

**IN THE HIGH COURT OF SOUTH AFRICA,
NORTHERN CAPE DIVISION, KIMBERLEY JUDGMENT**

Not Reportable
Case No: 2330/2021

In the matter between:

**THE NATIONAL DIRECTOR OF
PUBLIC PROSECUTIONS**

APPLICANT

And

EGIDIUS HAMUTEMYA HAUSIKU

RESPONDENT

Neutral citation: *National Director of Public Prosecutions v Hausiku* (Case no 2330/2021) (10 February 2023)

Heard: 18 November 2022

Delivered: 10 February 2023

Judgment

Phatshoane DJP

[1] This is an application in terms of s 48 of Prevention of Organised Crime Act 121 of 1998 (POCA) by the National Director of Public Prosecutions, the applicant, for the forfeiture of a certain white Opel Corsa 1.3 vehicle with registration no: C[...]/1[...], engine no: B[...] and chassis no: A[...] (the property/vehicle), which was seized on 7 February 2021 and held under Kimberley Case no: CAS 140/02/2021. Other contingent relief is also sought. At present, the property is under the effective control of the station commander of the South African Police Service (SAPS), Kimberley. It is further subject

to a preservation order issued by Nxumalo J on 11 February 2022, pending the outcome of the present application. In terms of the preservation order, all persons with knowledge of the property are prohibited from dealing with it in any manner. Its estimated value is in the order of R20 000.

[2] The applicant contends that the property is an instrumentality of an offence referred to in Schedule 1 of POCA, Item 25 (dealing in or being in possession of or conveying endangered, scarce and protected game or plants or remains thereof in contravention of a statute or provincial ordinance). Mr Egidius Hamutemya Hausiku, a Namibian citizen, the respondent, is the owner of the property. He entered an appearance to defend in terms of s 39(3) of POCA and filed papers resisting the application for an order forfeiting the property to the State.

[3] The facts leading to this application are fairly straightforward. On Thursday, 28 January 2021, Capt Gabriel Jacobus Vermeulen of SAPS, Stock Theft and Endangered Species Unit, received a report from his informer that two men intended to sell two pangolin skins for approximately R400 000 and had been willing to reduce the price because one of the pangolin skins did not have a tail. According to the informer, the deal had to be finalised by Saturday, 6 February 2021, failing which, the suspects had threatened, the transaction would be concluded with someone else.

[4] On 2 February 2021, the police applied and were granted authority in terms of s 252A of the Criminal Procedure Act 51 of 1977 to engage in an undercover operation in order to detect, investigate or uncover the commission of an offence, in this case, the unlawful trading in pangolin skins. On the morning of 7 February 2021 Capt Vermeulen and his team met at the Flamingo Casino, Kimberley, where the covert transaction would be concluded with the suspects. W/O Velile Fanie Tshabalala of SAPS, Kimberley, met the informer and four male suspects: Messrs Andrew Augusto Kalyanga (Kalyanga), Romanus Katembo (Katembo), Daniel Job (Job) and Egidius Hamutemya Hausiku (the respondent), all Namibian nationals, in the parking lot of the Flamingo Casino.

[5] W/O Tshabalala states that Kalyanga was the spokesperson for the other three men. He told W/O Tshabalala that they had two pangolin skins and opened the boot of the property to show the officer the skins which were kept underneath the luggage. One weighed 2.60 kg and the other 0.85kg. Kalyanga priced those at R500 000 but was willing to accept R400 000. W/O Tshabalala lifted his cap as a signal to his colleagues that the skins were inside the property. The four men were apprehended. Job handed over to W/O Tshabalala a transparent plastic bag, containing what appeared to be three precious stones which Job alleged were diamonds. The police officers searched the property in the presence of the suspects. Capt Vermeulen seized the pangolin skins; two knives which, the applicant has reason to believe, were used to skin the animals; the transparent plastic bag containing the three 'shiny objects' received from Job and other items of no relevance to the present application. One of these dazzling stones was later found to be an unpolished diamond. It weighed 0.59 carats valued at R 1 547.

[6] According to Prof R Jansen of Tshwane University of Technology, pangolins are under severe threat of extinction. A live pangolin is estimated to be worth nearly R1 million. Mr Marnus Smit (Smit), a Production Scientist in the employ of the Northern Cape Department of Environment and Nature Conservation, identified the two animal skins as that of Temminck's Pangolin species (*Smutsia temminckii*). Based on their weight, they were those of an adult and a pub pangolin. Smit stated that Temminck's pangolins are listed as vulnerable in the latest Red listings for mammals of South Africa as their populations continue to decline due to increased poaching. The species has been listed in appendix 1 of the Convention on International Trade in Endangered Species (CITIES) which proscribes commercial trading in the species. Pangolins are further listed as Threatened or Protected Species (TOPS) under the National Environmental Management: Biodiversity Act 10 of 2004 (NEM: BA) and TOPS Regulations. A permit is required for the possession, hunting, trading and transporting the listed species. Smit intimated that permits are never issued for the hunting or possession thereof.

[7] In terms of s 1 of the Northern Cape Nature Conservation Act 9 of 2009 (the NCNCA), a 'carcass' in relation to an animal means the whole or any part of the meat (whether dried, smoked, salted, cured or treated in any manner) the head, ear, tooth, horns, shell, scale, tusks, bones, feathers, tail, claw, paw, nail, hoof, skin, hide, hair, viscera or any part whatsoever of the carcass and includes the egg.

Section 22 (1) of the NCNCA provides that no person may, without a permit, be in possession of the carcass of a wild animal unless in circumstances specified in that Act. Any person found in possession of a specially protected species or carcass or derivative thereof by a nature conservator or a police officer and is unable to give a satisfactory account of such possession is guilty of an offence.¹

[8] The four suspects appeared in the Magistrate Court, Kimberley, on charges of contravening s 57(1) of the NEM: BA which provides that a person may not carry out a restricted activity involving a specimen of a listed threatened or protected species without a permit issued in terms of Chapter 7.

[9] The respondent's version is that he purchased the property in issue for a price of R21 000 in July 2018 and had not acquired it through the proceeds of crime. He says that his girlfriend is resident in Ritchie, a small town situated approximately 47 Km west of Kimberley. On 07 February 2021 he left Vioolsdrift for Ritchie to visit his companion accompanied by his countrymen, the three named suspects, who were also resident in Vioolsdrift. The three men had requested a lift from him as they were on their way to Kimberley to meet someone who had promised them work. They requested the respondent to drop them off at the Shell Service Station situated adjacent to the N12 national road, just north of Kimberley. At the filling station, a gentleman, who spoke to Kalyanga, requested the four men to follow his bakkie to Flamingo Casino, adjacent to the filling station, where the meeting would take place. Soon after they had parked their vehicle next to this gentleman's, W/O Tshabalala approached them. Kalyanga alighted and had a discussion with W/O Tshabalala. He requested the respondent, who

¹ Section 66(1)(k) of the Northern Cape Nature Conservation Act 9 of 2009 (NCNCA).

remained seated inside the vehicle with the other two occupants, to open the boot which he did.

[10] The respondent intimated that he was surprised to notice the police surrounding his vehicle and being arrested. He claimed not to have known that his countrymen carried pangolin skins in their bags or the knives that were seized. He denied that his vehicle was an instrumentality of an offence referred to in Schedule 1 of POCA or having acted in concert with others to trade in pangolin skins. It was argued for him that his version was probable; that the applicant failed to prove its case and was therefore not entitled to the forfeiture order.

[11] The issue central to this application is whether the property was an instrumentality of an offence. If it was, the forfeiture order must follow. Chapter 6 of POCA creates a two-stage process. The first stage provides for the granting of a preservation order and the seizure of the property pending a forfeiture application. The second provides for the forfeiture of the property subject to the preservation order. The provisions of Chapter 6 are not based upon any criminal conviction of an individual. Put differently, a criminal prosecution and conviction of an individual is not a prerequisite for the invocation of Chapter 6 and the granting of a forfeiture order. The applicant has to prove on a balance of probabilities that the property in issue is 'an instrumentality of an offence' referred to in Schedule 1 to the Act.

[12] An “instrumentality of an offence” is defined as “any property which is concerned in the commission or suspected commission of an offence”.² What constitutes an instrumentality of a criminal offence is now settled. In *Brooks and Another v National Director of Public Prosecutions*,³ Ponnann JA held:

‘[58] The correct interpretation of the concept 'instrumentality of an offence' in the context of POCA was considered by the Constitutional Court in *Prophet* [*Prophet v*

² Section 1(1) of POCA.

³ 2017 (1) SACR 701 (SCA) para 58.

National Director of Public Prosecutions 2006 (2) SACR 525 (CC)]. As Van Heerden AJ explained in *Mohunram* [*Mohunram and Another v National Director of Public Prosecutions and Another (Law Review Project as Amicus Curiae)* 2007 (2) SACR 145 (CC) (2007 (4) SA 222], in considering the meaning of the phrase 'an instrumentality of an offence' the Constitutional Court in *Prophet* adopted the interpretation accepted by the Supreme Court of Appeal in a trilogy of cases [*National Director of Public Prosecutions 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)]. Van Heerden AJ added:

'In the first of those cases, *Cook Properties*, Mpati DP and Cameron JA said that (i)t is clear that in adopting this definition the Legislature sought to give the phrase a very wide meaning. They held, however, that in order to ensure that application of the forfeiture provision does not constitute arbitrary deprivation of property in violation of s 25(1) of the Constitution

". . . the words 'concerned in the commission of an offence' must . . . be interpreted 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 or substantial sense the property must facilitate or make possible the commission of the offence. As the term 'instrumentality' itself suggests . . . the property must be instrumental in, and not merely incidental to, the commission of the offence. For otherwise there is no rational connection between the deprivation of property and the objective of the Act: the deprivation will constitute merely an additional penalty in relation to the crime, but without the constitutional safeguards that are a prerequisite for the imposition of criminal penalties.

In other words, the determining question is

". . . whether there is a sufficiently close link between the property and its criminal use, and whether the property has a close enough relationship to the actual commission of the offence to render it an instrumentality. "

[13] In *National Director of Public Prosecutions and Another v Mohamed NO and Others*⁴, Ackerman J held:

‘. . . Chapter 6 is therefore focused, not on wrongdoers, but on property that has been used to commit an offence or which constitutes the proceeds of crime. The guilt or wrongdoing of the owners or possessors of property is, therefore, not primarily relevant to the proceedings.

There is, however, a defence at the second stage of the proceedings, when forfeiture is being sought by the State. An owner can at that stage claim that he or she obtained the property legally and for value, and that he or she neither knew nor had reasonable grounds to suspect that the property constituted the proceeds of crime or had been an instrumentality in an offence ('the innocent owner' defence).'

[14] The gist of the applicant's case is that the property was an instrumentality of an offence not so much that it constituted the proceeds of crime. Albeit it is not essential to the grant of the forfeiture order, there is no evidence to suggest that either the respondent, Kalyanga, Job and or Katembo had any permit to trade in pangolin skins. The fact that the endangered species' skins were found in the boot of the respondent's vehicle prima facie buttresses the applicant's case that the property was an instrumentality of an offence. The respondent's case that he merely gave his countrymen a lift is less than frank. For reasons I am wholly unable to comprehend, he proffered no explanation as to why he did not drop them off at the filling station as they had requested him to do. Instead, he drove with them all the way into the casino parking lot.

⁴ (2002 (4) SA 843) (CC); 2002 (9) BCLR 970; [2002] ZACC 9) paras 17-18.

[15] On W/O Tshabalala's version, at the parking lot, he met the four men and greeted them. It is more probable that the four men were not inside the vehicle as the respondent sought to suggest. I say so because the evidence of W/O Moselane, the arresting officer, corroborated in broad outline the account given by W/O Tshabalala, to the effect that when Tshabalala gave the officers the signal the four men stood next to Tshabalala. It is beyond any comprehension that the respondent took the trouble to meet and greet his passengers' potential employer or was outside the vehicle with them when the deal was sealed. His version that he remained seated in the vehicle with the other occupants, except Mr Kalyanga, is untruthful because it would be absurd that the prospective employees, having travelled some 800 km, would remain seated in the vehicle and not directly communicate with their potential employer who had promised all three of them employment.

[16] The respondent's bare statement of having been in the dark, concerning his countrymen's alleged acts of criminality, is inconsistent with his actions. On the foregoing exposition, the ineluctable conclusion is that he was not innocent as he sought to portray. He knew that the pangolin skins were inside the boot and were about to be sold in exchange for money. The property was deliberately chosen by him and employed to convey the animal skins. In the premises there is a sufficiently close link between the property and its criminal use or the carrying out of the offence. It was not merely incidental to the execution of the crime.

[17] That the respondent was gainfully employed is of little or no importance or relevance. What is crucial is that he permitted the use of his vehicle as an instrumentality of the offence and consequently made it susceptible to a forfeiture order. His version that he was on his way to visit his companion does not exclude the nefarious activities that went about en route and the use of the property to further those transactions.

[18] In my view, the applicant established, on the balance of probabilities, that the property was used as an instrumentality of an offence and liable to be declared forfeit to the State. In the result I make the following order.

Order

1. An order is granted in terms of the provisions of s 50 of the Prevention of Organised Crime Act 121 of 1998 (POCA) declaring forfeit to the State a White Opel Corsa 1.3 with registration letters and numbers C[...] 1[...], engine no: B[...] and chassis no: A[...] (the property), seized and held under Kimberley CAS 140/02/2021 which is presently subject to a preservation of property order granted by this Court on 11 February 2022.
2. The appointment of a *curator bonis* is hereby dispensed with.
3. The property shall remain under the effective control of the Station Commander of the Kimberley South African Police Service (SAPS), pending the date on which the forfeiture order takes effect.
4. The Registrar of this Court must publish a notice of this order in the *Government Gazette* as soon as practicable as set out in s 50(5) of POCA.
5. Any person affected by the forfeiture order, and who was entitled to receive notice of the application under s 48(2), but who did not receive such notice, may, within 45 days after the publication of the notice of the forfeiture order in the *Gazette*, apply for an order under s 54 of POCA, excluding his or her interest in the property, or varying the operation of the order in respect of the property.
6. All the paragraphs of the order operate with immediate effect, except paras 7,8 and 9 below, which will only take effect on the day that a possible appeal is disposed of in terms of s 55, or on the day that an application for the exclusion of interests in

property in terms of s 54 of POCA is disposed of, or after expiry of the period in which an appeal may be lodged or application be made in terms of s 54 of the POCA.

7. On the date in respect of which this order takes effect, the Station Commander of Kimberley SAPS or a person duly authorized by him, is to hand over the property to Ms Selinah Letuka of the Assets Forfeiture Unit, the National Prosecuting Authority, Bloemfontein.

8. Ms Selinah Letuka or a person authorized by her is to assume control of the property and take it into her custody; dispose of the property by private sale or other means; and deposit the proceeds in the Criminal Assets Recovery account established under s 63 of POCA, account number 8[...], held at the South African Reserve Bank.

9. Ms Selinah Letuka or the person authorized by her shall as soon as possible, but not later than a period of 90 days from the date in respect of which this order is to take effect, file a report with the National Director of Public Prosecution on the manner in which she:

8.1 Completed the administration of the property; and

8.2 Complied with the terms of this order.

Phatshoane DJP

APPEARANCES:

For the applicant: Ms M P Msinda

Instructed by Office of the State Attorney, Kimberley.

For the respondent: Mr L Matlejoane

Instructed by

Matlejoane Attorneys, Kimberley