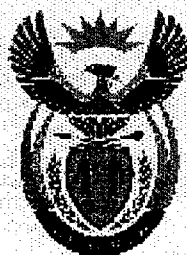


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Republic of South Africa

**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)**

Case No.: **6747/2011**

In the matter between:

THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS

Applicant

and

CHARLES NNAEMEKA

Intervening Party/Respondent

JUDGMENT delivered on **20 SEPTEMBER 2012**

MEER J.

[1] The applicant applies in terms of Section 48(1) of the Prevention of Organised Crime Act No 121 of 1998 (POCA) for a forfeiture order over the cash amount of R80 000.00 ("the property") seized at 72 Arena North, Royal Ascot ("the premises") by members of the South African Police Services ("SAPS") on 28 November 2007. The premises are owned by the

respondent. The applicant contends that the property is the proceeds of unlawful activities or an instrumentality of an offence as listed in Schedule 1 of POCA. The applicant contends moreover that the respondent acquired the property unlawfully and that he knew that the property was an instrumentality of an offence.

Background Facts

[2] On 28 November 2007 members of SAPS went to the premises with a search warrant to exercise a search for drugs and stolen property. They showed the warrant to the respondent and explained the purpose of their visit. On the premises were 2 other men who identified themselves as Adam Chifula and Innocent Nnaemeka.

[3] The police searched the premises and seized R80 000.00 in cash, laptop computers, cellular telephones as well as acetone and coffee filters, commonly used in the manufacturing of methamphetamine ("tik"). A scale believed to weigh drugs was also found. The SAPS members observed a yellow discolouration of the door to the garage of the premises, which in their view is a common indicator of tik manufacturing.

[4] According to the statement of Constable Pike, security officers at the entrance to the complex informed Pike that they had observed several vehicles coming in and out of the complex at unusual hours of the night and early morning. They also said that they observed a strange smell of chemicals emanating from the house. It is contended on behalf of the applicant that this is indicative of drug dealing/manufacturing activities. According to the applicant the police provided the respondent and the others present with an opportunity to answer questions about the cash and the other items seized, but they elected to remain silent and provided no explanation at the time.

[5] Constable Pike arrested the respondent and the other 2 men on charges of manufacturing methamphetamine and possession of suspected stolen property. The criminal charges were later withdrawn. One of the laptops seized from the premises was found to be stolen from a certain Ms Pauline De Kock and was returned to her.

[6] The substances seized from the premises were analysed and Sergeant Bonga Mabhulu, a forensic expert at the Forensic Science Laboratory, found these to contain methamphetamine (listed in part 3 of Schedule 2 of the Drugs and Drug Trafficking Act 140 of 1992 ("the Drugs Act"), acetone, (listed in part 1 of Schedule 2 of the Drugs Act) and ephedra alkaloid, (listed in Schedule 2 of the Medicines and Related Substances Act 101 of 1965). The items are prohibited substances used in the manufacturing of drugs.

[7] On 31 March 2011 this Court granted a preservation order over the cash amount of R80 000.00 which was under the control of Sergeant Mabhulu. At the time of the seizure no persons claimed ownership of the property and thus applicant did not cite a respondent in the preservation application. Applicant caused a copy of the preservation order to be published in the Government Gazette of 15 April 2011. Thereafter on 1 June 2011 the applicant commenced the forfeiture application. Such application was postponed twice so that attempts could be made to locate any persons who may want to lay claim to their cash. Thereafter a senior financial investigator within the National Prosecution Authority managed to locate the respondent on whom the preservation order and forfeiture application was served on 27 June 2011. On 29 July 2011 attorneys acting on behalf of the respondent filed a notice to oppose the forfeiture order and a notice to intervene in the proceedings. By agreement between the parties the forfeiture application which was enrolled for 3 August 2011 was postponed to 18 September 2012.

Respondents' version as per his answering affidavit

[8] In his replying affidavit the respondent states that he is a trader of goods imported from elsewhere in Africa. He sells food and cosmetics through N Charles Import and Export CC of which he is the sole member and he has two people working for him. His place of business, he states is in Mowbray. The respondent however provides no proof of his business.

[9] The respondent does not deny that the cash or the other items seized were found on the premises owned by him. He however denies that he was ever part of or had any knowledge of any unlawful activities on his premises. He points out that the incriminating goods were found in the garage which is separate from the house, the cash was found in his bedroom inside the house and that no incriminating material was found in his bedroom, linked to illegal drugs, thereby suggesting that the cash was the proceeds of unlawful activity. The cash, he explains was paid to him on 27 November 2007 by a Mr Sunday Okonkwo as the purchase price for a black VW Polo which the respondent had sold to this person. As it was a Sunday when the sale occurred, he could not bank the money.

[10] Attached to the respondent's answering affidavit is a document which is alleged to have been signed by both the respondent and Mr Okonkwo confirming the sale of the vehicle. The document is dated 27 November 2007. The first respondent states that he has recently tried to get in contact with Mr Okonkwo to obtain a confirmatory affidavit. He believed that Mr Okonkwo has left the country and is currently residing in Tanzania. The affidavit states that the respondent is not in a position to confirm whether he will be coming back any time soon. Contrary to this, in argument at the hearing, the respondent who represented himself stated he was in regular telephonic contact with Mr Okonkwo, who is his cousin, but could not explain the absence of an affidavit from this person.

[11] The respondent further adds in his affidavit that all the tenants of the property have a key to the garage where they stored personal items in boxes. He had never enquired from individual tenants as a matter of respect for their privacy, as to what they were storing in the boxes. In addition the garage was used to hang washing and at all other times the respondent's car was parked there.

[12] The respondent goes on to state that when the items were found in the garage he had explained to the police that he had no knowledge of them, and that they should question the tenants seeing that it was mostly their items that were stored in the garage. He also states that he explained to the police at the time the money was discovered that it was the proceeds of the sale of his vehicle. Attached to his affidavit is what he refers to as a print-out of the registration details of the vehicle. He contends from this that the purchaser did not transfer the vehicle onto his, the purchaser's name but sold it back "to the trade" some months later.

[13] The respondent challenges the evidence pertaining to the yellow discolouration of the garage door on the basis that this was not analysed. He denies, that there were chemical smells emanating from the house and that there was traffic at odd times at night. He states that as the evidence from the security guards, is hearsay, it should be rejected.

[14] The replying affidavit of Advocate Van Zyl notes that a period of 3 years lapsed before the respondent claimed the ownership of the cash. He adds that when Constable Pike showed the warrant to the respondent on arriving at the house the respondent, without further ado ran to the bathroom as if to dispose of something. If the respondent had nothing to hide, he would have not have acted in this manner.

Finding

Hearsay Evidence

[15] In respect of the evidence of the security guards as recorded in the statement of Constable Pike which the respondent objects to as being impermissible hearsay evidence, it is trite that Section 3(1) of the Law of Evidence Act 45 of 1988 provides a Court with a discretion to admit hearsay evidence. I am satisfied that regard being had to the nature of these proceedings, the nature of the evidence, the purpose for which it was tendered, its probative value (emanating from a statement by a police officer who had no reason to implicate the respondent in particular), and the interests of justice, that such evidence should be admitted. As was said by Conradie J in *Nyama v Gxalaba and Another* 1990(1) SA 650 (C) at 653 J:

"I think the correct way to treat the hearsay part of the evidence is to admit it as having sufficient probative value to qualify it for consideration and then to analyse it to see whether it has sufficient cogency to warrant its acceptance."

Is the Property an Instrumentality of an Offence/ Proceeds of Unlawful Activities

[16] Section 50(1)(a) of POCA enjoins a High Court, upon application by the National Director of Public Prosecutions in terms of Section 48(1), to make an order forfeiting to the State property which it finds on a balance of probabilities to be either an instrumentality of a Schedule 1 offence, or the proceeds of unlawful activities.

[17] It is trite that when a forfeiture order is sought a Court undertakes a two stage enquiry. See *National Director of Public Prosecutions v R O Cook Properties* 2004(8) BCLR 844 (SCA) at page 853 paragraph 21. During the first stage of the proceedings, the *onus* rests on the applicant to show on a balance of probabilities that the property in question constitutes the proceeds and/or an instrumentality of an offence.

[18] It is not disputed that illegal chemical substances and stolen items were found on the premises owned by the respondent. The affidavit of Sergeant Mabhulu the forensic expert attached to the Forensic Science Laboratory makes clear that an analysis shows that the substances found were illegal. It is also the case that a yellow discolourant associated by the police with the manufacture of tik was found on the garage door. The evidence of the security guards which I have found to be admissible, is corroborative of this activity.

[19] The respondent relies on two documents for proof that the money emanated from the sale of his vehicle. The first document on the respondent's version is the purported deed of sale marked Annexure "CUN1" dated 27 November 2007, the day before the search and seizure. There is however no evidence to corroborate the sale of the vehicle, evidence which, given that the cash was seized in incriminating circumstances, the respondent should have produced. The man who bought the vehicle according to the respondent is out of the country. In argument the respondent said he is in regular telephonic contact with him, yet he could not explain why the purchaser did not give a confirmatory affidavit. There are also no confirmatory affidavits from the witnesses to the document.

[20] Respondent's explanation as to why he had R80 000 in cash in his draw, namely that he received it on 27 November 2007, a Sunday, when banks were closed, does not pass muster, given that, as is pointed out by the applicant, that particular date fell on a Tuesday in 2007. Importantly, the respondent does not explain why, if indeed the cash was the proceeds of the sale of his vehicle, and he had a deed of sale from the day before, he did not show this document to the SAPS members at the time of the seizure. The applicant's contention in the circumstances that the deed of sale was a fabrication for the purpose of these proceedings, is understandable. Then there is the absence of a satisfactory explanation from the respondent as to why, if the cash emanated innocently from the sale of the vehicle, he did not lay claim to it for three years and why he had to be tracked down by an investigator.

[21] The second document annexed to the respondent's affidavit pertaining to the transfer of the vehicle to Barons Culemborg, does not assist in proving that the property emanated from the sale of the vehicle as alleged by respondent. The attachment certainly does not provide proof that the respondent received R80 000.00 for the sale of the vehicle. There is moreover nothing from that attachment to indicate that the respondent sold the vehicle to Mr Okonkwo, (to whom the vehicle on respondent's own version had not in fact been transferred), or that the latter transferred it to Barons Culemborg. In this regard there is some merit in the applicant's contention that, it is only the respondent, who, as the registered owner of the vehicle, could have signed papers transferring ownership to Barons. The second document does not in the circumstances assist the respondent.

[22] The respondent's explanation of the origin of the money in all of the circumstances lacks credibility, especially given that the cash was seized together with the undisputed illegal substances, stolen property and ingredients used in the manufacturing of methamphetamine. Given the absence of any other acceptable evidence, applicant's version must be accepted. I am satisfied that the applicant has shown on a balance of probabilities that the property in question constitutes the proceeds of an offence or is the instrumentality of an offence.

Innocent Owner Defense

[23] Given my finding that the property in question constitutes the proceeds of an offence/instrumentality of an offence, the *onus* now shifts to the respondent to establish the so-called "innocent owner" defence. To this end the respondent was required to establish on a balance of probabilities that he acquired the property lawfully and that he neither knew, nor had reasonable grounds to suspect that the property was an instrumentality of an offence. Given my rejection of the respondent's version that the property emanated from the sale of

his vehicle, the respondent has not shown on a balance of probabilities that he acquired the property lawfully.

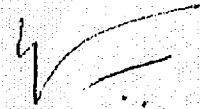
[24] The evidence in my view simply does not bear out the innocent owner defence. It is hard to believe that the respondent was unaware that ingredients used to manufacture drugs were stored in his garage or of any activity related thereto. The respondent himself admits using the garage and that his car was parked there. In the light of all the evidence the respondent has in my view not established on a balance of probabilities the innocent owner defence namely that he acquired the property lawfully and that he neither knew nor had reasonable grounds to suspect that the property was an instrumentality of an offence.

[25] In the circumstances I am of the view that the applicant has shown on a balance of probabilities that the property seized was either the proceeds of or an instrumentality of an offence and that the applicant is entitled to the forfeiture order it seeks.

I accordingly order as follows:

1. In terms of section 53 of the Prevention of Organised Crime Act 121 of 1998 (**POCA**) the cash amount of R80 000.00 seized on 28 November 2007 at 72 Arena North, Royal Ascot, Milnerton by members of the South African Police Services (**SAPS**) is declared forfeited to the State.
2. Sergeant Bonga Precious Mabhulu (**Mabhulu**) of the SAPS Forensic Science Laboratory (**FSL**) in Delft:
 - 2.1 Is directed to hand the cash amount of R80 000.00 to Inspector Charmaine Van Vuuren (**Van Vuuren**) of the SAPS.

- 2.2 Van Vuuren is directed to deposit the cash amount of R80 000.00 into the bank account of the State Attorney held at ABSA bank, account number 4051600990, branch code 632005 within 45 days of the granting of this order.
- 2.3 The State Attorney is directed to pay the R80 000.00 into the banking account of the Criminal Asset Recovery Account held at the Reserve Bank, account number 80303056.
3. The Registrar of this Honourable Court is directed to publish notice of this order in the Government Gazette as soon as practicable after the order is made.



Y S MEER

Judge of the High Court