further state that the railway tracks that were confiscated from Mhlengethwa were removed from the live railway lines that were still operational. The costs associated with the removal of the railway tracks in question was estimated by Mahlangu to be just over R1.9 million.
- [9] Charges against Mhlengethwa were withdrawn by the public prosecutor on 29 January 2024, while investigations by the police continue. Reasons for the withdrawal were not furnished to this Court. It is also unknown if there are plans afoot to reinstate the charges against him. It is however common cause that Mr. Johannes Porfirio Parreira (Parreira), the Manager at Livia Transport availed to the Investigating Officer, the printed copies of documents that Mhlengethwa had shown to the police when he was arrested. Parreira also told the police that he was the one who sent Mhlengethwa to collect and deliver the consignment that he was transporting when he was arrested. From the information downloaded from Parreira's phone, the police realised that it was not the first time that Livia Transport embarked on transporting the railway tracks relying on the same documents of authorisation as it did this time. It had done so twice before and this was the third time in the same year, 2023.
- [10] Court's approach to two applications.

For the two applications to be heard together does not imply that two separate judgments should be handed down. One judgment would be handed down with orders in respect of the two applications. For purposes of this judgment, I deem it prudent to focus on the preservation application launched by the NDPP, as the primary application, and only consider the *rei vindicatio* application as a secondary matter. Whatever the outcome in the preservation application, it would be able to cater for the outcome in both applications. If the preservation order is granted, that is if *rule nisi* is confirmed, it would mean, the *rei vindicatio* application gets dismissed as the two cannot be granted together. If the preservation order is dismissed, it follows then that the *rei vindicatio* application should be granted. Moreover, the applicants in the two applications are also the litigants in the preservation application, whereas the NDPP is not a party to the *rei vindicatio* application.

[11] The approach above was embraced by legal representatives for the NDPP and for the Minister of Police. Counsel for Livia Transport had a different view. He submitted that the court should hear the *rei vindicatio* application separately first, and only thereafter proceed to consider the preservation application. In my view, this approach defeats the purpose for which the two applications were heard together.

[12] The approach suggested by counsel for Livia Transport also has the potential for absurd outcome where the court may hand down a judgment in one application, only to recant it before the ink dries, in another. This can happen if the Court grants the *rei vindicatio* application, only to allow the preservation of the same property in the second application or refusing the *rei vindicatio*, only to have the preservation application also dismissed, leaving the property in unexplained state.

[13] In the *rei vindicatio* application, the Minister of Police as the Respondent therein, made it clear that one of the reasons they were opposed to the application was the order in *rule nisi* that was issued in the preservation application, that authorises them to keep the property. At the time the Minister of Police filed the answering affidavit, a preservation order had already been granted. Attending to the *rei vindicatio* application first would thus place the cart before the horse in that the

Court would not be able to give an answer to the defence raised in the opposition, which is the contravention of the court order granted as *rule nisi*. I will as such proceed to consider primarily, the preservation application and have the orders in both applications flowing from that consideration.

[14] The law.

Section 38 of POCA provides,

“38. Preservation of property orders

(1) The National Director may by way of an *ex parte* application apply to a High Court for an order prohibiting any person, subject to such conditions and exceptions as may be specified in the order, from dealing in any manner with any property.

(2) The High Court **shall** make an order referred to in subsection (1) if there are reasonable grounds to believe that the property concerned -

(a) is an instrumentality of an offence referred to in Schedule 1;

(b) is the proceeds of unlawful activities; or

(c) is property associated with terrorist and related activities.

(3) A High Court making a preservation of property order shall at the same time make an order authorising the seizure of the property concerned by a police official, and any other ancillary orders that the court considers appropriate for the proper, fair and effective execution of the order.

(4) Property seized under subsection (3) shall be dealt with in accordance with the directions of the High Court which made the relevant preservation of property order.” [Emphasis added].

[15] In the replying affidavit filed by the NDPP, in the preservation application, it was submitted that the Practice Directives of this Division as they stood then, were unlawful when it comes to the provisions related to POCA matters. This Court was therefore requested to make a declaration to the effect that they were not in unison with the statute (POCA). When counsel for the NDPP was requested to substantiate this argument, he indicated that the submission was in relation to the Practice Directives that have since been amended and that the Practice Directives as they stand currently, they do not offend the statutory provisions. The argument

was as a result abandoned and this Court shall make no pronouncement in that regard.

[16] From the common cause facts highlighted above, it is unquestionable that the following Schedule 1 offences as envisioned by section 38 of POCA were committed leading to the confiscation of the property by the police. The listing of the offences below should not be interpreted as suggesting that any party or individuals are guilty of any or all of them as the test for guilt in criminal matters requires more. For current purposes, I only enlist the offences apparently committed without identifying the offenders. The offences committed would *inter alia* entail,¹

- a) Theft of the railway tracks and saddles. These items belonged to Transnet which, from the evidence gathered, did not give consent for them to be taken for any reason whatsoever.
- b) Offence under section 36 or 37 of the General Law Amendment Act, 1955 (Act 62 of 1955). In *S v Du Preez*,² it was held that when it comes to reasonable suspicion that the property is stolen, the accused's response to request for explanation of possession of property should not be taken into account in assessing reasonableness or otherwise of suspicion. Only facts or factors preceding the formation of suspicion are to be taken into account in assessing its reasonableness. Equally, the reasonableness of the explanation that is given cannot be assessed in isolation but should be followed up. When officers fail to follow up an explanation that *ex facie* appears to be reasonable, that can result in the acquittal of the accused on charges against him.³ But when a follow-up is done that unmasks the documents as fake, that excludes the reasonableness otherwise proffered.
- c) Fraud. This was committed when there was misrepresentation about permits allegedly issued by the Department of Public Works and/or SAFCOL/Komatiland, to have the railway tracks removed, whereas in truth, no such authorisation was given by those institutions.

¹ See items 17-20, 33 & 33B of Schedule 1 of POCA.

² 1998 (2) SACR 133 (C).

³ See for example *S v Steward* 2017 (1) SACR 156 (NCK).

- d) Forgery or uttering. Statements given by the persons alleged to have issued the fake authorisation letters make it beyond any doubt that the documents in question were forged. I should however caution and stipulate that the crime of uttering is committed when the forged documents are presented by a person who knew that the documents were forged.
- e) Contravening section 25(4), read with section 32 and Schedule 3 of the Second-Hand Goods Act, No. 6 of 2009. Section 25(4)(a) provides that “[n]o person may have in his or her possession any apparatus which can be used for the recycling of any controlled metal or any article or substance containing any controlled metal, unless such person is registered as a recycler; or in the case of precious metals, such a person is authorised to possess and recycle precious metals under the Precious Metals Act, 2005 (Act 37 of 2005), or any other applicable legislation.”
- f) An offence referred to in section 3 of the Criminal Matters Amendment Act, No. 18 of 2015. This section provides that “any person who unlawfully and intentionally tampers with, damages or destroys essential infrastructure; or colludes with or assists another person in the commission, performance or carrying out of [these]; and who knows or ought reasonably to have known or suspected that it is essential infrastructure, is guilty of an offence and liable on conviction to a period of imprisonment not exceeding 30 years or, in the case of a corporate body as contemplated in section 332 (2) of the Criminal Procedure Act, 1977, a fine not exceeding R100 million.” [Emphasis added].

[17] The answering affidavit filed by Livia Transport in the preservation application does not question the commission of the offences listed above. It also does not dispute that its truck and trailers were used in the transportation of the stolen goods, hence it makes no issues in the confiscation of the railways tracks whose ownership was not questioned either. While it refused to confirm that crimes were committed, it made it categorically clear that it bears no knowledge of any crimes that were committed. Those who bear the knowledge presented evidence as employees of the Transnet, the Department of Public Works and/or SAFCOL/Komatiland. They all confirm that the offences listed above were indeed committed. The attempts by Livia Transport in distancing itself and its driver from being the persons who

committed these offences that were glaringly committed with great precision that required the involvement of several other persons and institutions does not mean the crimes were not committed.

[18] Whereas section 38(1) of POCA requires reasonable grounds to believe that the property concerned must have been an instrumentality of an offence referred to in Schedule 1, section 1 defines “instrumentality of an offence” as “any property which is concerned in the commission or suspected commission of an offence at any time before or after the commencement of this Act, whether committed within the Republic or elsewhere.” This puts the test required for preservation applications very low compared to the test required in forfeiture applications.⁴

[19] Wallis J (as he then was) observed in *National Director of Public Prosecutions v Abrina*⁵ that,

“As it is not a requirement of section 38(2) that the person in possession of the property sought to be preserved should have been the perpetrator of the unlawful activity by means of which the property was received by them, it is of no assistance to the Sewpersads to protest their innocence of any involvement in the fraud. That is irrelevant. In consequence of the fraud the PGAC authorised subsidies in terms of the Land Reform (Labour Tenants) Act. The money released by way of subsidy was used to acquire the farms in KwaZulu-Natal and the implements and livestock on those farms. Abrina 6822 was thereby relieved of any obligation to pay the purchase price of the farms, the livestock and the implements. It received these directly as the proceeds of unlawful activities. As I have said, it is immaterial whether Abrina 6822 was aware of those unlawful activities or a party to them. It is in possession of property in respect of which there are reasonable grounds to believe that the property is the proceeds of unlawful activities. Accordingly, taking the provisions of sections 38(1) and (2) at face value the preservation of property order was properly made.” [Emphasis added].

⁴ See *Mazibuko and Another v National Director of Public Prosecutions* 2009 (6) SA 479 (SCA).

⁵ 2011 (1) SACR 419 (KZP) at para 18.

[20] It is as such irrelevant for the court to consider the innocence or otherwise of Livia Transport, Ferreira and/or Mhlengethwa for purposes of the preservation application as it plays no role.

[21] Another aspect deserving of the court's attention is the argument presented by Livia Transport to the effect that, in bringing the *ex parte* application, the NDPP failed to disclose material information to the court, to wit, that there was a pending *rei vindicatio* application. For this reason, so it was argued, the *rule nisi* should be discharged. While I agree that applicants who bring applications on *ex parte* basis, that is, without a notice to their opponents, have a duty to make a full disclosure, including that which is unfavourable to them, I am unable to conclude that the NDPP failed to disclose information that was at its disposal. Under oath, the deponent to the NDPP's replying affidavit says he disclosed everything at his disposal. He steered away from expressing a view on whether the State Attorney officer was aware of the pending *rei vindicatio* application saying he did not know. He however expressed some doubts given the load of work they do and that services to them were outsourced, meaning, the NDPP's officers are preparing their own papers, in care of State Attorneys.

[22] It is common cause that the NDPP is not a party to the proceedings in the *rei vindicatio* application, as only the Minister of Police was cited. The only common denominator between these two parties is that both, being the State institutions, were making use of the State Attorneys, with the NDPP outsourcing their services from within its office, hence the correspondence would go to the State Attorneys, in care of an officer within the NDPP office. The fact that the NDPP, as the applicant was using the same office or officer within the State Attorney does not mean that they should also know what the State Attorney or individual officer therein knows, that is if he knew about other instructions previously given by other State entities to the State Attorney. The argument fails to establish that the NDPP as a litigant, was aware of the pending application and chose not to disclose it.

[23] Without trivialising the duty to disclose all information available at one's disposal when bringing an application *ex parte*, I do not see how the disclosure of the information about the pending *rei vindicatio* application, by the NDPP, if it was at its

disposal, could have influenced the outcome of the preservation application. This I say given the legal right that the NDPP enjoyed in bringing the preservation applications *ex parte*. The test for granting the order, as highlighted above has nothing to do with any possible pending application over the property involved. The test is whether there are reasonable grounds to believe that the property concerned must have been an instrumentality of an offence referred to in Schedule 1.

[24] I have no doubt that the disclosure would have played a greater role in the confirmation of the order as the court would have known at that stage that Livia Transport could be unaware of the preservation application. The non-disclosure would most probably have influenced the court to demand that service of the application should be served on Livia Transport. As indicated, *rule nisi* that was made final in this case was rescinded following an application to that effect by Livia Transport. The fact that Livia Transport was not served with the notice and that the *rei vindicatio* application was not mentioned in the founding affidavit for the preservation application must have influenced the NDPP to agree to that rescission. For reasons stipulated above, I am unable to find that the NDPP failed to disclose all the information at its disposal when it brought its application.

[25] Conclusion.

With the above, the preservation order stands to be allowed and in line with the Court's approach to these applications, it would mean that the *rei vindicatio* application stands to be dismissed. Counsel for Minister of Police argued that costs should follow the outcome in that matter because when Livia Transport launched its application, it was aware that that the property was impounded by the police and that it was the subject of criminal investigations as envisaged in section 20 of the Criminal Procedure Act, No. 51 of 1977.

[26] I agree with this contention. The *rei vindicatio* application appears to have been prematurely brought, if one considers the totality of the circumstances prevailing then. At the time the application was brought, Mhlengethwa, was still appearing in court as an accused person, meaning that the investigations were still on. He had been appearing as an accused person for just over two months at the stage.

Failure to cite the NDPP or the prosecutors seized with the matter and who would be in a better position to tell if the confiscated property would be needed as evidence in the criminal trial, may have been ill-advised. There is therefore no reason why costs should not follow the outcome.

[27] The Order:

For the aforesaid reasons, I make the following order.

27.1 *Rule nisi* granted by this court on 08 February 2024, under case No. 540/2024 is hereby confirmed.

27.2 The Respondent in that matter is ordered to pay the costs.

27.3 The application in case No. 5817/2023 is dismissed with costs.

**TV RATSHIBVUMO
DEPUTY JUDGE PRESIDENT
MPUMALANGA DIVISION OF THE HIGH COURT**

APPEARANCES IN CASE NO. 58167/2023:

FOR THE APPLICANT:	ADV. CFJ BRAND SC
INSTRUCTED BY:	SLABBER ATTORNEYS INC MBOMBELA
FOR THE RESPONDENT:	ADV. MO LETSOKO
INSTRUCTED BY:	STATE ATTORNEYS MBOMBELA

APPEARANCES IN CASE NO. 540/2024:

FOR THE APPLICANT:	ADV. AK MAUPJE
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INSTRUCTED BY:

SLABBER ATTORNEYS INC

MBOMBELA

DATE HEARD:

15 APRIL 2025

JUDGMENT DELIVERED:

22 APRIL 2025