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**IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG LOCAL DIVISION, JOHANNESBURG**

CASE NO: 021718/2022

NOT REPORTABLE

NOT OF INTEREST TO OTHER JUDGES

NOT REVISED

22.11.23

In the matter between:

**NATIONAL DIRECTOR OF PUBLIC
PROSECUTIONS**

Applicant

and

TIFOW ABNDIWAHID OMAR

Respondent

JUDGMENT

NOKO J

Introduction

[1] This is an application for reconsideration in relation to the preservation order which was obtained on 8 September 2022 by the applicant *ex parte* in terms of section 38 read with section 74 of the Prevention of Organised Crime Act 121 of 1998 (POCA). The preservation order was made in respect of R459 000.00 being cash amount seized by SAPS on 29 March 2022 and a white 2014 Freightliner Argosy truck with registration number and letters [...] with identification number [...] and engine number [...] and a trailer with registration numbers and letters [...] (both collectively referred to as Truck and trailer). The said Truck and trailer were, at the date of hearing, held at the Chamdor Police offices under reference SAP13/19/2022. The court is now requested to set aside the preservation order to the extent that it relates to the truck and trailer only.

[2] Reference to the applicant means the applicant in the *ex parte* application and the respondent is the applicant in the reconsideration application.

Background

[3] The background as mosaicked by the applicant is as follows. On 11 March 2022 a criminal syndicate which included Kabelo Mokhele Joseph Phiri (*Phiri*) and the

respondent planned and hijacked a Truck, consigned by RTT Group (Pty) Ltd (*RTT Truck*) along R21 road, near Pomona in Kempton Park. The hijackers impersonated metro police members from Ekurhuleni Metropolitan Municipality. The RTT truck was carrying a consignment of Aquafresh toothpaste (*consignment*) to the value of R2 500 000.00.

[4] The RTT truck was then driven to[...] , Amalgam. Jhb where the consignment was off loaded. The RTT truck was then driven off the premises. Later the respondent's truck and trailer were driven into the premises and the consignment was loaded in the presence of the respondent, Guled and Hassan. The security official at the gate at [...] was Suleyman Dickson (*Dickson*). Dickson together with his manager submitted statements outlining the occurrence of that day.

[5] The consignment was sold to Drink Cash and Carry, represented its by manager, Ziad Limbada (*Limbada*), for R1 197 262. Payment was made in two days, R895 000 and R302 262 on 12 March 2022 and 14 March 2022 respectively. The transaction was confirmed by Limbada.

[6] The information according to Ahmed Omar Ahmed (*Ahmed*) is that on 11 March 2022 he was requested by the respondent to pick up (and drop) a mechanic and a tyre to the address furnished to him by the respondent. The said address is [...] where he delivered the tyre and the mechanic. He further averred that the respondent was also on the premises. Ahmed stated that the respondent called him again the following day where the respondent was given a white plastic bag which contained undisclosed amount of cash to be delivered to Raphiri which he accordingly did.

[7] The RTT truck had a tracker and the route undertaken by that truck was traced through tracking system to [...] from where the respondent's Truck and trailer were subsequently traced and seized at City Deed depot by Sergeant Mosebo Matlala who was an investigating officer. Matlala avers that he reasonably believed that the truck was involved in the hijacking and robbery committed on 11 March 2022.

[8] Subsequently NDPP brought an application and obtained a preservation order in terms of POCA.

[9] The respondent on the other hand states that on 11 March 2022 he received a call from Mr Abdikadir Hassan Aden (Aden) who wanted to hire a truck to transport goods to Drink Cash and Carry supermarket. The truck had a damaged tyre which required to be fixed first and he accordingly started fixing it. After fixing the tyre he then sent his driver, Asad to assist Aden with his delivery and he would be given R10 000,00 for the service rendered. The driver left but called later and stated that he could not deliver the consignment to the purchaser as the purchaser's shop was closed for the day. He proceeded to park the Truck and trailer at City Deep truck depot overnight. The respondent was also agreeable to the arrangement to park the truck with the consignment overnight. The delivery was done the following day and Asad brought the cash of 10 000.00 to the respondent as discussed.

[10] The respondent was contacted by the security guard at City Deed truck Depot on 16 March 2022 who informed him that the police officers came to the site and were asking about the respondent's Truck and trailer. Due to his hectic schedule, he could not attend but he sent Aden to attend to them. Aden proceeded to the depot and later called

the respondent to inform him that he was arrested, and the Truck and trailer were seized by members of SAPS.

[11] The *ex parte* application was aimed at ordering members of SAPS to preserve the Truck and trailer.

Issues

[12] Issues for determination are as follows

- 12.1. Whether a case has been made out for the admission of the supplementary affidavit dated 9 February 2023.
- 12.2. Whether the applicant made out a case for the *ex parte* application.
- 12.3. Whether the applicant has made out a case for the preservation order as contemplated in terms of POCA.

Submissions by the parties

The submissions and contentions of the parties were categorised into several headings and this judgment would consider them *ad seriatim*.

Supplementary affidavit.

[13] The respondent requested that a supplementary affidavit be admitted which, as he stated, was intended to correct mistakes in the respondent's answering affidavit. In

addition, it is intended to place before court the outcome of the application for *mandament van spolie*. The *mandament van spolie* application served before Kemack AJ who held that the application and the judgment should be placed before Malindi J who will preside over the reconsideration application. Counsel submitted that no prejudice would befall the applicant and requested the court to admit the affidavit.

[14] The applicant contends that the supplementary affidavit should not be admitted as it did not add any new or relevant facts to the case. It only, so counsel contends, makes accusations which are vexatious, scandalous, and gratuitous against the applicant. In addition, the respondent has failed to satisfy the requirement that admitting a further affidavit will not prejudice the applicant.

[15] Ordinarily a party seeking to introduce a further affidavit is seeking the indulgence of the court. The court is enjoined in this regard to exercise its discretion to permit a further set of set of affidavits in exceptional circumstances¹, or special circumstances² or if a court considers it advisable³. I decided to admit the further affidavit, whilst it does, *inter alia*, introduce new facts on *mandament van spolie*, as it does not necessarily prejudice the applicant and ordinarily for a fair adjudication all information should be made available to court. The applicant was involved in the *mandament van spolie* and as such the information was important for the court and needed to be introduced.

Ex parte application

¹ *Kasiyamhuru v Minister of Home Affairs* 1991 (1) SA 643 (W) at 649.

² *Joseph and Jeans v Spitz* 1931 WLD 48.

³ *Reiseberg v Reiseberg* 1926 WLD 59.

[16] The applicant contends that section 38⁴ of POCA provides that NDPP may approach the court for an order on *ex parte* basis. And this was confirmed in *NDPP v Mohammed*. In any event, so the argument continued, POCA makes no restrictions as to whether the application is limited to where the property is in possession of the owner only. This was in reply to the contention that the property was not with the owner.

[17] The respondent contended that on a proper interpretation of section 38 of POCA the object is to restrain the usage of and to preserve the property. In this instance the truck and trailer were already in the possession of the SAPS. Now that it was with the State ergo the *ex parte* application was not appropriate, and the court should therefore set aside the order and return the Truck and trailer to the respondent.

[18] The respondent fails to acknowledge that state departments do actively execute their respective mandates separately. The activities and conduct of the members of SAPS cannot be attributed to the applicant. The seizer of the truck and trailer by SAPS were pursuant to a different regulatory framework and for the purposes of POCA separate process had to be implemented. If the applicant did not launch the application for the preservation, then SAPS was under no obligation not to release the truck and trailer alternatively SAPS would not have had authority to preserve the truck and trailer in terms of POCA without an order made in terms of POCA.

Lawfulness of the seizure

[19] The applicant's counsel contends that the provisions of section 38 do not have a requirement that seizure should be lawful and in any event the section 50(4) of the Act

⁴ 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.

states that the process as contemplated in the Act is not affected by the outcome of the criminal investigations and or proceedings.

[20] The respondent contended that conduct which predicated the basis for the seizure of the Truck and trailer should be within the parameters of the law. Otherwise, such conduct would offend the provision of section 25 of the Constitution which proscribe deprivation of the property arbitrarily. Being aware of the lawfulness of the seizure in a pending *mandament van spolie* the applicant approached the court *ex parte* for an order in terms of section 38 of POCA. In the *mandament van spolie* proceedings, respondent submitted, Sgt Mosebo Matlala in an endeavour to explain the basis of the seizure failed to refer any legislative provision but stated that, first, it was involved in the commission of a crime but no details for the crime was set out. Secondly, that he wanted to interview the respondent and had to seize the Truck and trailer to coerce the respondent to come for the interview. Thirdly, his attempts to know the whereabouts of the respondents from his wife were unsuccessful. Fourthly, that he obtained consent from Aden which assertion was disputed in an affidavit deposed to by Mr Aden. The exercise of public power can only be legitimate when it is lawful as decreed by the principle of the rule of law.

[21] The applicant has failed, so the argument proceeded, to demonstrate in terms of which legislative provision (including POCA) or even common law sanctions the seizure and retention of the Truck and trailer. In view of the unlawful seizure of the Truck and trailer the attempt to approach the court in terms of POCA should not legitimise the seizure and possession of the Truck and trailer. In fact, it was already pronounced by Kemack AJ that the seizure was unlawful.

[22] The order for preservation would have applied irrespective of where the property is situated or whomsoever is in possession of the property despite the legal basis or the right to such a possession. The respondent had a recourse and exploited same in terms of *mandament van spolie*, but the order issued in terms of thereof does not *ipso facto* bar the applicant from proceeding in terms of POCA.

Instrumentality of an offence

[23] The applicant's counsel contends that the requirement is that without interrogating the veracity of the evidence the court should be persuaded that the applicant harboured reasonable grounds to believe that the Truck and trailer are the instrumentality in the commission of the offence contemplated in schedule 1 of POCA. In this regard the question would be whether there is a sufficiently close link between the property and its criminal use, and whether the property had a close enough relationship to the actual commission of the offence to render it an instrumentality.

[24] The counsel contended that the respondent's arguments that the applicant failed to prove of the Truck and trailer were customised to enable truck hijacking and robbery or the robbery would have been committed without the Truck and trailer have no merits. Further argument by the respondent was that the applicant incorrectly submitted that the RTT Truck hijacking and robbery were a continuous offence, but the hijacking and robbery of the RTT truck ended before the truck and trailer were involved.

[25] In addition, applicant's counsel submitted, the proximity between the hijacking and robbery of the RTT truck and when the respondent's truck and trailer were used to transport the consignment to Limbada for sale is sufficient to underpin the conclusion

that the Truck and trailer were directly functional to the commission of the truck hijacking and robbery. The Truck and trailer assisted in the concealment of the hijacked consignment and transportation thereof without detection until the sale was consummated. The applicant further contended that the evidence of the respondent's acquaintance, Ahmed, was uncontroverted which placed the respondent at the scene when the consignment was loaded onto the Truck and trailer and the fact that there is link between the respondent and Raphiri who was part of those who initiated the hijacking and robbery. To this end the applicant submit that the requirements for a preservation order were satisfied.

[26] The respondent disputed that the applicant succeeded in discharging the onus of proving that the Truck and trailer were the instrumentality. In this regard, counsel referred to *Prophet v NDPP* which referred to 5 factors for consideration in the determination of whether the property is the instrumentality.⁵ The respondent further denies the allegations that he was aware that his truck would be used for the transportation of alleged stolen goods. It is also denied he planned that the Truck and trailer were to be used for hijacking and or robbery. All the 5 factors were not addressed by the applicant. The alleged stolen property was not closer to where the Truck and trailer were. It cannot be proved that this was not an isolated incident. The truck cannot be said to have also been customised for the crime in question.

[27] The aspect of instrumentality in POCA matters is the core and cardinal pillar in the adjudication exercise. It relates to the property which is concerned in the commission or suspected commission of an offence at any time before or after commencement of the

⁵ Para 80 Heads of Argument CL 005-36

Act.⁶ It was held in *National Director of Public Prosecutions v RO Cook Properties (Pty) Ltd and other cases*,⁷ where the SCA also considered the meaning of the phrase and concluded that non-prosecution of the suspect has no bearing on the proceedings contemplated in this Act. To the extent that the respondent contended that the withdrawal of charges against the respondent is *ipso facto* evidence of weakness in the NDPP case even for the preservation is therefore of no moment⁸ as “... *the guilt or wrongdoing of the owners or possession of property is ...not ... relevant to the proceedings*”.

[28] Whilst the respondent’s contention that he is the innocent owner may be entertained during forfeiture proceedings the evidence which was left unscathed is the fact that the respondent’s driver, Ahmed, saw the respondent on 11 Amalgam Street and he has further delivered cash to Raphiri at the instance and instructions of the respondent. It appears that the commission of the crime *in casu* was constituted by a chain of events, commencing from the hijacking and ending up at the supermarket where the consignment was delivered.

[29] The SCA’s findings on the factors which were referred by the respondent as referred to in *Prophet v NDPP* was upheld by the constitutional court⁹. It is noted that “[N]o one factor is dispositive, and the court must be able to conclude after considering the totality of circumstances, that the property was a substantial and meaningful

⁶ S 1 of the Act.

⁷ *National Director of Public Prosecutions and Another v RO Cook Properties (Pty) Ltd; National Director of Public Prosecutions v 37 Gillespie Street, Durban (Pty) Ltd and Another; National Director of Public Prosecutions v Seevnarayan* 2004 (2) SACR 208 (SCA)

⁸ See letter to NDPP from the respondent’s attorneys dated 17 July 2023, CL A06-25.

⁹ *Prophet v National Director of Public Prosecutions* 2007 (6) SA 169 (CC).

*instrumentality in the commission of the offence(s).*¹⁰ The truck and trailer were used to facilitate commission of the offence and was directly causally connected with it so that it is integral to the commission of the offence.

Proportionality

[30] The respondent has raised the question of proportionality to which the applicant correctly contended that it is an issue to be considered at the second stage of forfeiture proceedings and to this end it is irrelevant for the purposes of the *lis* serving before me.

Disputes facts

[31] The applicant's counsel contends that the argument that there were disputes of fact was baseless and in fact no details of any dispute of facts except thin arguments predicated on bald denials and gratuitous allegations intended to cast aspersions on Matlala's reliability and honesty. Counsel further contends that in the event that there is evidence of dispute of fact then the authority applicable would not be *Plascon-Evans* as submitted by the respondent but the test as set out in *Webster v Mitchell* case which finds application in interim relief and states as follows: “[T]he proper manner of approach is to take the facts as set out by the Applicant together with any facts set out by the Respondent which the Applicant cannot dispute and to consider whether, having

¹⁰ *National Director of Public Prosecutions v Kwetana* (4034)2021) [2022] ZAECGHC 20 (10 June 2022) Para [12].

regard to the inherent probabilities, the Applicant could on those facts obtain final relief at trial.”

[32] For the purposes of this *lis* the court should have regards to the “...uncontroverted facts presented by the applicant together with the facts presented by the respondent entitle her to the confirmation of the preservation of proper order.” (sic).

[33] The respondent averred that the applicant’s star witness Sgt Matlala stated that he was reliably informed that the respondent is the person who gave instructions of where and how to offload the consignment. At the same time a witness who was present when offloading was done says Abdullati (Mufti) was giving instructions.¹¹ The refusal to disclose the bundle of documents in the *mandament van spolie* buttress the view that the said sgt Matlala was being dishonest and hiding the information to the court.

[34] The respondent on the other hand persist that *Plascon Evan’s* principle finds application, which states that where there are disputes of fact in motion proceedings *the version of the respondent should be accepted irrespective of where the onus lies unless that version consists of bald or uncreditworthy denials, raises a fictitious dispute of fact, is palpably implausible, far-fetched or so clearly untenable that the court is justified in rejecting them merely on the papers.*¹² Failure to disclose material evidence has been dealt with in *Du Preez v Du Preez*¹³ where it was stated that false disclosure or material non-disclosure would negatively affect the application. The applicant contended that both Hassan and Ahmed claimed that the respondent was involved in the robbery but

¹¹ CL005-33

¹² Para 99. The fact that the evidence of the applicant has been discredited entitles the respondent with the relief as set out in rule 6(8) of the Uniform rules.

¹³ Para 111.

neither of them has submitted a confirmatory affidavit or submitted copy of their confessions. In any event it is denied.

[35] The applicant stated that there is a video which clearly indicate that the respondent was not where it was claimed he was but apparently the SPP stated that it is not clear. This is hiding of evidence. It should have been made available to court and the court would then make up its mind.

[36] The submission by the respondent that *Plascon Evans* principles finds application in this case is predicated fallacious understanding underpinning the said principles. The principles will be apt in respect of forfeiture proceedings as they are final in nature. To this end the applicable guide would be as set out in *Webster v Mitchel* in terms of which the proper approach would be “... *the take the facts as set out in the Applicant together with any facts set out by the Respondent which the Applicant cannot dispute and to consider whether, having regard to the inherent probabilities, the applicant could on those facts obtain final relief at trial.*”¹⁴

[37] On the overall conspectus of the evidence presented by the applicant it is probable that the applicant would be successful to obtain the final relief. Even if the respondent was correct on *Plascon-Evan* case the alleged disputes raise appears not to be genuine, are palpably implausible, and far-fetched.

¹⁴ See also SCA in *NDPP v Moyane* (47/2002) ZASCA 79 (31 May 2022) where it was stated regarding forfeiture that “[A]s the NDPP is seeking final relief in the forfeiture proceedings, any factual dispute arising on the papers should be resolved in terms of *Plascon Evans* rule.

[38] There is no evidence and arguments advanced on behalf of the respondent to buttress that the preservation order was obtained without proper reflection. In the premises the application for reconsideration lacks merits and is bound to fail.

Costs

[39] The costs shall follow the outcome.

Conclusion

[40] I grant the following order:

The application for reconsideration is dismissed with costs.

Mokate Victor Noko

Judge of the High Court

Gauteng Local Division, Johannesburg

Delivered: This judgement was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date of the judgment is deemed to be 22 November 2023.

Appearances.

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Adv C Molefi

Instructed by:

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Counsel for the NDPP

Adv A Dabula

Instructed by

NDPP

Date of hearing:

16 August 2023

Date of Judgment:

22 November 2023.