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

Case No: 508/2020

In the matter between:

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS **Applicant**

In re: R6 287 in cash (the property) seized by the south African Police Service (the SAPS) in Aliwal North on 7 November 2019

JUDGMENT

BESHE J:

[1] The applicant was granted preservation order in terms of *Section 38 of the Prevention of Organised Crime Act*[1] (POCA) on the 3 March 2020. This was in respect of an amount of R6 287.00 (the property) that was seized by the members of South African Police Service in Aliwal North on the 7 November 2019.

[2] The applicant is now seeking a forfeiture order in respect of the said property in terms of *Section 53 of the POCA* (Forfeiture order by default). The application for a forfeiture order is governed by *Sections 48 to 57 of the POCA*.

[3] *Section 48(1)* provides that if a preservation of property order is in force, the National Director of Public Prosecutions may apply to the High Court for an order

[1] Act 121 of 1998.

forfeiting to the State all or any of the property that is subject to the preservation order.

[4] *Section 50* governs the making of the forfeiture order and provides that such an order shall be made if the court finds on a balance of probabilities that the property concerned – [my underlining]

(a) is an instrumentality of an offence referred to in Schedule1;

(b) is the proceeds of unlawful activities; or

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

[5] The application is premised on the following facts:

On the 20 February 2018 as a result of an undercover operation one, ***Mr David Mokoena*** *sold 60 Mandrax tablets to a police agent for R2 700.00. Once again on the 15 March 2018 during the course of yet another undercover operation,* ***Mr Mokoena*** *sold 649 Mandrax tablets to a police agent for R29 250.00. Approximately a year and a half after the second incident, on the 17 November 2019, members of SAPS, armed with a search warrant visited* ***Mr Mokoena's*** *home situated at 204 Schalk Street, Aliwal North in order to arrest him presumably for the transactions that took place in February and March of 2018.* ***Mr Mokoena*** *was however not found at the abovementioned address. The police were directed to another address being Buffels Bron Flats, Springs. They then proceeded to the latter address. Before doing so however, they searched the place at Schalk Street and did not find any drugs. Having found* ***Mr Mokoena*** *at the Buffels Bron Flats, they informed him that he was under arrest in connection with the drugs he sold to undercover agents during 2018. They also conducted a search on the premises, on* ***Mr Mokoena*** *as well as his girlfriend* ***Ms Bini****. No drugs were found. The police found cash amounting to R6 287.00, the subject of this application, which they confiscated.*

[6] According to **Warrant Officer Siko** who is the investigating officer of the cases in respect of which **Mr Mokoena** was arrested in November 2019 in

connection with the two undercover operations, there are reasonable grounds to believe that **Mr Mokoena** is involved in dealing in drugs activities. And that therefore the property is proceeds of unlawful activity – dealing in drugs based on (i) the huge amount of money found in his possession and (ii) the amount of drugs that were sold to the undercover agents previously.

[7] According to the investigating officer, **Mr Mokoena** also has a previous conviction for dealing in drugs. However, **Mr Mokoena's** criminal record indicates that he was convicted of driving a motor vehicle without reasonable consideration for other road users.

[8] **Ms Nicole Peters** who is a Deputy Director of Public Prosecutions deposed to the founding affidavit in support of this application. She asserts that the property is an instrumentality in an offence.[2] Not proceeds of crime as **Warrant Officer Siko** suggests. I called upon applicant's legal representative to provide me with brief heads of argument in respect of the property being the instrumentality of an offence / proceeds of unlawful activities, in particular the link between the property and drugs sold to undercover agents more than a year prior to the confiscation of the property. After summarising the facts surrounding the confiscation of the property, a point is made that of importance is to note that **Mr Mokoena** has a previous conviction for drug dealing. As well as of the fact that neither **Mr Mokoena** nor his girlfriend has entered an appearance to oppose the forfeiture application.

[9] We know that there is no evidence of **Mr Mokoena's** previous conviction for dealing in drugs. Even if there was, I am not certain that that would be enough to show on a balance of probabilities, that the property constitutes proceeds of drug dealing transaction/s.

[10] The return of service in respect of this application indicates that **Mr Mokoena** was in the holding cells when he was served with the papers in question. So, there may be a number of reasons why he has not entered an appearance to oppose the application.

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[2] Paragraph 23 of the founding affidavit page 11 of the index – forfeiture application.

[11] I am not persuaded on the facts of this case that there is a sufficiently close link between the property and any criminal activity to render it to be proceeds of such crime.[3] Declaring the property forfeited would amount to what the Supreme Court of Appeal warned against in the matter referred to in footnote 3, namely ***NDPP v R.O. Cook*** where the court at paragraph [29] cautioned that the pursuit of the objectives of *Prevention of Organised Crime Act* should not exceed what is constitutionally permissible. I do not think that *POCA* is intended to operate in such a manner that just because a person was involved in alleged drug dealing activities previously, over a year and a half ago, any money found in that person's possession is in all probability proceeds from drug dealing activities and therefore liable to being forfeited.

[12] Had the property been found in **Mr Mokoena's** possession within a reasonable time after the two undercover operations, I would not have had any difficulty in concluding that on a balance of probabilities the property constituted proceeds of drug dealing. We do not know what happened to the money that exchanged hands during those undercover operations. Why it took over a year to arrest **Mr Mokoena** in connection therewith.

[13] I am not persuaded that the applicant has made out a case for the forfeiture order it seeks. It has not been shown on a balance of probabilities that the property is proceeds of drug dealing activities.

[13] Accordingly:

1. The application for the forfeiture of the property being an amount of R6 287.00 in cash is dismissed.

2. The property described in paragraph 1 is to be returned to Mr Mokoena forthwith.

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[3] See National Director of Public Prosecutions v R.O. Cook Properties 2004 (2) SACR 208 SCA at [32] in respect of instrumentality of crime.

N G BESHE
JUDGE OF THE HIGH COURT

APPEARANCES

For the Applicant	:	Mr Wolmarans
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Date Heard	:	28 June 2022
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