

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, EAST LONDON CIRCUIT COURT)**

Case No.: 62/2022

Reportable: Yes/No

In the matter between:

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS Applicant

and

PUMEZO MICHAEL MSIMANGO First Respondent

MARIUS HARMSE Second Respondent

ELANORE HARMSE Third Respondent

In re: a 2017 V250D Mercedes Benz Avantgarde v Class with registration number JZ [...] and VIN WDF[...], which is the proceeds of unlawful activities and is held under Zwelitsha CAS 93/10/2021.

JUDGMENT

Cengani-Mbakaza AJ

Introduction

[1] On 15 May 2022, this court issued a preservation order in terms of section 38(2) of the Prevention of Organised Crime Act 121 of 1998 (POCA).¹

¹ Pursuant to section 38(1) of POCA, the National Director of Public Prosecutions 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. Section 38(2) of POCA

The court issued the order after being satisfied that there existed reasonable grounds to believe that the 2017 V2500D Mercedes Benz Avant-grade V Class, with registration numbers and letters **JZ [...]** and Vehicle Identification Number (VIN) **WDF[...]** ('the property'), was indeed an instrumentality of offences of corruption and money laundering. Subsequently, the property remained in control of the police SAP 13 at the SAP identification Centre pending the finalisation of the forfeiture order.

The relief sought

[2] This is an application for a forfeiture order against the property² as specified in paragraph 1 of this judgment. The central issues are whether the property is the instrumentality of the offences of corruption and money laundering or the amount of R328 000 which is part of the purchase price of the property specified, is the proceeds of unlawful activities namely a gratification from corruption and money laundering; and/or that the R328 000 is an instrumentality utilised to facilitate the commission of corruption and money laundering. The application is opposed by the second and third respondents (the respondents). The first respondent filed no opposition papers.

The parties

[3] The applicant is the National Director of Public Prosecutions (NDPP) appointed in terms of section 10 read with sections 5(2)(a) of the National Prosecuting Authority Act 32 of 1999 and 179 (1)(a) of the Constitution of the Republic of South Africa, 1996.

provides: 'The High Court shall make an order referred to in subsection (1) if there are reasonable ground 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.'

² In terms of Section 48(1) of POCA, if a preservation of property order is in force the National Director, may apply to a High Court for an order forfeiting to the State all or any of the property that is subject to the preservation of property order.

[4] The first respondent is an adult male person, a salesperson at Star Motors in King William's Town. The second respondent is an adult male person employed by the Department of Education, Eastern Cape (DoE), as a Chief Director of the Supply Chain Management Department (SCM). The third respondent is an adult female, the second respondent's wife.

The preliminary issues

[5] During the course of the proceedings, it was brought to my attention that prior to the forfeiture application being made, the second respondent and other unidentified persons who are not involved in these proceedings (the co-accused) had faced a criminal charge in the high court emanating from the same set of facts. They were acquitted in terms of section 174 of the Criminal Procedure Act 51 of 1977 (CPA). The significance of this aspect is illuminated below.

[6] Mr Hellens SC, counsel for the respondents, through the papers filed, sought for the admission of the high court judgment where the second respondent and his co-accused were acquitted in terms of section 174 of the CPA. This application was based on the court's findings in criminal proceedings, where it was concluded that the second respondent and his co-accused had no case to answer. As argued, the justification for the admission of the judgment was to demonstrate that the property in question does not stem from unlawful activities, money laundering and corruption. Furthermore, he argued that the judge found *inter alia* that there was no evidence refuting the second respondent's exculpatory answering affidavit.

[7] Counsel referred to a number of authorities³ and in particular the well-established principle emanating from the case of *Hollington v Hewthorn & Co Ltd*.⁴

³ Counsel referred to the provisions of the Civil Proceedings Law of Evidence Amendment Act. He also referred to *Technology Corporate Management v Sousa* 2024(5) SA 57.

‘Evidence that a party has been convicted of a criminal offence is not evidence, not even prima facie evidence, in a subsequent contested civil suit; it is the irrelevant opinion of another court. In uncontested civil proceedings that fact of the conviction constitutes prima facie proof, the finding of a court in civil proceedings is inadmissible in subsequent criminal proceedings and a conviction is not evidence in subsequent criminal proceedings against someone else.’

[8] Counsel further referenced to *Graham v Park Mews Body Corporate*,⁵ and argued that in this instance the test to be applied is relevance and admissibility. His argument was based on the views expressed in *Technology Corporate Management*,⁶ where Wallis AJA, (with Mbha AJA, Van der Merwe, Plasket and Dlodlo AJJA concurring) held:

‘In my view that criticism of *Graham v Park Mews Body Corporate* was well-founded. The rule in *Hollington v Hewthorn* should not be extended beyond the circumstances to which it expressly applied. In other instances where it sought to use the findings in a previous case to prove facts in a subsequent case, the test for admissibility should be relevant and the court must pay careful attention to the weight to be attached to the evidence thus tendered, it should be excluded if, like the *Land Securities case*, it diverts the case into a collateral enquiry.’ (emphasis added).

[9] In contrast, Mr French, counsel for the NDPP argued that no clear basis had been laid to apply for the admission of the evidence adduced in the criminal proceedings. Furthermore, so he submitted, the judgment and the opinion of another court is irrelevant. Counsel referred to section 50 (4) of POCA which provides that the validity of an order under section 50(1) is not affected by the outcome of the criminal proceedings, or an investigation to institute such criminal proceedings, in respect of an offence with which the property concerned is in some way associated.

⁴ *Hollington v Hewthorn & Co Ltd* 2 1943 All ER 35.

⁵ 2012 (1) SA 355 (WCC) paras 59-65.

⁶ Fn 2 supra at para 165.

[10] It is trite that the concept of relevance is a matter of reasoning and common sense. In *R v Mpanza*,⁷ the court explained that any facts are relevant if from their existence inference may properly be drawn as to the existence of the fact in issue. In their body of work, *DT Zefferdt with AP Paizes and A St Q Skeen*,⁸ state the following:

‘The high degree of relevancy which the law requires is not a uniform standard... The court will require a high degree of relevance before it will receive evidence which involves a lengthy investigation of collateral issues or is likely to cause confusion, or prejudice or raise difficult questions of credibility, or whose reception would materially involve any other serious disadvantage. On the other hand, evidence which does not have these advantages will often be admitted, as a matter of convenience, even though its relevance may be fairly slight.’

[11] In deciding on the issue of relevancy, I am empowered with a discretion which I should exercise objectively. This discretion involves an assessment of whether the facts that were presented in the criminal proceedings are relevant for the determination of the issues in the matter under consideration. Logically, even if a finding is made that such evidence is relevant it will be excluded if its probative value is substantially outweighed by the dangers that it may cause confusion of the issues, and even collateral enquiries.⁹

[12] It is worth noting that Chapter 6 of POCA deals with civil recovery of the property that is derived from unlawful activities or is connected to the commission or suspected commission of an offence. The relevant section 37 of POCA provides:

‘37 Proceedings are civil, not criminal

⁷ 1915 AD 348 at 352 -353; *R v Trupedo* 1920 AD 58 at 62.

⁸ The law of Evidence p222 formerly (Hoffman and Zefferdt).

⁹ Fn 7 supra p222.

- (1) For the purposes of this Chapter all proceedings under this Chapter are civil proceedings and are not criminal proceedings.
- (2) The rules of evidence applicable in civil proceedings apply to the proceedings under this Chapter.
- (3) No rules of evidence applicable only in criminal proceedings shall apply to proceedings under this Chapter,
- (4) No rule of construction applicable only in criminal proceedings shall apply to proceedings under this chapter.' (accentuation added)

[13] In my opinion, the application for the admission of the judgment of the criminal proceedings attracts a lot of confusion and may divert the main issues into a lengthy and unnecessary enquiry. To begin with, section 37(3) of POCA explicitly prohibits the application of rules of evidence that are only exclusive in criminal proceedings. It is trite that section 174 of the CPA only applies in instances where the state has failed to establish prima facie evidence, which would enable a reasonable person to convict. This enquiry is conducted after the closure of the state's case. Most importantly, oral evidence was led in the criminal case that counsel was referring to.

[14] In the matter under consideration, I am seized with motion proceedings where evidence is presented through affidavits. Pursuant to section 50(1) of POCA, the burden of proof is on a balance of probabilities. Therefore, the burden of proof as dictated by evidentiary principles differs between the two scenarios. Moreover, the rules of construction are totally different rendering it impossible for the court to admit the judgment of the criminal proceedings. Furthermore, section 50 (4) of POCA lays no foundation for the admission of the outcome of the criminal proceedings.¹⁰ Therefore, admitting the judgment of the criminal proceedings would be contrary to the relevant statute.

¹⁰ National Director of Public Prosecutions and Another v Mohamed NO and Others 2002 (4) SA 843 (CC) (2002 (2) SACR 196; 2002 (9) BCLR 970) in para 16.

[15] Even if assuming I am incorrect in this regard, in *Prophet v National Director of Public Prosecutions*,¹¹ the Constitutional Court, as the highest authority has expressed a firm finding on this very issue. Nkabinde J held:

‘[42] The main reason that the applicant wanted to have the transcript of the proceedings in the magistrates' court admitted was to persuade this Court to accept that court's conclusion that the evidence gathered during the search on the property should be excluded, and its conclusion that the applicant be found not guilty. It needs to be said that the provisions of Ch 6 are not conviction-based (my emphasis). The findings of the magistrate, as reflected in the transcript in a related criminal trial, are, for the purpose of this judgment, irrelevant and may be described as 'superfluous' or 'supererogatory evidence' because they amount to an opinion on a matter in which a Judge might, in the forfeiture application, I have to decide.’ [footnotes omitted]

[16] In *National Director of Public Prosecutions v Botha N.O. and Another*¹² Victor AJ (Froneman J and Khampepe J concurring) held:

‘[31] The purposes of section 50 in the context of Chapter 6 of POCA were helpfully explained by this Court in *Mohamed* as follows:

‘Chapter 6 [POCA] provides for forfeiture in circumstances where it is established, on a balance of probabilities, that property has been used to commit an offence, or constitutes the proceeds of unlawful activities, even where no criminal proceedings in respect of the relevant crimes have been instituted. In this respect, Chapter 6 needs to be understood in contradistinction to Chapter 5 of [POCA]. Chapter 6 is therefore focused, not on wrongdoers, but on property that has been used to commit an offence or which constitutes the proceeds of crime. The guilt or wrongdoing of the owners or possessors of property is, therefore, not primarily relevant to the proceedings.’ [footnote omitted].

¹¹ 2007 (6) SA p169 (CC).

¹² [2020] ZACC 6; 2020 (1) SACR 599 (CC); 2020 (6) BCLR 693 (CC) (26 March 2020).

[17] In the result, the judgment of the criminal proceedings where the second respondent together with his co-accused were acquitted in terms of section 174 of the CPA is excluded in the current proceedings.

[18] Mr Hellens SC further challenged the validity of the founding affidavit sworn in by Dr Christopher Nkululeko Ndzengu (the deponent), contesting that it amounted to hearsay evidence. However, despite his vigorous opposition, he failed to explicitly demonstrate which specific material aspects of the founding affidavit he alleged were hearsay. Section 3 of the Law of Evidence Act 45 of 1988 defines hearsay as evidence whether oral or in writing, the probative value of which depends upon the credibility of any person other than the person giving such evidence. In the present matter, in his founding affidavit, the deponent disclosed a summary of evidence which is already on record and under oath.¹³ To a great extent, the material facts including the event that led to the allegations in question are common cause. Therefore, there is no basis to conclude that the evidence before the court amounts to hearsay evidence.

The pertinent facts

[19] During covid-19 pandemic, the DoE undertook an emergency procurement process for Personal Protective Equipment (PPEs). The process necessitated a deviation from the rules of tender standards and procedures. The SCM guided by the National Treasury and his subordinates oversaw the process.

[20] The DoE engaged a private contractor which consisted of teams from different units to conduct independent forensic auditing. At the time, the second respondent was still appointed as a Chief Director of the SCM Unit. Upon

¹³ Case No:5865/07, National Director of Public Prosecutions and HF Delpont and 12 others, reported on 22-03-2007, para 20.

selection of the candidates, the second respondent would sign appointment letters, which would later be dispatched to the service providers.

[21] One of the service providers that was awarded a tender to supply PPEs was KUPS Trading, Makupula being the sole director of the company. Makupula had previously rendered work for the DoE. The DoE had previously effected two payments in Makupula's bank account, one on 09 October 2020 and the second payment on 13 April 2021. These payments were in respect of other tender dealings between Makupula and the DoE.

[22] Although the content is unknown, a series of email communications as well as several cell phone charts between Makupula and the second respondent were detected by SAPS. Pursuant to his appointment as a supplier of PPEs under the tender, on 31 August 2020, Makupula received a payment in the amount of R4 066 513,95 from the DoE. This was after it was verified that the contract was successfully executed and the PPEs were delivered. Prior to the deposit of R4 066 513,95, Makupula had a balance of R239 in his bank account.

The applicant's case

[23] The applicant contends that the second respondent and Makupula used various motor vehicles to organise offences of corruption and money laundering. As alleged by the applicant, the suspicious sequence of events involving the vehicles has generated significant controversy and uncovered a web of intricate fabricated financial transactions. The vehicles are:

23.1 A Mercedes A250 V Class Avantgarde with VIN W1V[...] **(the first Mercedes).**

23.2 A Mercedes A250 V Class Bluetec with registration numbers and letters JFZ[...] and VIN WD[...] **(the second Mercedes).**

23.3 A Mercedes A220 V Class with registration numbers and letters **HXY [...]** and VIN **WDF[...]** (**the third Mercedes**).

23.4 The Benz.

[24] On 07 July 2020, Makupula purchased a Mercedes Benz V250 Avantgarde with a purchase price of R1 559 864.85 (the first Mercedes Benz) from a dealership known as Ronnies Motors. Makupula made a payment of R305 000 into Ronnie Motors' bank account in July 2020.

[25] On 11 September 2021, Makupula made a second payment of R328 000 in respect of the first Mercedes Benz. The amount of R328 000 which is categorised as gratification, was paid from the amount that was deposited by the DoE to Makupula's account following the execution of the contract referred to above. Makupula defaulted on the outstanding payments for the first Mercedes. He then informed Ronnies Motors that he would purchase a less expensive model with his "business partner". This model would be purchased from Star Motors in KingWilliam's Town. Ronnies Motors then levied Makupula a total of R60 000 for the costs incurred. The remaining excess amount of R573 000 was reimbursed to Makupula.

[26] The deposit of R633 000 which was paid for the first Mercedes consisted of two important payments that were made. The first payment of R305 000 stemmed from the second respondent's Standard Bank account and the second payment of R328 000 which is categorised as a gratification originated from KUPS Trading First National bank account. This is the same bank account number that the DoE had used to deposit the tender amount of R4 066 513,95.

[27] In December 2020, the first respondent, conducted an inspection of vehicles with specific mileages and values. He discovered the first Mercedes which according to the records belonged to the second respondent. He offered a

trade-in option for another Mercedes Benz (the second Mercedes), V series 220 Mercedes Benz with registration numbers and letters HXY [...].

[28] The second respondent accepted the deal and later changed his mind. He advised that he would sell the second Mercedes privately. Also, he would purchase the second Mercedes but not on a trade-in basis. The acquisition of the second Mercedes was concluded in April 2021. The second respondent later arrived at Star Motors requesting the first respondent to look for V250 as he was not happy with the power engine of the V220. Moreover, he asked the first respondent to place the second Mercedes on the sales lot at Star Motors and sell it on his behalf for the amount of R800 000.

[29] The first respondent complied and sold the second Mercedes to a new customer. Subsequently, the first respondent located a V250 V Series at Land Rover in Johannesburg (the third Mercedes). The third Mercedes was a 2017 Mercedes Benz with a valued price of R889 995.01. The second respondent instructed the first respondent to pay the said amount, being the purchase price of the Mercedes Benz to Land Rover in Sandton.

[30] Subsequently, the first respondent deposited the remaining balance of the purchase price from his bank account in two instalments namely R50 000 and R39 995.01. The first respondent informed SAPS that his intention in making the deposit was to receive his commission directly from the second respondent. For this reason, the third Mercedes was registered under the first respondent's name rather than the second respondent's name.

[31] The first respondent arranged that the second respondent should sign a purchase agreement, which the second respondent duly executed. Thereafter the second respondent paid the first respondent an amount of R150 000 in cash. Mr Gregory Hubbard (Hubbard), a sales manager at Star Motors confirms the following: that he evaluated the first Mercedes and offered the second

respondent R573 000 as a trade-in. According to Hubbard, the third Mercedes was valued at R850 000. The second respondent was supposed to pay R277 000 as a settlement amount of the vehicle.

[32] Subsequently, the second respondent informed him that he wished to alter the arrangement because his 'business partner' would be purchasing the second Mercedes and no longer intended to trade in the first Mercedes. Hubbard invoiced the second Mercedes at the full price of R849 999.99, thereby requiring an outstanding amount of R573 000 being due. On 23 February 2021, Makupula settled the outstanding balance. According to Hubbard whose assertion is corroborated by e-Natis records, the second Mercedes was initially registered in the name of the third respondent. However, at the time of the property's seizure, it was registered under the name of the first respondent.

[33] Hubbard also informed SAPS that in April 2021, the second respondent instructed Star Motors to place the second Mercedes on sale on his behalf for R800 000. An interested buyer was found and after the sale was facilitated and paid, the new customer was invoiced.

[34] In a nutshell, the applicant contends that considering the fact that KUPS Trading and or Makupula was awarded a tender and paid over at least R328 000 for a vehicle that was driven by the second respondent, a Chief director in the DoE SCM, demonstrates reasonable grounds to believe that the property or the R320 000 was used as an instrumentality to commit corruption and money laundering.

The respondents' case

[35] In opposing the application, the second respondent asserts that his involvement in the procurement process was to be a signatory in the memorandum to the Head of the Department. He was a member of the Bid Adjudication Committee (BAC) which recommended the appointment of the

first batch of thirty suppliers in excess of two hundred suppliers of personal equipment. Although it was required to play an oversight role in ensuring that the evaluation process was in line with supply chain management prescripts, the BAC played no role in the evaluation of tenders. On 25 May 2020, the recommendation of thirty suppliers was conducted by the BAC, however, KUPS Trading did not form part of that particular batch.

[36] The second respondent states that in the appointment of the batch where KUPS Trading was featured, he was not involved in the BAC nor the appointment committee. He has annexed a letter dated 27 May 2020 which the DoE had offered to accept KUPS Trading's quotation with certain terms and conditions. The letter was signed by Mr T Kojana, a Superintendent General. Further to his affidavit, the second respondent asserts that although he was authorised to sign the appointment letters in his capacity as director in the SCM Unit, he was on study leave from 22 to 25 May 2020; 27 to 28 May 2020; 08 to 09 June 2020; 15 to 17 June 2020; and 23 to 24 June 2020, therefore could not have approved the appointment letter of KUPS Trading.

[37] His understanding of his involvement in the Mercedes stems from the fact that early in July 2020, he learnt from Dabi, his colleague and Makupula's cousin that Makupula was trading in a 2015 Vito Mercedes at Ronnies Motors. He was then advised that the estimated value of the Mercedes was R365 000. He made an offer to Makupula via Dabi to purchase the Mercedes at R365 000 on condition that he make an initial payment of R305 000. The second condition was that he would effect the balance over a period of six months.

[38] The offer was accepted by Makupula, and he was advised to pay the stipulated amount at Ronnies' Motors. The payment was made on 04 or 07 July 2020. He avers that the source of the R305 000 he paid in respect of the first Mercedes was his savings from his bond held at Standard Bank. Together with Dabi, on 06 July 2020, he went to collect the first Mercedes at Ronnies' Motor.

On 09 July 2020, he went to Ronnies Motors to sign the sale agreement with the owner Makupula as a reference. He then took possession of the vehicle. Pursuant to the agreement between himself and Makupula, the final sale price would be effected once all defects were fixed. Around December 2020, he took the first Mercedes to Star Motors for service. He was advised that the mileage on the first Mercedes was too high. Pursuant to the advice he received from the first respondent, he agreed to trade in the first Mercedes.

[39] The first respondent found a Mercedes with a low mileage which is now the third Mercedes. Star Motors offered him R500 000 as a trade-in for the second Mercedes should he decide to purchase the third Mercedes. The third Mercedes was selling at R850 000. He agreed to purchase the vehicle and settled a difference of R350 000. For the trade-in of the first Mercedes, the registration papers were required and it was registered under Makupula's name.

[40] The second respondent explained that the first Mercedes remained registered in Makupula's name because the trade-in process had not been formally completed. Furthermore, registration in his name was delayed due to the outstanding defects that required repair. As informed by Dabi, the deal that Makupula had initiated regarding the first Mercedes had fallen through. For this reason, Makupula decided to reacquire the property from him. The second respondent avers that the motor vehicle deals he entered into were bona fide and the vehicles involved are not an instrumentality to commit the crimes as alleged.

[41] In a nutshell, the second respondent avers that the R328 000 that was paid to Ronnies Motors towards the purchase of a Mercedes cannot constitute gratification to him as he had no dealings with it. Furthermore, the property in question, which is categorised as proceeds of unlawful activities was initially owned by Makupula. He purchased the property from Makupula, but Makupula reacquired the property from Star Motors after he traded it in. His explanation regarding the registration of the first Mercedes is that there was an agreement

that the registration would be changed once the mechanical defects in the car were fixed including the settling of the outstanding payments.

Discussion

[42] Contrary to the submissions made by the applicant's counsel, Mr Hellens SC argued that from the papers filed, there is no evidence that the second respondent influenced KUPS Trading to be awarded a tender. No evidence was adduced to prove that the second respondent agreed to accept any gratification in order to act personally or to influence another to act in a manner prescribed by the Prevention and Combatting of Corrupt Activities Act 12 of 2004 (PCCA). Because he was on study leave at the time, KUPS Trading's contract was processed, the second respondent was not a signatory in the appointment letter. Moreover, there is no shred of evidence to prove that he was involved in any tender dealings. Also, the allegations that the money in question was a gratification for the performance of a corrupt act are a mere unjustified speculation and not a matter of probability.

[43] I agree with the applicant's counsel that the approach adopted by the respondents' counsel in this forfeiture application is ill-conceived. Although he acknowledges that the test in forfeiture proceedings is on a balance of probabilities, his argument inexplicitly expects the state to prove each element of corruption and money laundering beyond reasonable doubt. This wrong-headed proposition is further evident in his assertion that the tender process is not under investigations, the third respondent was charged with having committed criminal offences in relation to this tender deal which were later withdrawn. Further that there is no evidence, only a speculation that the second respondent accepted a gratification.

[44] In order to settle these issues, it is apposite to interrogate the basic principles and set of rules that are relevant to the dispute under consideration. Both parties referenced to section 3(b)(ii)(aa-cc) of the (PCCA) which provides:

‘Any person who directly or indirectly gives or agrees or offers to give to any other person any gratification, whether for the benefit of that other person or for the benefit of another person in order to act personally or by influencing another person in order to act in any manner that amounts to the abuse of a position of authority or the violation of a legal duty or a set of rules is guilty of the offence of corruption.’

[45] Section 4 (1)(b) (ii)(aa-cc) of the PCCA Act provides that:

‘Any person who, directly or indirectly, give or agrees or offers to give any gratification to a public officer, whether for the benefit of that public officer or the benefit of another person, in order to act, personally or by influencing another person so to act, in a manner that amounts to the abuse of a position of authority or the violation of a legal duty is guilty of an offence of corrupt activities.’

[46] Section 10 of PCCA prohibits the unauthorised giving or receiving of gratification in respect of the exercise of powers, duties, or functions within the scope of employment. Section 12 (1) (a) and (b) of PCCA creates offences relating to accepting or giving of gratification to improperly influence the procurement of any contract. Section 13 of PCCA creates offences relating to accepting gratification to influence the award of a tender.

[47] In addition to this legal framework, there are certain set of rules that the employees in particular the Senior Management Service members (SMS) should adhere to. Regulation 13 of the Public Service Regulations, 2016 which is also relevant to the SMS members provides that an employee shall abide by and strive to be familiar with all the legislation and other lawful instructions applicable to his or her official duties. Section 45 which falls under Part 3 of the Public Service Act of 1994 deals with the responsibilities of the officials other than the accounting officer. This provision outlines that the officials have a

responsibility to promote integrity and ethical behaviour within the department, identifying and reporting unethical behaviour and corruption to the head of the department.

[48] Further to these set of rules, Chapter 2 of the Public Service Regulations, 2016 provides for the conduct, financial disclosure anti-corruption and ethical management. Pursuant to Part (c), an employee shall legally execute the lawful policies of the government of the day in the performance of his or her official duties. Regulation 13 (c) provides:

‘An employee shall not engage in any transaction or action that is in conflict with or infringes on the execution of his duties.’ (emphasis added)

[49] Pursuant to these regulations, the employees shall promote efficient, effective, transparent, and accountable administration. Most importantly, regulation 91 entails that the members of the SMS shall display the highest possible standards of ethical conduct.¹⁴ They must minimize conflict of interest, and they must put the public interest first in the performance of their duties.¹⁵

[50] The appointment of the Chief Director, as in the present case is governed by Public Finance Management Act 1 of 1999. In addition to being an employee and the SMS member, he also serves as an accounting officer. His responsibility is to ensure the efficiency and integrity of the procurement process. Therefore, the applicant’s pleaded case does not hinge on whether the tender process is under investigation and or the second respondent personally appointed KUPS Trading etcetera. On the issues to be decided, there is no ambiguity in the applicant’s papers including the replying affidavit.

[51] Having analysed the facts presented before me, I conclude that the explanation of why the property which was owned by the second respondent

¹⁴ Regulation 91 (a) of the Public Service Regulations, 2016.

¹⁵ Regulation 91 (c), Public Service Regulations, 2016.

remained registered under the name of the first respondent is implausible. This includes the explanation regarding the first Mercedes which remained registered in Makupula's name despite subsequent transfer to the second respondent. Even more improbable is the claim that Makupula repurchased and reacquired the same Mercedes paying a higher price than he received six months earlier. More improbable is the fact that Makupula paid the purchase price to Star Motors, rather than to the second respondent who was supposedly the owner at the time.

[52] Based on the pleaded facts presented, the following findings have been established on a balance of probabilities:

52.1 The second respondent was involved in a questionable transaction involving a Mercedes which was partially paid for with the funds from KUPS Trading, a company that had received payments from DoE, a government department he oversaw.

52.2 KUPS Trading had a prior relationship with DoE and by virtue of his position, Makupula, the sole director of KUPS Trading had a prior relationship with the second respondent. Numerous telephonic and email conversations between the DoE and Makupula substantiate this fact.

52.3 Dabi, the second respondent's colleague and Makupula are cousins. The second Mercedes remained registered in Makupula's name until Makupula gifted it to Dabi.

52.4 Makupula and the second respondent paid monies to Ronnies Motors in respect of the same vehicle.

[53] POCA was implemented with various objectives in mind, one of which aims to address the rise of organised criminal syndicates and their activities. The Preamble emphasises that no individual should gain from the benefits of

unlawful activities. Therefore, it is imperative to objectively take note of POCA obligations as stipulated in the preamble.

[54] In the present instance, the probabilities overwhelmingly suggest that the second respondent was involved in a corrupt relationship with Makupula and the first respondent. The transactions point to corrupt activities with the second respondent benefiting from the tender award. Considering his position in the SCM Unit, the second respondent ought reasonably to have known of the department's tender history with Makupula. Therefore, his involvement with Makupula and his cousin, in this instance, constitutes an abuse of power and authority, a breach of trust and a clear conflict of interest. Furthermore, he was in deliberate defiance of the relevant set of rules and legal duties. Lastly, he neglected to prevent the appearance of bias in the tender process.

[55] Consequently, a case of forfeiture order has been proven on a balance of probabilities.

Proportionality

[56] It is well-established that once the threshold of the property as an instrumentality of the offence is established, a proportionality test must be established by weighing the severity of the interference with individual property rights against the extent to which the property was used for the commission of the offence, with due regard to the nature of the offence.¹⁶

[57] The proportionality enquiry aims to balance the necessity to combat crime against the Constitutional right to acquire property. The order as reflected below will serve that purpose.

¹⁶ Prophet v National Director of Public Prosecution fn 10 supra.

Order

[58] The following order is issued:

1. The property, namely, a 2017 V250D Mercedes Benz Avantgarde V Class with registration numbers and letters JZ [...] and VIN WDF[...], which is currently subject to a preservation order of the property order granted by this court, is hereby declared forfeited to the state in terms of the provisions of section 50(1)(a) and section 50(1)(b) of the Prevention of Organised Crime Act 121 of 1998 (POCA); or Alternatively
2. Certain property, namely the gratification amount of R328 000, embedded in the property which is presently subject to a preservation of property order granted by this court, is hereby declared forfeited to the state in terms of the provisions of section 50 (1) (a) and section 50(1) (b) of POCA.
3. The person appointed by this court in terms of the preservation order, namely the SAP 13 Clerk at Acardia Vehicle Pound is hereby substituted by Nondumiso Dyantyi (Dyantyi), the Enforcement Officer at the East London Asset Forfeiture Unit.
4. Dyantyi shall have all such powers, duties and authority as provided for in the POCA Act and in this order, including such powers, duties and authority reasonably incidental thereto.
5. In terms of section 56 (2) of the POCA, the property shall vest in Dyantyi on behalf of the state.
6. Dyantyi is authorized to:
 - 6.1 Assume control of the property and take it into her custody.

- 6.2 Dispose of the property by private sale or other means; and
- 6.3 Deposit the proceeds into the Criminal Assets Recovery Account (CARA) established under section 63 of the POCA, number 80303056 held at the South African Reserve Bank, Vermeulen Street, Pretoria; or

Alternatively:

- 6.4 Dispose of the property by private sale or other means, deposit gratification amount of R328 000 into CARA, and return the remainder of the proceeds of the sale to Marius Harmse.
7. The second and third respondents shall pay costs on scale A as contemplated under Rule 67A, read with Rule 69 of the Uniform Rules of Court, jointly and severally the one paying the other to be absolved.

N CENGANI-MBAKAZA
ACTING JUDGE OF THE HIGH COURT

Appearances:

For the Applicant : Adv A French
Instructed by : NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS

For the Respondents : Adv M R Hellens SC
Instructed by : PEYPER ATTORNEYS
Sandton, Johannesburg
C/o BATE CHUBB AND DICKSON INC.
EAST LONDON

Date Heard : 31 October 2024
Date Delivered : 18 March 2025