

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

**CASE NO: 1914/2019**

Reportable:	YES / <b>NO</b>
Circulate to Judges:	YES / <b>NO</b>
Circulate to Magistrates:	YES / <b>NO</b>
Circulate to Regional Magistrates:	YES / <b>NO</b>

In the matter between:

**THE NATIONAL DIRECTOR OF PROSECUTIONS**

**Applicant**

and

**FRANCO SMITH**

**First Respondent**

**IGNATIUS SMITH**

**Second Respondent**

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**JUDGMENT**

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**EILLERT AJ:**

**Introduction:**

- [1] This matter is an application to have property belonging to the Second Respondent, Mr Ignatius Smith, declared forfeit in terms of the provisions of the Prevention of Organised Crime Act 121 of 1998 ("POCA"). The property concerned are:

- (a) a Ford Ranger 2.5 Single Cab-motor vehicle (or 'bakkie') with registration numbers and letters C[...] 8[...] N[...], chassis number A[...] and engine number Q[...] ("*the Ford*"); and
- (b) a .222 calibre Sako rifle with serial number 3[...] ("*the Sako*").

In some instances in this judgment, I will refer to the aforesaid property individually, and in other instances collectively as "*the property*".

### **The factual background**

- [2] The Second Respondent is the owner of a riverfront property next to the Vaal River near Douglas, as well as a farm in the Douglas or Kimberley district, known as Koppiesdam. On the 15<sup>th</sup> of November 2018 a neighbour of the Second Respondent at the riverfront property, Ms Era Van Dyk, noticed that the Second Respondent's son, the First Respondent, was at the property and that the Ford was parked in the garage. When the First Respondent left the riverfront property in his girlfriend's car, Van Dyk went next door to have a look at what was loaded on the Ford. Van Dyk discovered dead animals at the back of the Ford, namely a kudu, two warthogs and a blesbuck. She took photographs of the animals and the number plate of the Ford with her cellular phone. Six days later, on the 21<sup>st</sup> of November 2018, Van Dyk again saw the Ford at the riverfront property and noticed that it was fitted with a spotlight. She photographed this as well.
- [3] During October and November 2018 Mr Cisco Cilliers, a farmer in the Douglas area, found a number of animal heads, intestines and skins of a kudu, warthog and blesbuck on his farm and near the road to Douglas. He took photographs thereof. Cilliers started investigating the occurrence and was informed by farm workers in the area that poachers were using a Ford bakkie and that such vehicle had been spotted by farmers in the area on a regular basis. He also received information from farm workers that it was the First Respondent that was responsible for the poaching. Cilliers received the

photographs taken by Van Dyk and went to confront the First Respondent at the riverfront property. He did not find the First Respondent there on the day but spoke to a person apparently in the employ of the First Respondent, who confirmed to Cilliers that they slaughter game at the riverfront property. Cilliers warned this person that they should stop with their poaching activities and that Cilliers would make sure that they are arrested.

[4] Cilliers arranged a meeting with farmers in the Douglas area during November 2018 to decide how to address the problem with poaching that they were experiencing. Mr Sean Ralph was present at the meeting. Ralph identified the Ford as the property of the Second Respondent. Because Ralph knew the Second Respondent well, he phoned the Second Respondent on the 22<sup>nd</sup> of November 2018 to inform him about the allegations of poaching against the First Respondent. The Second Respondent answered the phone call but told Ralph that he had clients with him and that he was on his way to a meeting. The Second Respondent requested Ralph to contact the First Respondent directly. Ralph tried to phone the First Respondent, but the First Respondent did not answer his phone. Ralph also sent messages via '*WhatsApp*' to the First and Second Respondents, attaching the photographs taken by Van Dyk and Cilliers, and thereby informed them of the allegations of poaching against the First Respondent and the intention of the farmers in the Douglas area to have the First Respondent arrested. The First Respondent answered Ralph via '*WhatsApp*' and provided an explanation for the shooting of the game, but did not respond when asked where the game had been shot.

[5] Another farmer in the Douglas area, Mr Johannes Jacobus Du Toit, was experiencing a lot of problems with poaching during 2018, especially on his farms situated next to the gravel road between Kimberley and Schmidtsdrift. At least four incidents took place during which Du Toit's fences were cut, and during which he found vehicle tyre prints in the veld and blood and intestines of game that had been shot. The last incident took place between the 14<sup>th</sup> and the 16<sup>th</sup> of November 2018 during which a kudu and two springbucks were poached. A criminal case was registered with the Plooyburg branch of the South African Police Service ("*SAPS*"), but no arrests were made, and the

case docket was closed. As a result of the poaching activities Du Toit and another farmer, Mr Dougie Cox, started keeping the gravel road between Kimberley and Schmidtsdrift under surveillance at night.

- [6] Matters came to a head on the evening of the 29<sup>th</sup> of November 2018. At 19h10 that night Du Toit was on his way to a surveillance point when he encountered the Ford between a farm of his and that of Cox. He recognised the vehicle and its occupants as he had seen them on the gravel road before. He then lost sight of the Ford and assumed that the vehicle's lights had been switched off. Du Toit called Mr Coenraad Johannes Bezuidenhout, a farmer residing closer to the road from Kimberley to Douglas, for assistance. He also called the SAPS Stock Theft Unit situated in Kimberley and reported the suspicious vehicle. Bezuidenhout commenced observing the T-junction where the Kimberley/Schmidtsdrift Road meets the Kimberley/Douglas tar road. In due course the Ford arrived at the T-junction, turned right, and drove toward Douglas. Bezuidenhout followed the Ford until it turned again and entered the farm Koppiesdam. Two officers of the SAPS Stock Theft Unit, Sergeant Mokgalagadi and Warrant Officer Bean, made their way to Koppiesdam. They entered the farm and found the First Respondent, a Mr John Thabang Hoogstaander, Bezuidenhout, other farmers of the area, and the Ford there. Bean noticed fresh blood and the hair of a kudu on the back of the Ford. He did not see any damage to the Ford. Initially the First Respondent and Hoogstaander told Bean that the blood belonged to springbucks which they had shot earlier that day, and that the rifle they had used was at the First Respondent's home. However, upon further investigation, Bean discovered the carcasses of two female kudus with gunshot wounds to the heads and throats cut open in the veld, and the Sako in a rifle bag behind a dam. Bean searched the Ford and found two .222 calibre cartridges in the vehicle. Whilst still on the farm, Du Toit contacted Bean and informed him that Du Toit had found a pool of blood and drag marks against the fence of the farm Kingston that is also located on the Kimberley/Schmidtsdrift gravel road. The following day Ms Anna Van der Merwe of the farm Kalkdam informed Du Toit that she had found a pool of blood in her veld, that the fence of her farm had been cut, and that there were

drag marks visible on the ground indicating that an animal had been dragged through the cut fence and toward the road. The First Respondent and Hoogstaander were arrested on the night of the 29<sup>th</sup> of November 2018, and the Ford and the Sako were seized by the SAPS.

- [7] As a result of the events of the 29<sup>th</sup> of November 2018 the First Respondent and Hoogstaander were charged in the Regional Court with three counts of contravention of the Northern Cape Nature Conservation Act 9 of 2009 (*“the Nature Conservation Act”*). The charges related to what transpired on the 29<sup>th</sup> of November 2018, and not to the earlier occurrences referred to above. The Second Respondent was not charged with any offence. The First Respondent pleaded guilty to the charges and admitted that the Ford and the Sako had been used during the commission of the offences. The First Respondent received a sentence of a fine of R12 000.00- or 12-months imprisonment, and an additional two years imprisonment, wholly suspended for a period of five years, on condition that the First Respondent not be found guilty of any similar offence during the said period.

### **The proceedings in this Court**

- [8] Subsequent to the events set out above, the National Director of Public Prosecutions applied to this Court for a preservation of property order. On the 22<sup>nd</sup> of May 2020 this Court, per Nxumalo AJ (as he then was), made a final preservation of property order in terms of section 38 of POCA in terms whereof the Ford and the Sako were preserved. The upshot hereto is the application for forfeiture that is the subject of this judgment. <sup>1</sup>

### **The issues to be determined**

- [9] The issues that must be adjudicated in this matter are threefold, namely:

#### **9.1 Whether the property are instrumentalities of an offence within the meaning of**

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<sup>1</sup> Due to circumstances not entirely within my control the delivery of this judgment has been significantly delayed. I regret this delay, and sincerely apologise to the parties involved.

the provisions of POCA;

- 9.2 If so, whether the Second Respondent's interest in the property ought to be excluded based on the so-called innocent owner defence provided for in section 52(2A) of POCA; and
- 9.3 whether it would be disproportionate to order forfeiture of the property in favour of the State.

### **Instrumentality of an offence**

- [10] Section 48(1) of POCA authorises the National Director of Public Prosecutions to apply to a High Court for an order forfeiting to the State all or any of the property that is subject to a preservation of property order. Section 50(1) of POCA provides as follows:

***“50. Making of forfeiture order. - (1) The High Court shall, subject to section 52, make an order applied for under section 48 (1) if the Court finds on a balance of probabilities that the property concerned—***

*(a) is an instrumentality of an offence referred to in Schedule 1;*

*(b) is the proceeds of unlawful activities; or*

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

- [11] The Applicant submits that the property are instrumentalities of an offence referred to in Items 25 and 33 of Schedule 1 of POCA. Item 25 of Schedule 1 addresses offences of dealing in, being in possession of or conveying endangered, scarce and protected game or plants or remains thereof in contravention of a statute or provincial ordinance, whilst Item 33 deals with any offence the punishment whereof may be a period of imprisonment exceeding one year without the option of a fine. The Second Respondent has not disputed the applicability of Items 25 and 33 of Schedule 1 of POCA.

[12] In **National Director of Public Prosecutions v RO Cook Properties (Pty) Ltd 2004 (8) BCLR 844 (SCA)** (“*Cook Properties*”) and **Prophet v National Director of Public Prosecutions 2006 (1) SA 38 (SCA)** (“*Prophet*”) the Supreme Court of Appeal determined the approach that this Court must take in an application for forfeiture in terms of POCA. Mpati DP (as he then was) summarised this approach in *Prophet* as follows:<sup>2</sup>

*“In National Director of Public Prosecutions v RO Cook Properties this Court held that where a forfeiture order is sought the court undertakes a two-stage enquiry. First, it ascertains whether the property in issue was an instrumentality of an offence. At this stage the owner's culpability is not relevant. The only question is whether a functional relation between property and crime has been established. Once that has been confirmed the property is liable to forfeiture and the court then proceeds to the second stage of the enquiry, viz whether certain interests in the property should be excluded from the operation of the forfeiture order (section 52). "Interests" include ownership. An owner is, therefore, not precluded from applying that his/her full interest in the property be exempted. The statute requires persons with an interest in the property, when opposing forfeiture or applying for an exclusion of an interest, to state that they acquired the property concerned legally and that they:*

*(a) 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; or*

*(b) where the offence concerned had occurred before the commencement of this Act, the applicant has since the commencement of this Act taken all reasonable steps to prevent the use of the property concerned as an instrumentality of an offence referred to in Schedule 1(section 52(2A)).*

*(As will emerge later in this judgment the appellant relies on neither (a) nor (b) above.) It is at this second stage of the enquiry that a proportionality analysis*

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<sup>2</sup> At paragraph [11]

*"may . . . in addition be appropriate". So also the owner's culpability."*

- [13] Section 1 of POCA defines an *"instrumentality of an offence"* 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, whether committed within the Republic or elsewhere."* Our Courts have however held a narrow interpretation of the definition of *"instrumentality"* to be appropriate, as the following dictum in Cook Properties states<sup>3</sup>:

*"[31] As will appear when we discuss the individual cases, it is not necessary for us to determine comprehensively what standard applies, nor (because of their outcome) to apply a proportionality analysis to the appeals before us. For now it is enough to say that the words "concerned in the commission of an offence" must in our view 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 (albeit that it is defined to extend beyond its ordinary meaning), 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."*

- [14] The Court in Cook Properties found practical assistance in *S v Bissessue* 1980 (1) SA 228 (N) and stated as follows at paragraph [32] of the unanimous judgment:

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<sup>3</sup> At paragraph [31]



*“... Here, despite its different (and pre-constitutional) context, we find practical assistance in S v Bissessue, where a magistrate declared forfeit a motor vehicle and fishing rods used in fishing without a licence under an ordinance that, in addition to a criminal penalty, required the court to declare any article used “in, for the purpose of, or in connection with the commission of the offence” forfeit. On appeal the forfeiture of the fishing rods was upheld, but that of the vehicle was set aside. The court held that “to qualify for forfeiture the thing must play a part, in a reasonably direct sense, in those acts which constitute the actual commission of the offence in question”. The same in our view applies to “instrumentality of an offence”. As suggested in NDPP v Prophet, 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. Every case will of course have to be decided on its own facts.”*

- [15] The Applicant submits that the property ought to be considered as instrumentalities of an offence as: (i) the Ford was employed to drive to the places where the kudus were shot with the Sako, loaded onto the Ford and transported to Koppiesdam; (ii) the Ford and the Sako were used more than once for illegal hunting and the instance on the 29<sup>th</sup> of November 2018 was not a once-off act; (iii) the Ford was fitted with an LED-light used to light toward the ground in front of the Ford so as not to be visible to other road users, (iv) the property were directly linked to the carrying out of the offences, were not merely incidental to the carrying out of the offences and formed part of the offences, and (v) the First Respondent could not perpetrate the offences without the property.
- [16] On behalf of the Second Respondent it was submitted that the property cannot be regarded as instrumentalities, as the mere use thereof does not satisfy the requirements of POCA set out above. The property was not integral to the commission of the offences, as the First Respondent could have utilised any similar property, which are commonly available, to commit the offences.

Furthermore, the Second Respondent did not conspire with the First Respondent to commit the offences, and the Ford was not specially adapted to make the commission of the offences possible.

[17] I am satisfied, on a balance of probabilities, that a sufficiently close link between the property and the offences committed has been established to warrant a finding that the Ford and the Sako are instrumentalities of the offences. The property facilitated or made possible the commission of the offences. In the words of **National Director of Public Prosecutions v Carolus and Others**<sup>4</sup> and **National Director of Public Prosecutions v Seleokane and Others**<sup>5</sup>, they were the very means by which the hunting and transporting of game and protected animals in contravention of the Nature Conservation Act took place. The property was not merely incidental to the commission of the offences but were in fact instrumental therein. This finding is further supported by the authorities of **NDPP v Swart 2005 (2) SACR 186 (SE)** and **National Director of Public Prosecutions v Engels 2005 (3) SA 109 (C)**.

[18] Except for the issue of the LED-light fitted unto the Ford, on which there was some debate at the hearing, I agree with the propositions of the Applicant, and they are relevant factors supporting the finding that the property are instrumentalities of the offence. On the basis of *Plascon-Evans*<sup>6</sup>, I must find that the LED-light fitted unto the Ford was for benign purposes, and not for any purpose related to illegal hunting.

[19] It is more probable than not that the First Respondent was involved in a pattern of sustained activity, and not just in the events of the 29<sup>th</sup> of November 2018. The facts set out in paragraphs [2] to [5] above span over a time-period of at least two months, if not more, and were detailed in several supporting affidavits forming part of the Applicant's founding papers. Only the Second Respondent filed opposing papers throughout the proceedings and could

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<sup>4</sup> 1999 (2) SACR 27 (C)

<sup>5</sup> [2003] 3 All SA 102 (NC)

<sup>6</sup> *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634 - 635

plausibly deny knowledge of the events preceding the 29<sup>th</sup> of November 2018. Tellingly, the person who could deny the events preceding the 29<sup>th</sup> of November 2018 or could provide an explanation which would negate his involvement, the First Respondent, chose not to file answering papers. I must therefore conclude that there is veracity in the averments of a pattern of sustained activity by the First Respondent. Cilliers' statement in his supporting affidavit that the poaching of game came to an end after the arrest of the First Respondent is further noteworthy in this regard.

- [20] I agree with the Second Respondent that the mere use of the property would not satisfy the requirements of POCA relating to instrumentality of an offence. That much is clear from the statutory definition of instrumentality quoted above, and the interpretation thereof found in *Cook Properties*. The First Respondent's employment of the property however went beyond mere use, and I have already found that the property was integral in the commission of the offences. As to the argument that the property was not integral to the commission of the offences as the First Respondent could have utilised any similar property, which are commonly available, to commit the offences, such an extremely narrow interpretation of the meaning of 'instrumentality' does not accord with the provisions of POCA and the interpretation thereof by our courts, as such a proposition would operate to exclude from forfeiture any property which has not in some way been specially adapted for the commissioning of an offence, something which the legislature clearly did not intend. I furthermore agree that there is no indication in the papers that the Second Respondent conspired with the First Respondent. Even so, my conclusion of the property being instrumentalities of an offence remain undisturbed.

### **The innocent owner defence**

- [21] I may now proceed to the second leg to the Second Respondent's opposition to the application, being his reliance on the so-called innocent owner defence encapsulated in section 52(2A) of POCA. Section 52(2A) provides as follows:

*“(2A) The High Court may make an order under subsection (1), in relation to the forfeiture of an instrumentality of an offence referred to in Schedule 1 or property associated with terrorist and related activities, if it finds on a balance of probabilities that the applicant for the order had acquired the interest concerned legally, and—*

*(a) 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 or property associated with terrorist and related activities; or*

*(b) where the offence concerned had occurred before the commencement of this Act, the applicant has since the commencement of this Act taken all reasonable steps to prevent the use of the property concerned as an instrumentality of an offence referred to in Schedule 1 or property associated with terrorist and related activities.”*

The provisions of subrule (b) to section 52(2A) do not find application herein.

[22] Section 52 of POCA casts an onus on the owner of the property concerned to prove certain facts on a balance of probabilities before the Court can make an exclusionary order.<sup>7</sup>

[23] In the matter at hand, it is not contentious that the Second Respondent acquired ownership of the Ford and the Sako legally. What is in contention is the Second Respondent's assertion that he did not know nor had reasonable grounds to suspect that the property is an instrumentality.

[24] On the papers there is some uncertainty whether the Second Respondent and the First Respondent were still residing in the same residence at the time that the offences were committed. It is clear though that the First Respondent used the Ford as he did not have a vehicle of his own. On the Second Respondent's version, the First Respondent used the Ford to earn an income

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<sup>7</sup> See Cook Properties, paragraph [24]

from time to time, to perform tasks for the Second Respondent and his wife, to transport a motorcycle and, in general, for his private use. There is no indication in the opposing papers that the First Respondent was employed at the time of the offences. The Sako was kept in a safe at the residence where at least the Second Respondent's wife and the First Respondent were residing. They had unfettered access to the safe. In this regard the Second Respondent explained that it was necessary for the First Respondent and his wife to have access to the safe as a side-arm was kept in it and they needed access thereto for the purposes of self-defence.

- [25] Initially, the Second Respondent stated in his answering affidavit in the preservation proceedings that he was not aware that the First Respondent was involved in any illegal activities. He further asserted that he did not authorise the First Respondent to use the property for illegal purposes. It was the version of both the First Respondent (in his plea explanation in the criminal proceedings) and the Second Respondent that the Second Respondent was not aware that the First Respondent had taken the Sako out of the safe, or for what purpose the First Respondent would use the Ford on the 29<sup>th</sup> of November 2018. The Second Respondent however did not dispute the communication that he had had with Ralph on the 22<sup>nd</sup> of November 2018. This was a week before the events of the 29<sup>th</sup> of November 2018. At the time, Ralph informed him about the allegations that the First Respondent was involved in the poaching of game and was utilising the Ford for this purpose. This was conveyed to the Second Respondent telephonically and via 'WhatsApp', and the photographs of the Ford and the game taken by Van Dyk and Cilliers were forwarded to the Second Respondent. At this point in the Second Respondent's answering affidavit his responses become rather peculiar. He stated that he was initially unable to speak to Ralph, as he had a client with him. When he phoned Ralph back, he told him that he was not aware of the facts and that Ralph should "sort it out" with the First Respondent. In paragraphs 16 and 17 of the answering affidavit the Second Respondent stated as follows:

*"16. Ek het toe vir Franco ook geskakel en was sommer baie kwaai met hom.*

*Ek het teenoor hom genoem dat ek die fotos van Shaun gekry het en dat hulle die ding moet uitsorteer. Ek was baie kwaad om te hoor dat hy by sulke goed betrokke was / is.*

17. *Franco, die Eerste Respondent, is 'n volwasse persoon van 27 jaar oud en ek het geglo dat hy, as daar enige onwettighede was, dit sou regstel. Ek het nie vermoed of geglo dat daar weer voorvalle sou wees nie. Ek het dus nie gedink dit nodig sou wees om drastiese stappe te neem nie. Franco het feitlik uitsluitlik die betrokke bakkie gebruik en kon nie daarsonder sy dag-tot-dag take verrig nie. Ek was verder ook nie bewus daarvan dat Franco self 'n vuurwapen gebruik het, en indien wel, watter vuurwapen nie. Die omstandighede, bv. of daar ook ander persone betrokke was, was onbekend aan my" (my emphasis added).*<sup>8</sup>

Based on the aforesaid paragraphs, the Second Respondent did not unequivocally deny the possibility that there was truth to the allegations that the First Respondent had been involved in illegal poaching activities prior to the 29<sup>th</sup> of November 2018, nor did he assert that he did not have reason to believe the veracity of the allegations. His attitude toward the allegations seemingly were that the First Respondent was an adult and that the First Respondent would need to address the possible illegalities. This, however, negates the fact that both the Ford and the Sako were registered in the Second Respondent's name and that the Second Respondent bore the responsibility for the way the property was utilized.

- [26] It has not been suggested, nor can I find, that the Second Respondent knew of the First Respondent's illegal activities on the 29<sup>th</sup> of November 2018 or

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<sup>8</sup> Loosely translated, these passages read as follows:

16. *I then also phoned Franco and was quite angry with him. I told him that I had received the photos from Shaun and that they should sort the matter out. I was very angry when I heard that he was/ is involved in matters such as this.*
17. *Franco, the First Respondent, is an adult who is 27 years old, and I believed that, if there were any illegalities, he would set matters right. I did not suspect or believe that the incidents would occur again. I therefore did not think that it was necessary to take drastic steps. Franco in fact utilised the bakkie exclusively and could not perform his day-to-day tasks without it. Furthermore, I was not aware that Franco himself had used a fire-arm, and if so, which fire-arm. The circumstances, for instance if others were also involved, were unknown to me.*

participated therein. However, based on the Second Respondent's own version, I am compelled to find that the Second Respondent did not discharge the onus, on a balance of probabilities, to show that he did not have reasonable grounds to suspect that the property was an instrumentality of an offence.

[27] In *Cook Properties*, the Court held as follows regarding the responsibility of property owners:

*“[28] Mr Kuper for the NDPP in Cook Properties and 3[...] G[...] Street argued that the Chapter is intended “to recruit property owners into an active role” as guardians of their property against crime. We agree that property owners cannot be supine. In particular, we endorse the notion that the State is constitutionally permitted to use forfeiture, in addition to the criminal law, to induce members of the public to act vigilantly in relation to goods they own or possess so as to inhibit crime. In a constitutional State law-abiding property-owners and possessors must, where reasonably possible, take steps to discourage criminal conduct and to refrain from implicating themselves or their possessions in its ambit. And the State is entitled to use criminal sanctions and civil forfeitures to encourage this. Here constitutional principle recognises individual moral agency and encourages citizens to embrace the responsibilities that flow from it.*

*[29] We therefore agree that the Act requires property owners to exercise responsibility for their property and to account for their stewardship of it in relation to its possible criminal utilisation...”*

[28] In the circumstances of this matter, to have discharged the onus, one would have expected of the Second Respondent to have done more than merely giving the First Respondent a stern talking to and to trust that the First Respondent, as an adult, would not involve himself in any further possible offences. I am of the view that the law expected of the Second Respondent to at least have investigated the allegations of poaching properly, and at the very

least to have restricted the First Respondent's access to the means by which potential further offences could be committed. In the circumstances, the Second Respondent unfortunately cannot avail himself of the innocent owner defence.

### **Proportionality**

[29] The question that remains is that of proportionality, namely, to determine on a balance of probabilities whether the grant of a forfeiture order would amount to an arbitrary deprivation of property in contravention of section 25(1) of the Constitution. In this regard a thorough and very helpful analysis of all factors that ought to be considered during this analysis was provided by the Constitutional Court in **Mohunram and Another v NDPP 2007 (2) SACR 145 (CC)**. I have been guided by the principles stated therein and, save for what I will allude to below, I do not find it necessary to repeat *verbatim* what was set out in paragraphs [56] to [102] of such case.

[30] In paragraph [57] of Mohunram, Van Heerden AJ held as follows:

*“The proper application of a proportionality analysis weighs the forfeiture and, in particular, its effect on the owner concerned, on the one hand, against the purposes the forfeiture serves, on the other. The broader societal purposes served by civil forfeiture under chapter 6 of POCA have been held to include:*

- removing incentives for crime;*
- deterring persons from using or allowing their properties to be used in crime;*
- eliminating or incapacitating some of the means by which crime may be committed; and*
- advancing the ends of justice by depriving those involved in crime of the property concerned.”*



- [30] According to the Second Respondent, the trade value of the Ford in 2020 was the amount of R124 000.00. (I accept that the value of the Ford would have decreased significantly by the time that this judgment is delivered). The Second Respondent further estimated the value of a new Sako rifle with a telescope to be an amount of R25 000.00, and the second-hand value thereof to be R13 000.00. These estimates were accepted by the Applicant at the hearing. The value of the kudus, if hunted, were put by the Second Respondent at R4 000.00 per animal, and therefore R8 000.00 in total. Based on these figures alone, it was argued on behalf of the Second Respondent that forfeiture of the property would be disproportionate. As I have shown in the previous paragraph, these are not the only considerations to bear in mind. Of course, I have already found that it is more probable than not that the events of the 29<sup>th</sup> of November 2018 were not a once-off occurrence, and the Second Respondent's estimates therefore do not consider the other losses that were probably suffered by all the affected farmers in both the loss of game, damage to property, and time and money spent in bringing the First Respondent and his accomplice to book.
- [31] I must also bear in mind that the Second Respondent has already been effectively deprived of the property since 2018 for the duration of the proceedings in this Court. Additionally, a criminal sanction was imposed on the First Respondent, and I referred to his sentence in paragraph [7] above. It is also so that it was the First Respondent who was sentenced, and that thus far, but for the preservation of the property, the Second Respondent has not suffered any consequence.
- [32] Contravention of the Nature Conservation Act is regarded as a serious offence. The penalty clause of the Act prescribes a maximum sentence of both a fine and a period of imprisonment of ten years. As the Full Court observed in **National Director of Public Prosecutions v Mniki**<sup>9</sup>:

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<sup>9</sup> (CA 85/2011) [2011] ZAECGHC 41 (25 August 2011)

*“[12] The offence with which the respondent was charged related to hunting protected wild animals without the requisite permit. The uncontroverted evidence of Mike Eksteen of the department of economic development and environmental affairs highlighted the prevalence of these offences. It appears to be widespread and combating it is extremely difficult as it occurs mostly at night. Conservation of our wildlife is a national priority and the ravages of indiscriminate poaching is obvious. The animals poached were in all likelihood the property of other persons and the loss to them not insubstantial...”*

[33] Taking all of the considerations set out above into account, I am not persuaded that the forfeiture of the property would be disproportionate. I am of the considered view that an order for forfeiture would serve the broader societal purpose of deterrence and would advance the ends of justice.

## **ORDER**

[34] In the premise the following order is made:

1. In terms of the provisions of section 50 of the Prevention of Organised Crime Act 121 of 1998 (POCA), the following property seized and held by the South African Police Service (SAPS) under Kimberley CAS 89/11/2018, which is currently subject to a preservation of property order granted by this Court on 30 August 2019, is declared forfeit to the State:
  - 1.1 the Ford Ranger 2.5 Single Cab-motor vehicle with registration numbers and letters C[...] 8[...] N[...], chassis number A[...] and engine number Q[...]; and
  - 1.2 the .222 calibre Sako rifle with serial number 3[...].
2. In terms of section 50(6) of POCA, paragraph 5 below shall take effect 45 days after publication of a notice thereof in the Government Gazette.
3. The VSS Commanding Officer, Kimberley, will take care of the property 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 VSS Commanding Officer, Kimberly.
5. On the date on which this order takes effect, to wit 45 days after publication in the Government Gazette, the VSS Commanding Officer, Kimberley, shall hand the property to a Senior Special Investigator of the Applicant, who shall:
  - 5.1 Assume control of the property and take it into his custody;
  - 5.2 Sell the property at a best price either by public auction or private treaty;
  - 5.3 Sign all documents necessary to effect the sale, transfer and registration of the property; and
  - 5.4 Pay the proceeds thereof, less any commission and incidental expenses occasioned by the sale, into the Criminal Assets Recovery Account number 8[...] established in terms of section 63 of POCA.
6. The Applicant is further directed to publish a notice of this order in the Government Gazette as soon as it is practicable.

**A EILLERT**  
ACTING JUDGE

Date of hearing: 29 January 2021  
Date of Judgment: 19 July 2024

On behalf of the Applicant:

**Adv. L Van Dyk**  
**(Instructed by NDPP)**

On behalf of the Second Respondent:

**Adv J.J Schreuder**

**(Instructed by Engelsman Magabane Inc.)**