



Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Regional Magistrates:	YES / NO
Circulate to Magistrates:	YES / NO

**IN THE HIGH COURT OF SOUTH AFRICA  
(Northern Cape Division, Kimberley)**

Saakno / Case number:	<b>598 / 2015</b>
Datum aangehoor / Date heard:	<b>26 / 02 / 2016</b>
Datum gelewer / Date delivered:	<b>01 / 04 / 2016</b>

**In the application of:**

**THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS**      Applicant

and

**DIKELETSO VINCENT MJEZA**      Respondent

In re: Maroon Volkswagen JETTA CL, Reg. No and Letters  
[B...], seized on 26 November 2014 and held under  
Campbell CAS34/11/2014

Coram: Erasmus, AJ

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**JUDGMENT**

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**ERASMUS, AJ**

- [1] This is an application in terms of section 48(1) of the Prevention of Organised Crime Act, No 121 of 1998 ('POCA') to declare forfeit to the State of a maroon Volkswagen Jetta with registration number and letters [B...], chassis number AAVZZZ1HZRU015080 and engine number ACH013569 ('the property'). The basis for the application is that the property constitutes an instrumentality of a criminal offence.
- [2] This application was lodged after an interim preservation order in terms of section 38 of POCA was granted on 10 April 2015 and subsequently confirmed on 26 June 2015.
- [3] The respondent gave notice of his intention to oppose the forfeiture application and filed answering papers. The procedure was not in accordance with and neither within the period, as envisaged in section 39(3) and 39(4) of POCA. I assume for purposes of this judgment that the respondent intended to apply for leave to enter appearance in terms of section 49 of POCA. The respondent did not apply for the exclusion of the property from the operation of the forfeiture. The respondent and applicant proceeded to file answering and replying papers, as envisaged in section 62 of POCA. The parties proceeded to argue the merits of the forfeiture application before me.

[4] The following facts are common cause between the parties:

- 4.1 On 26 November 2014 at approximately 20:15, the South African Police Services ('the Police') noticed the property parked next to the N8 road near Campbell. There were three males at or in the vicinity of the property, one of which was the respondent.
- 4.2 The respondent informed the Police that they had been traveling from Schmidtsdrift to Kimberley when he experienced problems with the property and that they were awaiting assistance.
- 4.3 The Police requested and was granted permission by the applicant to search the property. At that moment the other two male persons ran away from the scene.
- 4.4 In the trunk of the property the Police recovered the carcasses of ten slaughtered sheep ('the livestock') under a green net. Their intestines were found inside the property in a white plastic bag behind the front seat of the property.

- 4.5 The respondent did not have a permit to convey livestock, as envisaged in section 8 of the Stock Theft Act, No. 57 of 1959.
- 4.6 The Police arrested the respondent on the scene for stock theft and seized the property.
- 4.7 The livestock was identified by their owner and he estimated their market value at approximately R10,000.00.
- 4.8 As the livestock had already been slaughtered, and being of no further value to the owner, the carcasses were fed to lions.
- 4.9 Stock theft is very prevalent in the Northern Cape Province and this necessitated the establishment of a specialized unit in the Police to investigate these crimes.
- 4.10 The respondent is the owner of the property.

4.11 The book value of the property is approximately R17,500.00, but was bought shortly before the incident for the amount of R10,500.00.

4.12 The respondent has a previous conviction for theft.

[5] In addition to the facts set out above, it appears from the papers filed in support of the preservation application, that the respondent informed the Police on the scene that the other two men had hired him to fetch the livestock at Schmidtsdrift. He could neither produce any documentation in support of a legal purchase and sale of the livestock, nor a permit to transport the livestock. The applicant did not deal with this aspect in his answering affidavit in opposition to the forfeiture application.

[6] The version of the respondent, as set out in his answering affidavit, is as follows:

6.1 He denied both having committed the crime of stock theft and that the property had been instrumental in committing stock theft.

- 6.2 He received a phone call from a person by the name of 'Oubaas' who requested him to fetch him and a friend as they were on their way from Griekwastad. The respondent found them approximately 10 (ten) kilometers outside of Schmidtsdrift.
- 6.3 At the scene he noted that Oubaas and the other man had a number of sheep carcasses with them. He suspected it to be stolen and refused to load it into the property. He was then threatened with knives and so, for his own safety, he consented to the loading of the livestock into the trunk of the property.
- 6.4 The respondent experienced problems with the property when he was approached by the Police. The police enquired about the contents of the trunk of the vehicle and they then requested him to open same and he complied.
- 6.5 The livestock was covered with a net and the Police enquired as to the contents. The respondent informed the Police that the contents belonged to the two men and that it was at that moment that Oubaas and the other male ran away.

- 6.6 By the time the respondent had met up with the other two men, the theft of the livestock had already been committed. He neither knew from which farm it had been stolen nor where it had been slaughtered.
- 6.7 Although the property was used to convey the stolen livestock, the respondent did so because he had been threatened by the other two males to assist them and was thus forced to convey the livestock.
- 6.8 The criminal matter against the respondent was provisionally withdrawn.
- [7] In reply to the respondent's averments pertaining to the threat to convey the livestock, the Police stated that the respondent never reported nor mentioned to them that he had been threatened by the other two males. They reiterated that the explanation provided to the Police was that the two male persons who had fled the scene had hired him to fetch the livestock from Schmidtsdrift and that he could not explain why they had run away.

- [8] The basis for the opposition of the forfeiture application is twofold. It is alleged that the property was not an instrumentality of an offence listed in Schedule 1 to POCA, as envisaged in Chapter 6 of POCA. Secondly, the respondent submitted that the forfeiture of the property would be disproportionate when its effect on the respondent is weighed against the purpose of the forfeiture in this instance.
- [9] The purpose of Chapter 6 of POCA<sup>1</sup> includes the objectives of removing incentives for crime, deterring persons from using or allowing their property to be used in the commission of crime, eliminating some of the means by which crime may be committed, and advancing the ends of justice by depriving those involved of the property that is an instrumentality of an offence.
- [10] In terms of section 50(1)(a) of POCA a High Court shall, subject to the provisions of section 52, make a forfeiture order if it finds, on a balance of probabilities, that the property concerned is an instrumentality of an offence referred to in Schedule 1.

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<sup>1</sup> NDPP v R O Cook Properties (PTY) Ltd; NDPP v 37 Gillespie Street Durban (PTY) Ltd and another; NDPP v Seevnarayan 2004 (2) SACR 208 (SCA) par [18]



[11] An owner of property can avoid forfeiture by opposing the making of a forfeiture order or applying for an order to exclude their interest in the property.<sup>2</sup>

[12] During the first stage of proceedings the onus rests on an applicant to show on a balance of probabilities that the property concerned is an instrumentality of an offence referred to in schedule 1. An **'instrumentality of an offence'** is defined as *'any property which is concerned in the commission or suspected commission of an offence at any time before or after the commencement of this Act ...'*.<sup>3</sup>

[13] The focus is on the role the property played in the commission of the crime. It is irrelevant whether or not criminal proceedings have been instituted and a criminal conviction is not a condition precedent to forfeiture.<sup>4</sup>

[14] As rightly pointed out by Adv. Van Dyk for the applicant and Mr. Rust for the respondent, the issue pertaining to what constitutes an instrumentality of a criminal offence has been the subject of much debate in our courts and

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<sup>2</sup> NDPP v R O Cook Properties (PTY) Ltd *supra* par [22]; Section 48 read with the provisions of section 50 and 52 of POCA

<sup>3</sup> Section 1 of POCA

<sup>4</sup> NDPP v R O Cook Properties (PTY) Ltd *supra* par [20]

appears to have been settled. In **NDPP v R O Cook Properties**<sup>5</sup> it was held that the words '*concerned in the commission of an offence*' must be interpreted as follows:

*"...so that the link between the crime committed and the property is reasonably direct, and that the employment of the property must be functional to the commission of the crime. By this we mean that the property must play a reasonably direct role in the commission of the offence. In a real and substantial sense the property must facilitate or make possible the commission of the offence."*<sup>6</sup>

[15] Howie JA in **NDPP v GEYSER AND ANOTHER**<sup>7</sup>, in considering what constitutes an instrumentality of an offence, held that

*"to be an instrumentality of an offence the property concerned must by definition in POCA, be 'concerned in the commission' of that offence. As the cases have interpreted that definition, the property must facilitate commission of the offence and be directly causally connected with it so it is integral to the commission of the offence."*

[16] Once the applicant has established that the property concerned is an instrumentality of an offence, the second phase of proceedings commences. During this stage of proceedings the state of mind of the owner of the property comes into play.

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<sup>5</sup> 2004 (2) SACR 208 (SCA)

<sup>6</sup> R O Cook Properties, supra par [31]; See also NDPP v Prophet 2006(2) SACR 525 (CC) par [57] and Mohunram and another v NDPP 2007 (2) SACR 145 (CC) par [49]

<sup>7</sup> 2008 (2) SACR 103 (SCA) par [17]

[17] In relation to the forfeiture of an instrumentality of an offence referred to in Schedule 1, a Court may, in terms of section 52(2A) of POCA, make an order excluding certain interests in property which is subject to the forfeiture order, from the operation thereof. This is referred to as “the innocent owner-defence”.<sup>8</sup>

[18] This exclusion may only be ordered if the Court finds that the respondent herein has shown on a balance of probabilities, that he had acquired the interest in the property concerned legally, and neither knew nor had reasonable grounds to suspect that the property in which the interest is held is an instrumentality of an offence referred to in Schedule 1.

[19] Mere innocence on the side of the respondent is not enough.<sup>9</sup> Section 52 must be read with the provisions of sections 1(2) and (3) of POCA.

[20] In terms of section 1(2) it will be accepted that the respondent had knowledge of a fact if he had actual knowledge of the fact or if the Court is satisfied that he believed that there is a reasonable possibility of the

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<sup>8</sup> NDPP v R O Cook Properties (PTY) Ltd *supra* par [23] and [24]; NDPP v Mohammed NO and Section 1(1) of POCA others 2002 (2) SACR 196 (CC) par [17] and [18]; See also NDPP v Gerber 2007 (1) SACR 384 (W) par [18]

<sup>9</sup> NDPP v R O Cook Properties (PTY) Ltd *supra* par [24]

existence of that fact and failed to obtain information to confirm the existence of that fact.

[21] In terms of section 1(3) of POCA the respondent ought reasonably to have known or suspected the fact if the conclusions that he ought to have reached are those which would have been reached by a reasonably diligent and vigilant person having both the general knowledge, skill, training and experience that may reasonably be expected of a person in his position and the general knowledge, skill, training and experience that he in fact has.

[22] As rightly submitted by Ms. Van Dyk, Chapter 6 is designed to recruit property owners into an active role as guardians of their property against crime. They cannot be supine.<sup>10</sup>

[23] Ms. Van Dyk submitted that the property is directly linked to the carrying out of the offence and that it is not merely incidental to the carrying out of the offence and forms part of the offence. Mr. Rust submitted that the property was merely incidental to the commission of the crime as the respondent '*merely showed up at the scene*

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<sup>10</sup> NDPP v R O Cook Properties (PTY) Ltd *supra* par [28] and [29]; NDPP v April 2007 4 All SA 1183 (C) par 44

*where he picked up the other two gentlemen'. He did not go to the scene with the intention to remove the stolen items.*

[24] It is common cause that the livestock conveyed by the respondent and which was subsequently found in the property had been stolen and that he did not have a permit to convey the livestock found in his vehicle.

[25] Any offence for which the punishment may be a period of imprisonment exceeding one year without the option of a fine falls within the ambit of an offence referred to in Schedule 1.

[26] In terms of section 8 of the Stock Theft Act<sup>11</sup>, no person shall drive, convey or transport any stock or produce of which he is not the owner on or along any public road unless he has in his possession a removal certificate issued to him by the owner of such stock or produce. Section 14 of the said Act provides for sentences for any offence under this Act, of imprisonment exceeding one year without the option of a fine.

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<sup>11</sup> Act 57 of 1969

[27] The property played a direct role in transportation of the stolen stock and made possible the commission of the offences in question. It was instrumental (and not merely incidental) to the commission of the offence of stock theft and also a contravention of section 8 of the Stock Theft Act.

27.1 The version of the Police that the respondent informed them on the scene that the other two men had hired him to fetch the livestock stands uncontested. At best for the respondent, he knew or at least suspected that the livestock had been stolen. The property was chosen and used to transport the stolen livestock. The ten sheep and intestines could not be carried and had to be conveyed in the property. The property facilitated the commission of the crime and was instrumental therein.

27.2 The property also played a direct role in the commission of the offence of conveying or transporting stock or produce of which the respondent was not the owner on or along the public road without him being in possession of a removal certificate. Without the property the offence could not have been committed.

[28] During the second stage, when considering the respondent's 'innocent owner' defence, it appears to be common cause that the property was acquired legally. What remains to be answered is whether the respondent discharged the onus and has shown, on a balance of probabilities that he did not know or ought reasonably to have known or suspected that the property was an instrumentality of an offence referred to in Schedule 1.

[29] The respondent's defence is that he did not go to the scene with the intention to remove the stolen items. On his arrival, he saw the livestock and suspected it to have been stolen. When he refused to load the livestock, the other two males threatened him with knives. This resulted in him succumbing to their threats and loading the stolen livestock.

29.1 On this version, at best for the respondent, he knew or at least suspected that the livestock had been stolen. Despite this, he still loaded it into the property and transported it.

29.2 The respondent's explanation that he was threatened with knives is far-fetched and a clear fabrication and as such has to be rejected. If

there was any truth in this allegation, and if he really feared for his life, he had had ample opportunity to inform police official Mpana of such threat on the scene after the other 2 men had fled. Yet he only disclosed this alleged threat in his answering affidavit.

29.3 It is highly improbable that the respondent had driven to a place 10 km from Schmidtsdrift only to find two men next to the road having 10 carcasses and intestines in their possession. It is more probable that he had assisted them in the theft and the slaughter of the livestock or at least, had transported it from where it had been slaughtered.

[30] I find that the applicant proved, on a balance of probabilities, that the property concerned is an instrumentality of an offence referred to in schedule 1.

[31] Having regard to the evidence before me, I find that the respondent has not discharged the onus in terms of section 52 by proving, on a balance of probabilities that he did not know or ought reasonably to have known or suspected that the property was an instrumentality of an offence referred to in Schedule 1.



[32] Mr. Rust submitted that, if the object of forfeiture proceedings is kept in mind, the forfeiture of the property and deprivation of the respondent's property in circumstances where he had been 'forced to transport stolen sheep', would be disproportionate and arbitrary and therefore unconstitutional.

[33] Although proportionality is not a statutory demand, it is an equitable requirement developed by the courts to balance combating crime against property rights.<sup>12</sup>

[34] Proportionality is not exclusively determined by a direct comparison of the value of the property sought to be forfeited and the value of the offence, but involves consideration of numerous other factors. These factors include the seriousness of the offence, removing the incentive of crime, deterrence, eliminating or incapacitating some of the means by which crime may be committed, advancing the ends of justice by depriving those involved in crime of the property concerned where the property is closely associated with the commission of the crime.

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<sup>12</sup> NDPP v R O Cook Properties (PTY) Ltd *supra* par [15]; Mohunran v NDPP *supra* para [56] and [130]

[35] Other factors, relevant to the respondent, are the nature and use of the property and the effect of the forfeiture on the respondent.<sup>13</sup>

[36] In **PROPHET V NDPP**<sup>14</sup> it was stated:

*"A mere sense of disproportionality should not lead to a refusal of the forfeiture sought. To ensure that the purpose of the law is not undermined, a standard of 'significant disproportionality' ought to be applied for a court to hold that a deprivation of property is 'arbitrary and thus unconstitutional', and consequently refuse to grant a forfeiture order. And it is for the owner to place the necessary material for a proportionality analysis before the court."*

[37] I am of the view that the forfeiture of the property would not be disproportionate when its effect on the respondent is weighed against the purpose of the forfeiture in this instance and would not amount to an arbitrary deprivation of property.

37.1 Stock theft is rife in this Division. It is difficult to combat and has necessitated the establishment of a specialized unit in the SAPS to investigate these crimes. There are, as set out in the applicant's founding papers in the preservation application, a

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<sup>13</sup> Mohunran v NDPP *supra* at par [57] and [123]

<sup>14</sup> 2006 (1) SA 38 (SCA) at par [37]

number of syndicates in operation in the Northern Cape Province and stock farmers suffer huge losses as a result thereof. Owners of motor vehicles facilitate the commission of these crimes by providing transport to convey the stolen livestock.

- 37.2 In this instance, the purchase price of the property is almost exactly the same as the value of the stolen livestock. Although any deprivation of property has an impact on the owner, it cannot be said that the deprivation in this instance is disproportionate.
- 37.3 The respondent is no stranger to crime and has one previous conviction for theft.
- 37.4 The crime is a serious one and, given the number of sheep that were stolen and slaughtered, it was not committed out of necessity, but sheer greed.
- 37.5 The impact the crime, given the number of sheep that was stolen, is immense on the victim of the crime, Mr. Morweng. He is a small farmer having

owned only seventeen sheep. Fifteen were stolen during this incident, only five of which were recovered alive.

37.6 The respondent has failed to place circumstances, relevant to the proportionality analysis, before me. He merely denied involvement in the offence and maintained that the property was not instrumental in the offence. Although he stated that he is the owner of the vehicle, the vehicle has not yet been registered in his name. It does not appear from the answering papers whether he is employed. He stated though that he had paid for the vehicle in cash.

[38] I am satisfied that the requirements for the forfeiture of the property to the State have been met and that it would not be disproportionate to deprive the respondent of his property.

### **IT IS ORDERED THAT:**

1. In terms of section 53(1)(a) of the Prevention of Organised Crime Act 121 of 1998 (POCA), the maroon Volkswagen JETTA with registration numbers and letters

[B...], chassis number AAVZZZ1HZRU015080 and engine number ACH013569 (the property) presently kept by the South African Police Service (the SAPS) at the Kimberley SAPS stores under SAP13/211/2014 under a case registered as Campbell CAS 34/11/2014 is declared forfeit to the State.

2. In terms of section 50(6) of the POCA, paragraph 5 below shall take effect 20 (TWENTY) days after publication of a notice thereof in the Government Gazette.
3. The SAPS Commanding Officer, Kimberley, who was authorized in the Preservation Order to take care of the property, be and is hereby directed to continue acting as such for the purpose of this order.
4. Pending the taking effect of this order, the property shall remain in the custody of the SAPS Commanding Officer, Kimberley.
5. On the date on which this order takes effect, to wit 20 (TWENTY) days after publication in the Government Gazette, the SAPS Commanding Officer, Kimberley shall

hand the property to the Senior Financial Investigator of the Applicant, Jacobus Smit, who is authorized to

- 5.1 sell the property at best price, either by public auction or private treaty;
  - 5.2 sign all documentation necessary to effect the sale, transfer and registration of the property; and
  - 5.3 cause the balance of the proceeds of its sale, less any commission and incidental expenses thereto, to be deposited into the Criminal Asset Recovery Account.
6. The applicant is further directed to publish a notice of this order in the Government Gazette as soon as it is practicable.

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**SL ERASMUS**  
**ACTING JUDGE**

On behalf of the Applicant: Adv L van Dyk (oio The State Attorney)

On behalf of the Respondent: Mr. H. Rust (oio Haarhoffs Inc.)