

IN THE NORTH GAUTENG HIGH COURT, PRETORIA
[REPUBLIC OF SOUTH AFRICA]

- (1) REPORTABLE: ~~YES~~/NO
(2) OF INTEREST TO OTHER JUDGES: YES/~~NO~~
(3) REVISED.

CASE NUMBER: 7635 / 18
24/4/2019

In the matter between:

THE NATIONAL DIRECTOR OF
PUBLIC PROSECUTIONS

APPLICANT

And

RICH MANDAVA

RESPONDENT

JUDGMENT

MAVUNDLA J

- [1] This is an opposed application for an order seeking that a 2006 white Tata heavy load Truck with registration number [...] Chassis number MAT 45002067R45258 and engine number 21109865 held at the Pretoria West Vehicle Pound under SAP 13 number 3809/17 be declared forfeited to the State in terms of section 48(1) of *Prevention of Organized Crime Act* 121 of 1998 ("POCA").
- [2] A preservation order in terms of section 38(1) of POCA was obtained by the applicant in relation to the aforesaid vehicle on the 09 February 2018 on allegation that it was used to transport stolen livestock.

- [3] Under chapter 6, forfeiture would be preceded by a preservation order in terms of s38 and followed by the forfeiture order, irrespective whether there is a prosecution or not. The State need only place before the Court facts which on a balance of probability show that the property sought to be forfeited as a proceed of unlawful activity and should be declared forfeited to the State in terms of s50 of the Act¹.
- [4] The background facts which lead to the preservation order being granted and upon which the forfeiture is now sought are that: On 28 October 2017 around 22hh00 in the evening Mr. David Zulu, a pensioner residing at Block X Soshanguve, Pretoria and owner of the cattle in issue herein, went to bed. His herd of 17 cattle and 3 of his son's cattle totaling 20 in number were locked in the kraal. His cattle had stickers and were branded with a DCH mark for identification purposes. None of the cattle were insured and their value was estimated at R200 000. 00 (two hundred thousand rand). On 29 October 2017 round about 01h00 in the morning he woke up and went to the kraal where the head of cattle was kept, only to find that his 20 cattle were stolen.
- [5] Zulu on realizing that the head of cattle was stolen, he followed their spoor from the kraal and traced them to Onderstepoort in Soutpan. Upon arrival at the place where the marks or prints led him to, he found the truck which is the subject matter of this application loaded with some of his cattle. He only managed to apprehend the driver of the truck, as other suspects fled the scene. He discovered that six of the cattle were missing. A criminal case was opened and registered under Pretoria North 405/ 10/ 2017.
- [6] Warrant Officer Moses Mandia Sibanda ("Sibanda") stationed at Pretoria North Police station was on duty on the 29 October 2017 when a stock theft complaint was reported to him. He took an affidavit from Mr. Zulu. Upon receiving the stock theft complaint, Sibanda subsequently drove to plot 103 Rooivak where he found a truck loaded with fourteen cattle that were stolen in Soshanguve. Upon arrival at Soutpan, the truck was parked on the side of the road and the driver² was identified as Mandava. Zulu also

¹ *Vide National Director of Public Prosecutions v Mohamed* 2002 (4) SA 843 (CC) at 851E-F.

arrived and identified the cattle as his. Mandava's response was that he was supposed to transport the cattle to Rustenburg. Mandava appeared as if he had been assaulted by the community members who had apprehended him to bring him to the police. He warned Mandava of his rights and arrested him for stock theft.

[7] Sibanda determined that although the truck was registered in the name of Macarena Company it had been sold to Mandava.

[8] In my view, the truck was important for the commission of the offence of stock theft because without the truck of Mandava, it would have been difficult to steal the cattle from Soshanguve and transport it to Soutpan which was a considerable distance apart, nor to the intended destination.

[9] Various colored photos were attached to the papers. Some of the photos show the place where the cattle and the truck were found. The buildings at the relevant place seem to be in ruins, there were no window frames, no roofs (photos 11, 12, 13, 25, and 26). Photos 27 and, 28, 29, 30, 31, 32 and 33 show walls some partially broken, with gaping holes where windows were supposed to be; a broken brick loading pad. There is no sign that the premises are inhabited, but seemed abandoned. One of the photos show some of the cattle still on the open white truck which has side rails at the back.

[10] The respondent, in resisting the final forfeiture order gave a version that: he is a Zimbabwean with passport No [...] and Traffic Register No 4017 0000 FM2C. He is married and have three children, aged 15 years, 12 years and 9 years. His wife is unemployed and he is the only breadwinner for his family. He is employed as Assistant Manager in HTN Farm and earns R6 000. 00 per month. He has a diploma in agriculture and was employed by Gobeng Consultants as an agricultural Consultant under the Department of Agriculture , Vryburg, North Province until his services were terminated in 2017. He was earning R16 000 per month. On termination of his employment he was paid substantially by his previous employer. Out of the aforesaid payment, he bought³the truck in issue, as he was now self-employed and transporting mainly farm produce and livestock.

- [11] The respondent's version was that he is the owner of the truck in issue, which he bought through the substantial amount paid to him by his previous employer. Sometime in September he was approached by one Morgan who spoke Shona as he did. Morgan inquired from him whether the truck belonged to him. He confirmed this. Morgan constantly contacted him and eventually requested him to transport for him the cattle in issue, after he had informed him that he was in the business of buying and selling cattle. Morgan requested him to come to Pretoria to transport cattle for him.
- [12] On Friday 27 October 2017 Morgan requested him to come to Pretoria to transport cattle for him on either Saturday or Sunday. The Respondent left his place in Rustenburg at about 4h00 and drove to Pretoria. He met Morgan and his partners at the Sasol filling station just before 06h00 in the morning. Morgan came into his truck and they followed his partners in a VW Polo to some plot, which he came to know as Plot 103 Soutpan Road where they arrived at 6h00, where there is a homestead and some people.
- [13] He reversed his truck into the plot where the cattle were loaded. He asked Morgan to complete and sign Cattle transportation form which he had and told him to go to the police station for it to be signed by the police and he agreed. As he was driving towards the gate to exit Plot 103 Soutpan Road he was blocked by two bakkies and firearms were pointed at him by some of the people on the two bakkies. Morgan and the other gentleman who was with them on the truck jumped out of the truck and ran away. He was severely assaulted by the people who came in the two bakkies and no explanation was sought from him. An amount of R3 600 was taken from him. He was placed in one of the bakkies and taken to an ATM at a filling station where he was forced to provide his pin number and an amount of R3 000 was withdrawn from his account. He was then taken back to where his truck was and the police came and arrested him.
- [14] He further attached a copy of a statement by one Anna Madisha made to the police. Madisha in her statement said that at about 21:00 ON 28/10/2017 a VW Golf vehicle came to her place at Plot 103 Soutpan

Road Hammanskraal driven by an African male person who on exiting the vehicle inquired from her whether she could lend him a big plastic can for water because they are stuck with a truck near the garage on the road. She noticed that the Golf vehicle was full of other people. At about 5:30 in the morning she heard a big truck driving into the Plot and went to the back of the yard. She did not go outside to investigate. After a while she noticed that there were cattle in the yard and were loaded on the truck. The truck exited her premises at about 6:00 in the morning. As the truck was to get onto the road after exiting the yard, she noticed community members who stopped the truck. She saw a passenger jumping off the truck and running away. The driver of the truck was apprehended.

[15] The respondent further stated that he purchased the truck for an amount of R188 000. 00 for legitimate purpose and was generating an income of between R18 000. 00 and R20 000. 00 per month. He disputes that he was involved in the theft of the cattle.

[16] It was submitted on behalf of the applicant that the respondent disputes that the cattle were stolen at the time indicated by Zulu, contending that they were stolen in the morning at 6h00. This is rather a strange contention on his part, because how would he know that the cattle were stolen at the time he alleged if he was not involved in the theft as such? The court was requested to find that the respondent was part of the stock theft and his vehicle was being used in transporting the stolen cattle. The respondent with his agricultural background must have known that the cattle was stolen, particularly because he was unable to provide details as to where in Rustenburg the cattle was to be transported to. It was further submitted that the truck was an instrumentality of crime in that it was to be used in transporting the cattle and therefore the truck should be declared finally to the State.

[17] On behalf of the respondent it was submitted that on the respondent's version, there was no close link between the theft of the cattle and the truck. According to the applicant's version the cattle were stolen much earlier, whereas the respondent with the truck arrived at Plot 103 Soutpan

at 6h00. It was submitted that there is no close link between the property and the actual commission of the crime and therefore the truck was not an instrumentality, as required by POCA, in this regard relying on the authority of *Mohunram and another v NDPP*.²

[18] The respondent *in casu*, claims that he was asked to transport the cattle to Rustenburg. He seems to be professing lack of knowledge that the cattle were stolen. As an alleged innocent owner of the truck, to have his interest excluded from forfeiture he must satisfy this court on a balance of probabilities among others that he "neither knew nor had reasonable grounds to suspect that the property in which the interest is held is an instrumentality of an offence."; vide ***National Director of public Prosecutions v Hilton Plaatjies and Another***.³

[19] Indeed the respondent has stated that he purchased the truck. This as much is not in dispute. The legal acquisition of the truck is not the only consideration the court must take into account, but also the use thereof in the commission or furtherance of the commission of the offence. *In casu* the truck was found while the loading of the stolen stock was being loaded. Theft is a continuing process. The truck was a necessary criminal instrumentality, to distance the cattle further away from the original place it was stolen from. The cattle were already loaded on the truck which was already exiting the Plot 103. It stands to reason that the truck was being used in transporting the stolen cattle, as such it was an instrumentality of stock theft; vide *Mohunram v NDPP (Law Review Project as Amicus Curiae)*.⁴

[20] The question is whether on the balance of probabilities, the respondent has satisfied this court that he did not know that the cattle were stolen. His version that he did not know that the cattle were stolen must be adjudged by looking at the surrounding circumstances. He was unable to furnish the

² 2007 (2) SACR 145 (CC) par (44) "... 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 relation ship to the actual commission of the offence to render it an instrumentality'".

³ *Unreported judgment Case NO: 3203/2010 Delivered 13/11/ 2014 (Eastern Cape Local Division, Port Elizabeth) at para [16]*

full details of Morgan. Nowhere does he say that he inquired from Morgan about the lawfulness of the possession or ownership of the cattle. The cattle were found at a derelict place. The respondent had more than enough to reasonably suspect that Morgan cannot be the owner of the cattle, or that the cattle was stolen. In the result I am not satisfied that on a balance of probabilities the applicant has shown that he did not know that the cattle were stolen. Consequently, I find that the respondent knew very well that the cattle was stolen and made his truck available to transport the said cattle.

[21] In the result I find that the applicant has made a case for the relief sought; accordingly, the following order is issued:

1. That the 2006 White Tata load Truck with registration number [...] Chassis number MAT 45002067R45258 and engine number 21109865 held at the Pretoria Wets Vehicle Pound under SAP 13 number 3809/17 is declared forfeited to the State in terms of section 53 of the Prevention of Organized X Crime Act 121 of 1998 (POCA);
2. In terms of section 56(2) of the Act, ownership of the property shall vest in the State as from the effective date of this order;
3. That the appointment off a curator is dispensed with;
4. Subject to paragraph 5 below, the property shall remain in the custody of the SAPS until it is sold in an auction and the proceeds thereon transferred or deposited into the Criminal Assets Recovery Account established in terms of section 63 of the Act (account number [...]) held at the South African Reserve Bank, Vermeulen Street, Pretoria.
5. That any person whose interest in the property concerned is affected by the forfeiture order may within 21 days after he or she acquired such knowledge of the order, set the matter down for variation or rescission by the Court.

⁴ supra at 167 para [49].

6. That the respondent to pay the costs of the application

N.M MAVUNDLA

JUDGE OF THE COURT

DATE OF JUDGEMENT : 25/04/2019
APPLICANT'S ADV : ADV. D. L. PHAHLANE
INSTRUCTED BY : THE STATE ATIORNEY
RESPONDETS' ADV : ATT. M .G. R. MOGASHOA
INSTRUCTED BY : MOGASHOA MG ATIORNEYS