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IN THE NORTH WEST HIGH COURT, MAFIKENG

CASE NO: M 405/2014

In the matter between:

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS Applicant

and

DINGAAN DAVID SELABE Respondent

DATE OF HEARING : 17 MAY 2018

DATE OF JUDGMENT : 07 JUNE 2018

COUNSEL FOR THE APPLICANT : ADV. VAN DYK

COUNSEL FOR THE RESPONDENT : ADV. VOSTER

JUDGMENT

HENDRICKS J

Introduction

[1] On the 25th September 2014 the National Director of Public Prosecutions (the applicant) applied, on an *ex parte* basis, for a preservation order in terms of section 38 of the Prevention of Organized Crime Act No 121 of 1998 (“POCA”) of some of the property (movable and immovable) belonging to Mr. Dingaan David Selabe (the respondent). Gura J granted the interim preservation order. On the 29th October 2014, after service of the interim preservation order, the respondent filed a notice of intention to oppose coupled with an opposing affidavit.

[2] On 04th February 2015 the applicant applied for a forfeiture order in terms of section 48 of POCA. After several postponements of the matter, it eventually served before Kgoele J on 30th November 2017. It was ordered that the matter be postponed until 17th May 2018 and that the applicant should file “*a supplementary affidavit explaining ownership of the land where the house was build as well as explaining how the vehicle still under finance can be forfeited to the State.*” After listening to oral submissions by counsel on 17th May 2018 and upon perusal of the documents filed, judgment was reserved.

Background Facts

- [3] It is alleged by the State that the respondent is a member of a crime syndicate which defrauded complaints out of large sums of money by way of false tender processes. The syndicate targeted wealthy business men and building contractors. They would impersonate government officials of the Department of Human Settlement in the North West Province and the complainants were promised Government tenders if they pay large sums of money into the bank accounts of members of the syndicate in order to secure these tenders.
- [4] A crime combatting project was registered and 13 members, including the respondent, were arrested. They are currently on trial in the High Court on charges of *inter alia* money laundering and racketeering. It was established that the respondent registered a business under the name of Selebi Constructions CC and opened a bank account in its name. Large sums of money were deposited by members of the syndicate into this bank account. Investigations revealed that the money was used to *inter alia* acquire motor vehicles and build a house in Majemantsho Village, Mahikeng. Payments to the builders of this house were made from the bank account of the respondent. During the period of almost a year (2011 – 2012) more

than R1.4 million was deposited and used from the bank account of the respondent. This, whilst the respondent did not have a legitimate income. The respondent lived a lavish lifestyle and spend most of the money on everyday living expenses.

- [5] The bank account of Selebi Constructions CC was mainly used to transfer proceeds of unlawful activities. For example, an amount of R224 312.00 was deposited into this account and the whole amount was subsequently withdrawn, which is a clear indication that this account was not utilized as a business account but rather as a conduit pipe to channel and to launder money. Several motor vehicles were acquired by the respondent. The preservation order makes provisions that four motor vehicles be attached and preserved. The *curator bonis* appointed by the Court in terms of the preservation order of 25th September 2014 by Gura J, established that three (3) of the motor vehicles mentioned in the preservation order were already disposed off by the respondent at the time when the order was obtained. The only remaining motor vehicle is a Range Rover manufactured by Land Rover, bearing registration numbers and letters [...] NW. In terms of the supplementary affidavit filed in compliance with the court order of Kgoele J, this Range Rover is paid up.

- [6] The application for forfeiture is opposed by the applicant. The applicant filed a very concise answering affidavit, which does not answer all the allegations levelled against him. He denies

involvement in any crime and maintain his innocence. The forfeiture order is further opposed on the basis that it should only be applied for after the criminal case has been finalized or at least after the respondent had testified in the criminal trial. It was contended that if a comprehensive affidavit is made at this stage, it would compromise the position of the respondent and would negatively affect his right to a fair trial. To expect of the respondent to divulge information at this stage of his criminal trial in opposition of the forfeiture order is tantamount to trial by ambush. Furthermore, was it contended by Adv. Voster on behalf of the respondent, that the house in Majemantsho Village, which is build on tribal land, cannot be forfeited because ownership of the land resort in the Traditional/Tribal Council. The Traditional/Tribal Council, so it was contended, is not a party to these proceedings and should at least have been joined because it has a vested interest in this matter.

- [7] The Chief / Kgosi of the Barolong Boora Tshidi Tribe, Kgosi Jeffrey Montshioa deposed to an affidavit on the letterhead of the Barolong Boora Tshidi Traditional Council and declare:

“We would like to utilize the house of Dingaan David Selabe situated in Majemansho Village for community use as guest house or crèche or as the Traditional Council may decide after the forfeiture application is finalized or successful.”

[8] There is therefore no uncertainty or any dispute with regard to the ownership of the land on which the house of the respondent is build in Majemansho Village. The land belongs to the Barolong Boora Thsidi Tribe. The Barolong Boora Tshidi Traditional Council under the auspices of Chief / Kgosi Jeffrey Montshioa manage the affairs of the tribe. The affidavit of Chief / Kgosi Jeffrey Montshioa is unequivocally clear that in the event this Court grant the forfeiture order, the Traditional/Tribal Council of the tribe will utilize the house of the respondent either as a guest house or crèche, or as the Traditional/Tribal Council may decide. Therefore, nothing debar the granting of the forfeiture order of this house should this Court decide to grant such an order. The objection by Adv. Voster that the Traditional/Tribal Council is not cited as a party to these proceedings is unmeritorious.

[9] Insofar as the Range Rover motor vehicle is concerned, the Duputy Director of Public Prosecutions Adv. Maphummulo states that according to the *curator bonis*, the debt of the motor vehicle with Wesbank has been settled in full. The respondent is therefore the registered owner and title holder of this motor vehicle. During oral submissions, Adv. Voster on behalf of the respondent, made it common cause that the said Range Rover motor vehicle is fully paid and conceded that as such it may be declared forfeited, should this Court decide to make such an order.

[10] Adv. Van Dyk, on behalf of the applicant, submitted that the affidavit of the respondent lack detail. Not all the averments made by the applicant in its founding affidavit has been contested by the respondent in his opposing affidavit. This much was conceded to by Adv. Voster on behalf of the respondent. Averments that are uncontested or uncontroverted should be regarded as been admitted. Bear denials are also regarded as admissions.

[11] Adv. Voster with reference to paragraph 21 of the respondent's heads of argument, stated that it cannot be expected of the respondent at this juncture to depose to an affidavit and fully declare under oath details that may not be beneficial for him in his criminal trial. Should the respondent now before his criminal trial is finalized or before he testified in the criminal trial depose to such an affidavit, *"he would be a victim of a disguised effort by applicant to ambush him to reveal his defence."* This, he submitted, is based on common sense.

[12] In reply to this contention, Adv. Van Dyk referred this Court to the Full Bench decision of the High Court of South Africa, Gauteng Division, Pretoria in the matter of **Ntsoko v National Director of Public Prosecutions** 2016 (1) SACR 103 (GP) (Ntsoko matter). That court stated:

"[15] That POCA is draconian and invasive, was reiterated and confirmed by Bosielo AJA (as he then was) writing for the Court

in the matter of Mazibuko and another v National Director of Public Prosecutions, through the following remarks:

"[22] It is generally acknowledged that the effects of forfeiture are draconian and potentially invasive of the rights of people to their properties. There is an ever-present threat of a serious conflict between the right to property as provided for in s 25(1) of the Constitution and an order for the forfeiture of property under s 50(1) of POCA which can result in far-reaching consequences if not managed with care. I agree with Nkabinde J in Prophet v National Director of Public Prosecutions where she expressed the following caution:

'While the purpose and object of ch 6 must be considered when a forfeiture order is sought, one should be mindful of the fact that unrestrained application of ch 6 may violate constitutional rights, in particular the protection against arbitrary deprivation of property particularly within the meaning of s 25(1) of the Constitution, which requires that no law may permit arbitrary deprivation of property. In first National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance (FNB) this Court held that arbitrary in s 25(1) means that the law allowing for the deprivation does not provide sufficient reason for the deprivation or allows deprivation that is procedurally unfair. The Court said:

"(F)or the validity of such deprivation, there must be an appropriate relationship between means and ends, between the sacrifice the individual is asked to make and the public purpose this is intended to serve. It is one that is not limited

to an enquiry into mere rationality, but is less strict than a full and exacting proportionality examination.'

[16] In the Prophet matter, it was also held that: "the general approach to forfeiture, once it had been established that the property was an instrumentality of an offence, was to embark on a proportionality inquiry--- weighing the severity of interference with individual rights to property against the extent to which the property had been used in commission of the offence." This approach, with respect, in my view, also holds well in instances of the innocent bystander as well as in dealing with proceeds of crime."

and also

"[26] It needs mention that the appellant did not make a full disclosure of his defence to the allegations mentioned herein above. The essence of his defence was a denial of being involved in any criminal activities and that the properties mentioned are proceeds of criminal activities and that failure to deal specifically with the allegations by the respondent is in no way to be construed as an admission thereof. He further pointed out that the investigations were made in 2010 but he is yet to be arrested and charged.

[27] In my view, regard being had to the above evidence placed before the Respondent, and before the Court, and the response of the appellant to the allegations leveled against him, the inference to be drawn is that the evidence was overwhelming and making it irresistible to infer and conclude that the properties and the amounts in the bank accounts of the appellant were indeed proceeds of criminal activities.

[28] *The amounts claimed, no sooner than they were deposited into the bank accounts of the appellant were immediately utilized to purchase the aforesaid immovable property and the vehicles, thus making them in terms of time very proximate to the commission of the fraudulent claims. In my view, there was also a potential risk that, left longer in the hands of the appellant, the money would be further depleted and the properties either devalued by usage. In respect of the house, left longer in the hands of the appellant or his sister, would be indirectly permitting them to further enjoy the spoils of the appellant's criminal activity, while awaiting finalization of a criminal trial, were chapter 5 to be employed, which, as already pointed out earlier, is a long process. I am therefore of the view that the decision of the respondent to resort to chapter 6 of POCA, cannot be faulted. In my view, in the circumstances of this case, the need to curb the evil of crime, benefiting from the proceeds of criminality, placed on a balancing scale, outweighs the constitutionally enshrined rights of the appellant.*

[29] *It is common cause that the respondent obtained an ex parte preservation order with a rule nisi, calling upon the appellant or any person with a legal interest, to show cause why the reserved properties, should not be declared forfeited. The court called upon to decide the forfeiture issue, is not called upon to decide the veracity of the evidence placed before it. It suffices, if the evidence satisfies the Court that there is a reasonable ground to believe that, the affected properties are proceeds of unlawful activities. On the other hand the appellant had to satisfy the Court on a balance of probabilities that it is not necessary to grant a forfeiture order. Towards acquitting the requirement placed on the appellant, it is not enough, in my*

view, to make bold statements of denial of criminality. The appellant must at least place facts which demonstrate that the properties were not procured out of criminality. In this regard, I am of the view that the appellant was quite correctly found lacking by the Court a quo. I am further of the view, that in as much as the Court must protect the constitutionally enshrined rights of the appellant, it must do so on factual grounds. The Court must also balance those rights of the appellant based on factual grounds, against the legislative object of POCA. In this instance, for the same reasons as pointed out herein above, I am of the view that, the rights of the appellant are by far outweighed by the legislative objects of POCA. The Court a quo remarked that it might be unfair to expect of the appellant to give his explanation at this stage of the application of forfeiture before he knows what charges are to be preferred against him, but nonetheless proceeded, quite correctly so in my view, to grant the forfeiture order. The fact of the matter is that both chapters (chapter 5 and 6) are remedies placed in the statute book available to the choice of the respondent. The trial Court quite correctly in my view rejected the contention of the appellant that both chapter 5 and 6 were unconstitutional. The Supreme Court of Appeal has to date, notwithstanding the plethora of POCA related cases before it, not found POCA, in particular chapter 5 and 6 unconstitutional.”

- [13] I am in full agreement with the *dicta* in the abovementioned **Ntsoko** matter. There is at least a duty on the respondent to rebut the allegations levelled against him. Mere or bear denials are insufficient. In my view, it also does not amount to a trial by ambush as submitted

by Adv. Voster. The contention by Adv. Voster that it infringe on the respondent's fair trial rights to depose to an affidavit in opposition to a forfeiture order when the criminal trial is not yet finalized or before the respondent, as an accused person testified in the criminal trial, does not hold water. Adv. Voster could not refer this Court to any authority in this regard and said that it is a matter of common sense. I am holding a different view. As so aptly stated by the Court in the unanimous decision of **Ntsoko**, supra, that there is a plethora of POCA – related cases and it was not found that POCA, in particular chapters 5 and 6, are unconstitutional.

[14] I am satisfied that the applicant succeed on a balance of probabilities to make out a case for the forfeiture of the Range Rover of the respondent and the house that the respondent build in Majemantsho Village.

Order

[15] Consequently, the following order is made:

1. An order be and is hereby granted in terms of the provisions of section 50(1) of the Prevention of Organised Crime Act 121 of 1998 (POCA) declaring forfeited to the State:

- 1.1 a Land Rover Range Rover motor vehicle with registration numbers and letters [...] NW, Chassis number

SALLSAA239A207267 and Engine number 0370317368DT (the motor vehicle); and

1.2 a house which the respondent build in Majemantscho Village (the house);

both presently subject to a preservation order granted by this Court on 25 September 2014 under the abovementioned case number.

2. The *curator bonis* appointed by this Court in terms of the preservation order on 25 September 2014, is directed to continue to act as such with authority to perform all the functions specified in POCA, subject to the provisions of the Administration of Estates Act 66 of 1965, and to the supervision of the Master of the High Court.

3. In terms of section 56(2) of POCA the vehicle and the house shall vest in the *curator bonis* on behalf of the State upon the granting of the order.

4. The *curator bonis* is authorised to:

4.1 assume control of the motor vehicle and take it into his custody;

4.2 sell the motor vehicle on public auction and/or private treaty and/or any other means; and

4.3 to deduct his fees and expenditure which were approved by the

Master of the High Court, from the proceeds of the sale of the Land Rover motor vehicle.

5. The forfeiture of the house is subject to the exclusion of any interest of the innocent owner of the land/house. In terms of section 52(2) of POCA ownership of the land and the house built thereon shall revert to the Barolong Boora Tshidi Traditional/Tribal Council. The house shall thereafter be utilised by the Traditional/Tribal Council and/or the Chief of the Majemantsho Village (Kgosi Jeffrey Kgotleng Montshioa) and/or his/their successors in title, not personally, but solely for the benefit of all the people of the village. The determination of such use shall be left to the discretion of the Traditional/Tribal Council from time to time.
6. The *curator bonis* is directed to ensure compliance with the provisions of this order. He shall as soon as possible, but not later than a period of ninety (90) calendar days of this order coming into effect, file a report with this Court on the manner in which he executed and complied with the terms of this order. A copy of the report must also be served on the Applicant.
7. Any person whose interest in the property concerned is affected by the forfeiture order, may within twenty (20) calendar days after he or she has acquired knowledge of such order, set the matter down for variation or rescission by this Court.

8. In terms of section 55 of POCA, the preservation order shall remain in force and all the provisions of this order shall operate with immediate effect, subject to the outcome of any possible appeal that may be lodged in this regard.

R D HENDRICKS
ACTING DEPUTY JUDGE PRESIDENT OF THE HIGH COURT,
NORTH WEST DIVISION, MAHIKENG