IN THE HIGH COURT OF SOUTH AFRICA

FREE STATE DIVISION, BLOEMFONTEIN

Case no: **1406/2022**

Reportable: NO

Of Interest to other Judges: NO

Circulate to Magistrates: NO

In the matter between:

THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	Applicant
and	
JOSEPH KHOZA	1ST Respondent
JOSEPH S PROJECT CC	2nd Respondent

CORAM: JP DAFFUE J

HEARD ON: 27 OCTOBER 2022

DELIVERED ON: 4 NOVEMBER 2022

ORDER

1. The following properties, subject to a preservation order granted by this court under the above case number on 14 April 2022, are declared forfeited to the State in terms of s 50 of the Prevention of Organised Crime Act 121 of 1998 (POCA):

1.1 A Scania truck with registration number [....] with engine number [....] and chassis number [....];

1.2 A Tanker trailer with registration number [....] with chassis number [....];

1.3 A Toyota Land Cruiser double cab with registration number [....] with engine number [....] and chassis number [....] (the properties).

2. The appointment of a curator bonis is dispensed with and the properties shall vest in the custody of the station commander of the South African Police Service in Vrede, or an officer of equal or higher rank, and her/she is hereby directed to deal therewith as follows:

2.1 To assume control of the properties and take it into his/her custody;

2.2 when the forfeiture order comes into effect, to hand over the properties to Selinah Letuka (Letuka), an enforcement officer with the Asset Forfeiture Unit, for Letuka to dispose thereof by public auction or other means and to deposit the proceeds of the sale of the properties into the Criminal Asset Recovery Account established under s 63 of POCA, number [....] held at the South African Reserve Bank, Vermeulen Street, Pretoria.

3. Any person whose interest in the properties concerned is affected by the forfeiture order may within 20 days after he/she/it has acquired knowledge thereof set the matter down for variation or rescission by the court.

JUDGMENT

Introduction

[1] On 14 April 2022 the National Director of Public Prosecutions (the NDPP) brought an ex parte application to this court in accordance with s 38(2) of the Prevention of Organised Crime Act 121 of 1998 (POCA) whereupon a preservation order was granted on the same day pertaining to the following properties:

1.1 A Scania truck with registration number [....]with engine number [....] and chassis number [....];

1.2 A Tanker trailer with registration number [....]with chassis number [....];

1.3 A Toyota Land Cruiser (the Land Cruiser) double cab with registration number [....]with engine number [....] and chassis number [....] (the properties).

The order was duly served and published whereupon the first respondent, Mr Joseph Khoza (Mr Khoza) filed an affidavit in terms of s 39(3) and (5) of POCA. I shall deal later herein again with the contents of this affidavit.

[2] On 24 June 2022 the NDPP issued an application to declare the truck, tanker trailer and Land Cruiser (the properties) forfeited to the State. The respondents filed an answering affidavit, deposed to by Mr Khoza, to which the NDPP replied whereupon the opposed application was enrolled for hearing on 27 October 2022. After hearing argument judgment was reserved.

Asset forfeiture in terms of POCA

[3] Section 50 of POCA provides that the High Court shall, subject to s 52 make an order applied for in terms of s 48(1) if it finds on a balance of probabilities that the property concerned was inter alia an “instrumentality” of an offence referred to in schedule 1 of the Act.

[4] A forfeiture order may only be issued in respect of property which is the subject of an existing preservation order under s 39 of POCA. It is common cause that this is so in this case. The respondents' counsel argued that by the time the preservation order was granted, the Land Cruiser had already been returned to the respondents. He also accused the NDPP of providing a false version to the court when applying ex parte for the preservation order. The NDPP's counsel submitted that when he applied for that relief he was unaware of this fact. In ex parte applications the utmost good faith is expected of litigants and their legal representatives and the relief obtained may be set aside in appropriate circumstances if it appears at a later stage that incorrect facts were placed before the court or facts were not placed before the court that were supposed to be provided. In my view, the fact that a SAPS member returned the Land Cruiser to the respondents during the investigation could not be a bar to a successful preservation order. There can be no doubt that the Land Cruiser was involved and used in order to commit a crime insofar as the pumps and equipment used to pump the stolen diesel to the tanker trailer of the second respondent were conveyed in the Land Cruiser. Objectively speaking, even if the return of the Land Cruiser was disclosed, the court would have granted the preservation order on the common cause facts of this case.

[5] Chapter 6 of POCA is focused on property that either has been used to commit an offence or which constitutes the proceeds of crime and not on the wrongdoers themselves. The chapter may be invoked even where there is no prosecution as it is not conviction-based.[1] As indicated, the NDPP merely has to prove on a balance of probabilities that the property concerned is an 'instrumentality' of an offence. The guilt or wrongdoing of the owner or possessor of the property is not primarily relevant to the proceedings.

Common cause facts

[6] The following facts are either common cause between the parties, or not pertinently disputed:

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[1] *National Director of Public Prosecutions & Another v Mohamed NO & Others* 2002 (2) SACR 196 (CC) paras 14-17.

6.1 Joseph S Project CC (the CC), cited as second respondent in the application of which Mr Khoza is the sole member, is the owner of the properties;

6.2 At about 03h30 on 22 September 2020 Lieutenant Colonel Odendaal (Col Odendaal) and a colleague pursued the Land Cruiser who started to speed up at that stage, but they managed to pull it off the road. The driver was Mr Celimino Ndimande (Ndimande) who was accompanied by two male persons, to wit Messrs Matsiba and Mcimochor. Inside the Land Cruiser the SAPS members found a big yellow diesel fuel pump, a mobile pump as well as a black bag. The three persons, who could not explain from where they were coming, were arrested on suspicion of theft of diesel and taken to the Vrede police station;

6.3 Odendaal established that the Land Cruiser belonged to the CC. He also received information about two Scania trucks, carrying diesel that was possibly stolen at Mooi River, which were on their way to Mpumalanga;

6.4 At about 06h20 that same morning the SAPS members spotted a Scania truck and tanker trailer on the Vrede/Warden road. They stopped the truck and checked the load. Contrary to the load papers provided to them by the driver indicating that metal was transported, the tanker trailer contained fuel which was later positively identified as diesel. Contrary to the relevant regulations the inlet, outlet and control valves of the tanker were not sealed and the driver, Mr Joseph Msindo (Msindo), could not produce any permit for transporting fuel;

6.5 Msindo mentioned that he was employed by a certain Joseph from Delmas who had instructed him to transport a load diesel from Mooi River. It was established that the Scania truck and tanker trailer also belonged to the CC;

6.6 The properties were confiscated by SAPS under Vrede CAS 91/09/2020;

6.7 Msindo was arrested for transporting stolen diesel;

6.8 First respondent made a statement to SAPS and confirmed his version in the affidavit filed in terms of subsecs 39(3) and (5) of POCA as well as in his answering affidavit in the forfeiture application, a version which will be evaluated under the next heading.

6.9 The diesel transported in the tanker trailer was valued at R525 200 and according to samples taken from the freight the diesel was stolen from the Transnet Pipelines Island View storage tank on 13 September 2020;

6.10 Theft of fuel from the Transnet pipelines has become extremely prevalent recently with millions of rands being lost and the DPCI in the Free State is busy investigating these organised crime related offences.

6.11 The estimated value of the properties is R600 000;

Evaluation of the facts in dispute

[7] As mentioned in the previous paragraph, numerous material facts are either common cause, or not seriously disputed. Consequently, an evaluation of the respondents' version is called for, bearing in mind the objective facts and other issues not in dispute.

[8] Mr Khoza deposed to two affidavits in these proceedings on behalf of himself as well as the CC. He indicated in his statement to SAPS that a certain Mr Rafick (Rafick) attended at his work place and requested to hire a truck and tanker trailer as his own truck was stuck at Mooi River and had to be taken in for repairs. I interpose to mention that the CC's registered address is in Benoni whilst Mr Khoza mentioned two addresses in his SAPS statement, to wit in Benoni and Delmas respectively. In his answering affidavit he provided the address in Delmas as his residential address. It was agreed that the diesel would be pumped from Rafick's truck into the CC's tanker trailer. Rafick also requested a bakkie to transport the tools that he required for the operation which was also provided, being the Land Cruiser. Mr Khoza's two

employees would be the drivers of the vehicles rented out. The rental costs agreed upon was R15 000 in respect of the truck and tanker trailer and R5 000 in respect of the Land Cruiser. The amount of R20 000 was paid in cash. This verbal agreement was entered into on 21 September 2020 and in terms thereof the vehicles would be returned the next day, but that never happened. Mr Khoza did not request and/or receive any information whatsoever pertaining to Rafick; neither his full names, nor his identity number, cell phone number, address or the registration number of his broken down truck. There is no indication that he issued a receipt to Rafick or that the transaction was captured in his books of account. Upon being contacted by his one driver he went to the Vrede police station on 22 September 2020.

[9] The proceedings are opposed motion proceedings wherein the NDPP is seeking final relief; therefore, any factual dispute arising on the papers should be resolved in accordance with the *Plascon-Evans* rule.[2] Unless the circumstances are special, opposed motion proceedings are not designed to determine probabilities and a final order can only be granted if the facts averred in an applicant's founding affidavit which have been admitted by the respondent together with the facts alleged by the latter justify such an order. However, when a respondent's version consists of bald or uncreditworthy denials and/or raises fictitious disputes of fact and/or is palpably implausible, far-fetched or clearly untenable, a court is justified in rejecting such version merely on the papers.

[10] Bearing in mind the undisputed evidence and common cause facts mentioned under the previous heading it is necessary to consider the respondents' version. In my view the version is so palpably implausible, far-fetched and uncreditworthy that this court is entitled to reject it merely on the papers and I say this for the following reasons:

> 10.1 Mr Khoza insisted in both affidavits filed in these proceedings that he is the owner of the truck, tanker trailer and Land Cruiser whilst the objective documentary evidence reveals that the CC with registered address in Benoni is the owner;

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[2] *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634E–635C.

10.2 When the SAPS members asked for the required paper work, the truck driver handed over a document relating to the transportation of metal products whilst he was transporting fuel. In this regard counsel for the respondents argued that the duty to complete this documentation rested upon Rafick. This argument is untenable as the owner of the truck and tanker trailer, the CC represented by Mr Khoza and/or its driver, had a duty to ensure that the documentation was in order;

10.3 According to Mr Khoza, Rafick, who was unknown to him at all relevant times, arrived at his offices in Delmas on 21 September 2020. Rafick wanted to hire a truck and tanker trailer to transport diesel. According to his version Rafick's truck had broken down in Mooi River several hundred kilometres away in KwaZulu-Natal. It is Mr Khoza's case that he is a businessman and owner of eleven trucks and is involved in the transportation sector of our economy for the past 18 years. He wanted to convince the court that he entered into a verbal agreement with a stranger without obtaining any personal details of this person and/or to the destination to which the diesel was supposed to be transported. Mr Khoza, failed to obtain proof from Rafick that the diesel had been obtained from a reliable source and that the storage in the tanker and transportation thereof would be in line with the applicable legislation and regulations. His failure must be considered against the backdrop that his insurance might have been at risk if illegal, unauthorised and/or inflammable goods without proper safety precautions were transported, not to mention the possibility of his vehicles being seized for transporting illegal goods;

10.4 Mr Khoza tried to create a distance between himself and the illegal transportation by denying that he went to Mooi River. The crucial question to be considered is how the Land Cruiser arrived in Mooi River bearing in mind the version of his own employee, Ndimande on whose police statement Mr Khoza relied.[3] I quote:

[3] Annexure JK5 on p 62 of the forfeiture application.

'On Monday 21.09.2020 at about 11:00 it happened that I was informed by my boss Mr Joseph Khoza that myself and the other driver Mr Msindo must go to Mooi River. He never exactly told us what we were going to do there. On our arrival at Mooi River we went to a nearby truck stop.

I was driving one truck and could not remember its registration numbers with, whilst A/male Msindo was also driving another truck. We then slept there. At around 21:00 it happened that A/male known as Rafael came to me, requested the keys to the truck that I was driving. I handed the keys to him and he gave me the Toyota Cruiser keys.

On Tuesday 22.09.2020 at around 01:00 he informed me that I should travel with Toyota Land Cruiser. By then, there were two A/males on the bakkie. I then travelled from Mooi River….'. (emphasis added.)

There can be no doubt that this statement records, contrary to Mr Khoza's version, that Ndimande and Msindo were the drivers of two trucks who travelled to Mooi River where Ndimande eventually met this person Rafael and later the other two male persons whom he found, on his version, in the Land Cruiser who accompanied him until apprehended by SAPS.

10.5 In his warning statement Msindo refused to give any explanation, although he indicated the following to Col Odendaal immediately after being stopped and during questioning about permits:[4]

'… that he has a load Diesel that he was ask to take from Mooirivier during the night and that he has no papers and the guy who hires him is a certain Joseph from Delmas and that Rafael is on the way with another truck. …'.

This version to Col Odendaal immediately after being stopped that another truck with a load of diesel driven by Rafael was on its way is in line with that of Ndimande that the two of them were the drivers of two trucks that went all the way to Mooi River.

[4] Affidavit of Col Odendaal, annexure BS5 at p 38.

10.6 On Mr Khoza's version the two persons apparently employed by Rafick accompanied his drivers to Mooi River in order to show them the location of Rafick's broken down truck. He referred to this aspect twice in his answering affidavit and stated the second time:[5]

'The physical possession of my vehicles was with my two drivers. Mr Raffick further provided me with his employees, Timashe Matsiba and Victor Mcichimori who assumed the role of directing my drivers to where the goods were to be fetched.' (emphasis added.)

This version is clearly contradicted by Ndimande in his statement relied upon by the respondents and also his own affidavit filed in terms of subsecs 39(3) and (5) of POCA.[6]

10.7 According to Mr Khoza he owns eleven trucks. On his version and bearing in mind the years spent in the transport industry he had never questioned the legality of the goods to be transported by his customers when using his vehicles, whether for personal or commercial use. Contrary hereto he eventually mentioned that after the seizure of his property he only has one truck to be used in his business and that the truck and tanker trailer seized by SAPS generated a rental income of R80 000 per month.[7] No financial statements and/or accounting records have been placed before the court to prove the veracity of his version. This is just another example of a bald statement which is not worthy of acceptance. Also, this version contradicts the deponent's earlier version in the same affidavit as well as his earlier affidavit in terms of subsecs 39(3) and (5) of POCA.

10.8 I am satisfied that Rafick (or Rafael) is a figment of Mr Khoza's imagination and that such person does not exist at all. In concluding the evaluation of the factual disputes, it is worth mentioning what the Supreme

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[5] Mr Khoza's version appears in paras 7.3 (the first version) & 32 (the second and confirmatory version) pp 44 & 48 respectively.
[6] Paras 18.3 and 18.4 of the affidavit dated 9 June 2022 where Mr Khoza indicated that his two drivers would find Rafick and his two employees in Mooi River and that they would give directions where 'the goods were going to be offloaded.'
[7] Paragraphs 12 and 31 of the affidavit in terms of subsecs 39(3) & (5) of POCA.

Court of Appeal has stated in *Wightman t/a J W Construction v Headfour (Pty) Ltd and Another.*[8] Litigants are warned to seriously and unambiguously address the facts said to be disputed in opposed motion procedure. When a respondent signs an answering affidavit they commit to the contents thereof, inadequate as they may be. There is also a serious duty on the legal adviser who settles an answering affidavit to ascertain and engage with facts which the client disputes and to reflect such disputes fully and accurately. Recently the Supreme Court of Appeal considered a respondent's opposition in a case where the NDPP unsuccessfully sought a forfeiture order in the high court.[9] After criticizing the respondent's 'bald allegations unsupported by any evidence or reason' it concluded that the inescapable inference to be drawn from the totality of the facts was that the particular funds were derived from unlawful activities. Consequently, the NDPP's appeal succeeded.

Proportionality

[11] Courts are required to be acutely aware and sensitive towards the constitutional rights of respondents in considering forfeiture orders. Compliance with chapter 6 of POCA has the potential of intruding on the constitutional guarantee against arbitrary deprivation of property. Therefore, as Nugent JA stated, 'there needs at least be a rational relationship between the deprivation and the legislative ends that are sought to be attained through the deprivation.'[10]

[12] The Supreme Court of Appeal stated in *Prophet v National Director of Public Prosecutions (Prophet)*[11] that the owner of property to be declared forfeited must present evidence before the court in order for it to do a proper proportionality analysis. It was also recorded in the majority judgment that '(a) mere sense of disproportionality should not lead to a refusal of the order sought' and '(t)o ensure that the purpose of the law is not undermined, a standard of "significant

[8] 2008 (3) SA 371 (SCA) para 13.
[9] *National Director of Public Prosecutions v Moyane* (474/2021) [2022] ZASCA 79 (31 May 2022).
[10] *National Director of Public Prosecutions v Van Staden and Others* 2007 (1) SACR 338 (SCA) para 4, quoting with approval *National Director of Public Prosecutions v R O Cook Properties (Pty) Ltd* 2004 (2) SACR 208 (SCA) paras 15 & 16.
[11] The majority judgment in *Prophet v National Director of Public Prosecutions* 2006 (1) SA 38 (SCA) para 37.

disproportionality" ought to be applied for a court to hold that a deprivation of property is "arbitrary" and thus unconstitutional,…'. Ponnan JA cautioned in a minority judgment that the courts should be vigilant to ensure that the provisions of POCA are not used *in terrorem,* explaining that the 'draconian effect' of POCA 'would be exacerbated,… were the elevated benchmark "significantly disproportionate" to be applied.'[12] The Constitutional Court did not express itself on this specific issue in an appeal to that court.[13]

[13] I considered the following aspects in the proportionality analysis:[14]

13.1 The respondents did not deny the respective values of the preserved properties and the stolen diesel;

13.2 The evidence is indicative of a rational link between transportation of the stolen diesel and criminal gang activities;

13.3 The scale of theft of diesel on the particular Transnet pipeline is huge and requires extraordinary measures for its detection, prosecution and prevention, especially insofar as there can be little doubt that SAPS is confronted with organised crime committed by sophisticated syndicates using expensive vehicles;[15]

13.4 The use of the property was deliberate and planned and not merely incidental;

13.5 The property was important to the success of the illegal activity insofar as the tanker trailer was specifically manufactured to transfer fuel like diesel and the Land Cruiser was suitable to transport the pumps and equipment required;

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[12] Ibid paras 45 & 47.
[13] *Prophet v National Director of Public Prosecutions* 2006 (2) SACR 525 (CC) para 69.
[14] Ibid paras 58 – 69.
[15] *Mohunram v National Director of Public Prosecutions* 2007 (4) SA 222 (CC) para 126.

13.6 The property was illegally used during night time and over an extended distance of hundreds of kilometres during level 3 of the Covid 19 regulations without authorisation;[16]

13.7 On all probabilities the admitted transportation of diesel was not an isolated event, bearing in mind that two trucks transporting diesel were on their way the same night from KwaZulu-Natal en route through the Free State Province to somewhere in Mpumalanga;

13.8 If the truck and tanker trailer were acquired and/or used or rented out for legitimate business purposes, the respondents would be able to present invoices, accounting records or financial statements confirming this, which they failed to do.

Conclusions

[14] I am satisfied that the NDPP was entitled to obtain a preservation order and that the application for forfeiture was brought timeously after service and publication of that order. Furthermore, a proper opportunity was provided to the respondents to respond to the allegations which they did, referring again to the affidavit in terms of subsecs 39(3) and (5) of POCA as well as the answering affidavit in the forfeiture application. Having rejected the version presented by the respondents and bearing in mind the objective and common cause facts as well as the issue of proportionality, a proper case has been made out for the relief sought by the NDPP.

Order:

1. The following properties, subject to a preservation order granted by this court under the above case number on 14 April 2022, are declared forfeited to the State in terms of s 50 of the Prevention of Organised Crime Act 121 of 1998 (POCA):

1.1 A Scania truck with registration number [....]with engine number [....] and chassis number [....];

[16] Affidavit of Col Odendaal, annexure JK 2 at p 53

1.2 A Tanker trailer with registration number [....]with chassis number [....];

1.3 A Toyota Land Cruiser double cab with registration number [....]with engine number [....] and chassis number [....] (the properties).

2. The appointment of a curator bonis is dispensed with and the properties shall vest in the custody of the station commander of the South African Police Service in Vrede, or an officer of equal or higher rank, and her/she is hereby directed to deal therewith as follows:

2.1 To assume control of the properties and take it into his/her custody;

2.2 when the forfeiture order comes into effect, to hand over the properties to Selinah Letuka (Letuka), an enforcement officer with the Asset Forfeiture Unit, for Letuka to dispose thereof by public auction or other means and to deposit the proceeds of the sale of the properties into the Criminal Asset Recovery Account established under s 63 of POCA, number [....] held at the South African Reserve Bank, Vermeulen Street, Pretoria.

3. Any person whose interest in the properties concerned is affected by the forfeiture order may within 20 days after he/she/it has acquired knowledge thereof set the matter down for variation or rescission by the court.

J P DAFFUE, J

On behalf of the Applicant:	Adv KJA Ntimutse
Instructed by:	Asset Forfeiture Unit

	BLOEMFONTEIN
On behalf of the Respondents:	Adv T Mogwera
Instructed by:	Tshepo Thusi Attorneys
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