IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE LOCAL DIVISION, PORT ELIZABETH

Case no. 456/2015
Date heard: 19/11/15
Date delivered: 8/12/15
Reportable

In the matter between:

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS **Applicant**

and

KALMAR INDUSTRIES SA (PTY) LTD **Respondent**

JUDGMENT

PLASKET, J

[1] The applicant, the National Director of Public Prosecutions (the NDPP), applies in these proceedings for a forfeiture order in terms of s 50(1) of the Prevention of Organised Crime Act 121 of 1998 (POCA), a preservation order having been granted by this court on 10 February 2015. The property that is subject to the preservation order and in respect of which the forfeiture order is sought is described as follows in a schedule to the notice of motion in the preservation application:

‘1 a Swift 001 purpose built lifting platform, valued at R2 506 000;
2 Robert Muller’s tools and equipment valued at R57 400 . . .;
3 Robert MacGeoghegan’s equipment valued at R52 150 . . .;
4 Q6’s equipment valued at R237 030 . . .;
5 Douglas Reed’s personal items valued at R1 510 . . .;’

[2] The application is opposed by the respondent, Kalmar Industries SA (Pty) Ltd (Kalmar).

[3] Section 38(1) of POCA provides that a preservation order may be applied for ex parte and, in terms of s 38(2), such an order may be granted if a court has reasonable grounds to believe that the property sought to be preserved is either an 'instrumentality of an offence referred to in Schedule 1' of POCA, the 'proceeds of unlawful activities' or 'property associated with terrorist or related activities'.

[4] Section 48(1) of POCA provides that if a preservation order is in force, the NDPP 'may apply to a High Court for an order forfeiting to the State all or any of the property' so preserved. Section 50(1) provides that, subject to s 52 (which allows for the exclusion of interests in property), a court may grant a forfeiture order if it finds on a balance of probabilities that the property concerned is either an 'instrumentality of an offence referred to in Schedule 1' of POCA, the 'proceeds of unlawful activities' or 'property associated with terrorist or related activities'. Theft, the offence alleged to have been committed by Kalmar, is an offence listed in Schedule 1 of POCA.

[5] From the case law, it is clear that the preservation and forfeiture provisions of POCA are 'not conviction based' and 'may be invoked even when there is no prosecution'.[1] As a result, 'the guilt or wrongdoing of owners or possessors of property is "not primarily relevant to the proceedings"' because the focus is really on the role of the property in relation to criminal activity, rather than the state of mind of the respondent.[2]

The facts

[6] The material facts are relatively simple. Kalmar had accepted a warranty claim by Transnet in respect of work it had done on a number of rubber tyre gantries (RTGs) at the Port of Ngqura outside Port Elizabeth. As Kalmar was not able to do

[1] *National Director of Public Prosecutions & another v Mohamed NO & others* 2003 (4) SA 1 (CC) para 16.
[2] *National Director of Public Prosecutions v RO Cooke Properties (Pty) Ltd; National Director of Public Prosecutions v 37 Gillespie Street Durban (Pty) Ltd & another; National Director of Public Prosecutions v Seevnarayan* [2004] 2 All SA 491 (SCA) paras 20-21 (hereafter, the *RO Cook Properties* case).

the work itself in the time required it entered into a sub-contract with Q6 Management Projects Africa (Pty) Ltd (Q6) to refurbish some or all of the RTGs. (There is a dispute of fact on the papers as to the precise terms of the sub-contract.)

[7] To facilitate its work refurbishing the RTGs, Q6, according to Mr Vicus Luyt, one of its directors, researched, designed and had fabricated the lifting platform. Q6's workforce moved onto a site allocated to it in the port. It then set itself up on the site, which it secured with a perimeter fence, and moved tools and equipment onto the site. It began to refurbish the first RTG, using the lifting platform to do so.

[8] The relationship between Kalmar and Q6 began to deteriorate for reasons that are disputed but which are irrelevant to this matter. In due course, Kalmar cancelled the sub-contract. Q6 was ordered to leave the site. It did so, leaving behind the lifting platform and, according to various deponents, the other tools and equipment that are described in paragraph 1.

[9] It is not in dispute that the sub-contractor that succeeded Q6 used the lifting platform, at least for a short time. Q6 laid a charges of theft against Kalmar in respect of the lifting platform and the other tools and equipment. That led, in turn, to the application for the preservation order and now to this application for a forfeiture order.

The issue

[10] The papers are over 1 000 pages long. They are replete with irrelevant and argumentative matter and issue has been taken (by both sides) with virtually every factual averment made by any deponent, irrespective of its materiality. Despite this, there is one crisp issue that is definitive of the matter. It is whether the lifting platform and the other property that has been preserved are instrumentalities of the offence of theft.[3] The question that therefore needs to be answered is whether, in a case in which theft is alleged, the thing stolen is itself an instrumentality of the offence of theft and thus subject to preservation and forfeiture in terms of POCA.

[3]Paragraph 4 of the NDPP's heads of argument states: 'It is the Applicant's case that the property in question is the instrumentality of an offence namely theft set out in terms of items 17 and 18 of schedule 1 of POCA.'

[11] In addressing the question I have posed I shall work from the assumption that the property concerned was stolen. I wish to make it clear, however, that this is in dispute and that I have not found that it has been established by the NDPP that Kalmar stole the property. Indeed, Kalmar's case is that it is the owner of the lifting platform and that it became the owner in terms of its sub-contract with Q6. In respect of the remaining property, it denies that it has ever been in possession of these items and has no knowledge of them.

[12] An instrumentality of an offence is defined in s 1 of POCA to mean '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'.

[13] Despite its breadth, the definition has been given a narrower meaning, primarily in order to keep it within constitutional limits. The long title and preamble of POCA point to its meaning when they speak, in the former, of it providing for 'civil forfeiture of criminal property that has been used to commit an offence' and, in the latter, of nobody being 'entitled to use property for the commission of an offence'.

[14] These indications of what is meant by the term 'instrumentality of an offence' have been used by the courts to interpret the term. In *National Director of Public Prosecutions v Mohamed NO*,[4] Ackermann J spoke simply of the 'complex, two-stage procedure' envisaged by s 38 of POCA applying, inter alia, when it is established that 'property has been used to commit an offence'.

[15] In two earlier cases, the term was given a similar meaning. In *National Director of Public Prosecutions v Carolus*,[5] Blignaut J held that 'a property would only qualify as an instrumentality where it has been used as a means or instrument in the commission of an offence, or where it is otherwise involved in the commission of the offence'. In *National Director of Public Prosecutions v Patterson*,[6] Foxcroft J, with

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[4] *National Director of Public Prosecutions v Mohamed NO* (note 1), para 17.
[5] *National Director of Public Prosecutions v Carolus* 1999 (2) SACR 27 (C) at 39g-h.
[6] *National Director of Public Prosecutions v Patterson* 2001 (2) SACR 665 (C) at 667B-D.

reference to the preamble, held that 'the word "instrumentality" was used in its ordinary English meaning as a means by which the offence is committed' and that 'the prohibited conduct is the use of the property for the commission of an offence'.

[16] These passages were approved by Mpati DP and Cameron JA in the *RO Cook Properties* case.[7] They held that for property to be 'concerned in the commission of an offence' there must be a reasonably direct link between the property concerned and the crime committed and that the 'employment of the property must be functional to the commission of the crime'.[8] They concluded that for property to be an instrumentality of an offence, it 'must have been employed in some way to make possible or to facilitate the commission of the offence'.[9] It must, in other words, be 'instrumental in, and not merely incidental to, the commission of the offence'.[10]

[17] That is precisely what Nugent JA found in *National Director of Public Prosecutions v Van Staden & others*.[11] The functionality requirement mentioned in the *RO Cook Properties* case meant, he held, that 'the property is the means, or the tool or instrument, that is used to commit the offence'.[12] That is in line with the dictionary definition of the word 'instrumental', namely 'of the nature of or serving as an instrument or means' and of the word 'instrument', namely a 'thing with or through which something is done or effected; a means' or a 'tool, implement or weapon'.[13]

[18] An instrumentality of an offence is thus, for example, the diving equipment used to harvest perlemoen unlawfully, the ski-boat used to transport the divers from the shore to the perlemoen and to convey the perlemoen to the shore, and the vehicle used to unlawfully convey the perlemoen;[14] or the house that has been

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[7]Note 2, para 32.
[8]Para 31.
[9]Para 34.
[10]Para 31.
[11]*National Director of Public Prosecutions v Van Staden & others* 2007 (1) SACR 338 (SCA).
[12]Para 12.
[13]Para 12, footnote 27.
[14]*National Director of Public Prosecutions v Engels* 2005 (1) SACR 99 (C), paras 39-40.

specially adapted and equipped for the unlawful manufacture of drugs;[15] or the premises that have been modified and set up as an illegal casino.[16]

[19] As the lifting platform and the other property in issue in this matter were the very things alleged to have been stolen, they cannot have been instrumentalities of the offence of theft. They were never used to commit or facilitate the offence of theft.

[20] As they were not instrumentalities of the offences concerned, the jurisdictional requirement for the granting of both a preservation order and a forfeiture order are absent. That being so, the application cannot succeed and the preservation order must be discharged.

[21] The matter was postponed on 24 March 2015 and costs were reserved. I am satisfied that those costs should be costs should merely follow the result. It was argued by counsel for Kalmar that for various reasons I should make an attorney and client costs order against the NDPP. I do not believe such a costs order to be justified.

The order

[22] For the reasons set out above, the application is dismissed with costs, including the costs reserved on 24 March 2015, and the preservation order granted on 10 February 2015 is discharged.

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C Plasket

Judge of the High Court

[15] *Prophet v National Director of Public Prosecutions* 2005 (2) SACR 670 (SCA), paras 28-29; *Prophet v National Director of Public Prosecutions* 2006 (2) SACR 525 (CC), para 57.

[16] *Mohunram & another v National Director of Public Prosecutions & another (Law Review Project as Amicus Curiae)* 2007 (4) SA 222 (CC), para 50.

APPEARANCES

For the applicant: H van der Linde SC and S Nkweuse instructed by the State Attorney, Port Elizabeth

For the respondent: CB Garvey instructed by MacLarens Attorneys, Johannesburg and Rob Williams Attorneys, Port Elizabeth