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.

23 / 04 / 2015
DATE

SIGNATURE

CASE NUMBER: A737/13

23/4/2015

SOLOMON SELLO NTSOKO — APPELLANT

AND

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS — RESPONDENT

JUDGMENT

MAVUNDLA J,

[1] This is an appeal, with the leave of the Court *a quo*, against the judgment and forfeiture order delivered by Preller J in terms of section 48 of Prevention of Organized Crime Act 121 of 1998 ("*POCA*") on 30 January 2013, declaring various properties of the appellant forfeited to the State as benefits of criminality.

[2] The crisp issues to be determined in this appeal are: whether the decision of the respondent to apply for the preservation and forfeiture order in terms of chapter 6 of Act 121 of 1998 infringed on the appellant's Constitutional rights to a fair trial

and to property; and whether the Court *a quo* failed to protect the applicant's aforesaid rights to property.

[3] It is common cause that the appellant is a medical practitioner in the North West Province. During 2009 the appellant submitted 1919 (one thousand nine hundred and nineteen) claims to the Workman's Compensation Fund, in respect of services he allegedly rendered to 49 patients who suffered from occupational injuries and or diseases and were entitled to be compensated. An amount of R12 million was subsequently paid into the bank account of the appellant by Workman's Compensation Fund.

[4] It is also common cause that immediately after payments from the Fund, the appellant started making internet and or bank cheque payments and purchased immovable property Erf No 1596 Amandasig Extension, 44 Magaliesberg Country Estate, Gauteng as well as three x 3-series BMW and a Mini Copper which he registered in the name of his sister Ms. Ida Ntsoko (Ms Ntsoko).

[5] It is common cause that the respondent first obtained a preservation order in terms of s38 of POCA on the 11 October 2010 in respect of the following property:

5.1 Cash amount of R1 500 000 and all positive interest accrued on the said amount held at First National Bank under investment account number 71233012873;

5.2 Cash amount of R1 500 000 and all positive interest accrued on the said amount held at First National Bank under investment account number 71236050664;

5.3 BMW 320IM motor vehicle with registration number TPT 138 GP;

5.4 BMW 320A motor vehicle with registration number VSV 452 GP;

5.5 BMW 320IM motor vehicle with registration number YJP 795GP;

5.6 Mini Cooper motor vehicle with registration number XPV 425 GP.

[6] On the 21 October 2010 the appellant filed a rescission application in which he requested the court to rescind and vary the preservation order granted against him on 11 October 2010. Tuchten J on 22 October 2010 varied the aforesaid preservation order permitting the appellant the use of the aforesaid vehicles.

[7] The items that were the subject of the preservation order belonged to the appellant who applied to this Court to set aside the preservation order and not to grant a forfeiture order in terms of s48 of POCA.

[8] In opposing the forfeiture appellant chose not to fully disclose his defence on the criminal charges, which had the effect that he was not able to convince the Court not to grant the forfeiture order.

[9] The purpose of *POCA* is chiefly designed to combat the spiraling wave of organized crime and to provide legislative mechanism of depriving criminals in general, of the proceeds of unlawful activity. The mechanism for such deprivation of the benefits of criminal activity is either through chapter 5, which is dependent on, arguably a protracted and arduous process of a successful prosecution and conviction of the offender, when only then the proceeds of unlawful activity can be declared forfeited to the State; or through chapter 6 which is not conviction-based but may be invoked even when there is no prosecution; *vide National Director of Public Prosecutions v Mohamed* NO.[1]

[1] 2002 (4) SA 843 (CC) at 850E-851D.

[10] It was submitted on behalf of the appellant that in respect of chapter 6, it is a requirement if an affected person wished to oppose the forfeiture that such person must set out facts under oath, the basis of his defence. A person facing criminal prosecution, such as the appellant, has a Constitutional right not to be forced to disclose his defence. It was further contended that in respect of a person suspected of criminal activities, a forfeiture order should be obtained in terms of Chapter 5, so as not to compromise or infringe his right to a fair trial and forced to forego his right to silence.

[11] It was further submitted on behalf of the appellant that the respondent was aware that *POCA* is draconian, invasive on the constitutionally enshrined rights of the appellant, in respect of his right to silence and his right to property. The respondent was aware that *POCA* obliges the appellant to forgo his right of silence by compelling him to place facts before the court to persuade it to release the property placed under the preservation order. In exercising its discretion, so it is contended, the respondent should have resorted to the less invasive option presented by chapter 5, which only permits forfeiture upon conviction; relying on the *Gaertner and others v Minister of Finance and others.*[2] It was further contended that Chapter 6 should be employed in the case of the so-called innocent bystander, which the appellant was not, because he is yet to be prosecuted for alleged fraud. It was further submitted that the decision to resort to Chapter 6 violated the appellant's rights and therefore the forfeiture order granted should be set aside for the aforesaid reasons as well, because the court failed to protect the appellant against such a draconian forfeiture legislative mechanism.

[12] The preamble of *POCA* provides, *inter alia,* as follows: "measures to combat organized crime, money laundering and certain criminal gang activities, to provide for the recovery of the proceeds of unlawful activity; for the civil forfeiture of criminal property that has been used to commit an offence, property that is the proceeds of unlawful activity".

[2] 2014 (1) SA 442 (CC).

[13] In *National Director of Public Prosecutions v Van Staden and Others*[3] dealing with the provisions of Chapter 6 of the Act, Nugent JA remarked that:

"It has been said, at times, that the purpose of the Prevention of Organized Crime Act 121 of 1998 is to combat the special evils that are associated with organized crime, but that is not entirely correct. That is certainly one of its purposes, and perhaps even its principal purpose, but as pointed out by this Court in *National Director of Public Prosecutions v R O 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*[4], its provisions are designed to reach far beyond organized crime and apply also to cases of individual wrongdoing."

[14] In order to meet the legislative objectives of *POCA*, the respondent is provided with the mechanism in chapter 5, or 6. The process of forfeiture, under chapter 5 would commence through a restraint order which quarantines such proceeds of crime from being disposed of pending the outcome of the prosecution, if successful, then and only then the order of forfeiture may be granted by the Court. On the other hand, 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 proceeds of unlawful activity should be declared forfeited to the State in terms of s50 of the Act[5].

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[3] 2007 (1) SACR 338 (SCA) at paragraph [1].
[4] Ft n2: 2004 (2) SACR 208 (SCA) (2004) (8) BCLR 844; [2004] 2 ALL SA 491).
[5] *Vide National Director of Public Prosecutions v Mohamed* (supra) at 851E-F.

[15] That *POCA* is draconian[6] 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,*[7] 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[8] 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)[9] 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[10], 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.

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[6] *Prophet v National Director of Prosecutions* 2006 (2) SACR 525 (CC) (2007 (2) BCLR 140) IN PARA [46].
[7] 2009 (2) SACR 368 (SCA) at 378A-G.
[8] *Prophet v National Director of Prosecutions* 2006 (2) SACR 525 (CC) (2007 (2) BCLR 140) para 61
[9] 2002 (4) SA 768 (CC) 2002 (7) BCLR 702 para 100.
[10] *Supra* at paragraph [58] at 548g.

[17] In the matter of *S v Kelly*[11] it was held that there is no rule of practice compelling the State to call a witness. The State has an unfettered discretion of choice as to who to call. The same discretion, in my view, attains also in respect of what charges to prefer against an accused. The NDPP exercises an administrative decision when he decides to prosecute. It is trite that an administrative decision is reviewable in terms of *PAJA*. On face value, the taking of a decision to prosecute, is an administrative decision, therefore should fall within the ambit of *PAJA*. However, in the matter of *Kaunda & others v President of the Republic of South Africa & others*[12] it was held that in terms of *PAJA* a decision to institute a prosecution is not subject to review. This is so because a decision to prosecute is excluded by the definition of s1 (ff) of the National Prosecuting Authority Act 32 of 1998, through which the NDPP acts.[13]

[18] Similarly, the decision by the NDPP to proceed in terms of chapter 5 or chapter 6, is an administrative decision, however, in my view, axiomatically, falling outside the purview of *PAJA*. This does not mean, nonetheless, that such decisions are placed well beyond the scrutiny of the Courts. Such decisions fall to be reviewed in terms of the principle of legality. In this regard, in the matter of *National Director of Public Prosecutions and Others v Freedom under Law*[14] Brand JA held as follows:

> "[28] The legality principle has by now become well established in our law as an alternative pathway to judicial review where *PAJA* finds no application. Its underlying constitutional foundation appears, for example, from the following dictum by Ngcobo J in *Affordable Medicines Trust and Others v Minister of Health and Others*[15]:

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[11] 1980 (3) SA 301 (AD).
[12] 2005 SA (4) 231 (CC) at 263 para 84.
[13] *Vide National Director of Public Prosecutions and Others v Freedom Under Law* 2014 (4) SA 306 (SCA) para [21].
[14] *Supra.*
[15] 2006 (3) SA 247 (CC) (2005 (6) BCLR 529; [2005] ZACC 3) para 49.

'The exercise of public power must therefore comply with the Constitution, which is the supreme law, and the doctrine of legality, which is part of that law. The doctrine of legality, which is an incident of the rule of law, is one of the constitutional controls through which the exercise of public power is regulated by the Constitution.'

[29] As demonstrated by the numerous cases since decided on the basis of the legality principle, the principle acts as a safety net to give the court some degree of control over action that does not qualify as administrative under PAJA, but nonetheless involves the exercise of public power. Currently it provides a more limited basis of review than PAJA. Why I say 'currently' is because it is accepted that '(l)egality is an evolving concept in our jurisprudence, whose full creative potential will be developed in a context-driven and incremental manner' (see *Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd and Others (Treatment Action Campaign and Another as Amici Curiae)*2006 (2) SA 311 (CC) (2006 (1) BCLR 1; [2005] ZACC 14) para 614; Cora Hoexter op cit at 124 and the cases there cited). But for present purposes it can be accepted with confidence that it includes review on grounds of irrationality and on the basis that the decision-maker did not act in accordance with the empowering statute (see *Democratic Alliance and Others v Acting National Director of Public Prosecutions and Others* 2012 (3) SA 486 (SCA) paras 28 – 30).[16]

[19] In the matter of *Booysen v Acting National Director of Public Prosecutions and Others*[17] Gorven J held that:

"[15] In turn, the principle of legality requires that the exercise of public power 'must be rationally related to the purpose for which the power was given'. 23 This is the rationality test. It has been held that rationality is a minimum requirement applicable to the exercise of all public power. 24 'Decisions must be rationally related to the purpose for which the power is given, otherwise they are in effect arbitrary and inconsistent with this requirement.' 25 A rational connection means that —

'Objectively viewed, a link is required between the means adopted by the [person exercising the power] and the end sought to be achieved'. 26

[16] *Supra* paras 28 – 30).
[17] 2014 (2) SACR 556 (KZD).

The test is therefore twofold:

'Firstly, the [decision-maker] must act within the law and in a manner consistent with the Constitution. He or she therefore must not misconstrue the power conferred. Secondly, the decision must be rationally related to the purpose for which the power was conferred. If not, the exercise of the power would, in effect, be arbitrary and at odds with the rule of law.'

[20] I am equally of the same view that the same discretion attains in respect of choice to resort to chapter 5 or chapter 6, in order to achieve the legislative purpose and object of *POCA*. I am unable to find that the decision to resort to chapter 6 was irrational and not connected with the aforesaid legislative object of *POCA*.

[21] The DPPP is duty bound, when exercising the discretion of choice, balancing societal interest encapsulated in the objects of *POCA* and that of the appellant; *vide Mazibuko*[18] matter. In doing so, the respondent must, invariably take into account the circumstances of the case and the proximity of the proceeds of crime to the offending action of the appellant.

[22] *In casu*, the evidence presented by the respondent was that during 2009, the applicant, a medical practitioner, defrauded the Department of Workman's Compensation Fund ("the Fund") of R 12 143 417. 92 by submitting 1919 claims to the Fund in respect of services he allegedly rendered to 49 patients who suffered from occupational injuries and or diseases. Investigations revealed that both Ms. Ronell Matshika (Ms Matshika) and Ms. Priscila Makhaza, former employees of the Fund assisted him in processing and paying the said claims.

[23] The *modus operandi* followed was that applicant would submit fictitious and grossly inflated claims to the Fund through the assistance of his messenger, Mr. Sello

[18] Supra at 378g.

Mahlangu and other employees of the Fund. He would claim exorbitant amounts for procedures which he ostensibly rendered. The said claims would be submitted directly to Ms. Matshika to process the claim and later Ms. Makhaza for approval and payment.

In order to claim compensation from the Fund, the employer must complete an accident report reflecting full information on the injury sustained by the employee, which form must be submitted to the Fund. The employee must then be treated by a doctor/ medical officer "service provider") who will submit necessary reports. The services provider will then claim all the relevant expenses from the Commissioner.

During the investigation, affidavits were obtained from 30 persons purportedly treated by the appellant, but denied neither any knowledge of nor being treated by the appellant. Most of the purportedly treated persons had minor occupational related injuries and were treated by different doctors other than the appellant. The investigation further revealed that there were legitimate claims submitted by various doctors in relation to the treatment of the aforesaid persons and payments were made in consequences thereof.

The applicant never consulted with any of the 49 patients/ persons mentioned above and as such all his claims from the Fund were unlawful. Furthermore, the appellant inflated the said claims in that he would, in most instances, claim not less than R4 000 for a single consultation, which claims are ludicrous for a general practitioner.

[24] It is common cause that the claims were paid electronically by bank transfer to the appellant's bank account on different dates for a period of four months to the total of R12 143 417. 92. Before the payment, investigation revealed that before the first payment from the Fund, the applicant's bank account stood at a negative balance of R57 655. 72. It is common cause that immediately after payments from the Fund, the appellant started making internet and or bank cheque payments and purchased immovable property Erf No 1596 Amandasig Extension, 44 Magaliesberg Country Estate, Gauteng as well as three x 3-series BMW and a Mini Copper which he

registered in the name of his sister Ms. Ntsoko. The investigation further revealed that Ms Ntsoko was employed as a receptionist by the appellant but there was no evidence of any salary transfer into her bank account. It was submitted by the respondent that it is highly likely that Ms Ntsoko received a small salary from cash on hand, as such it is highly unlikely that she would have afforded substantial amounts to purchase the property registered in her name. The respondent submitted that the property was registered in Ms Ntsoko's name, in an effort by the appellant to conceal or disguise the nature and source, location, disposition or movement of the property or ownership as he knew that it is proceeds of unlawful, criminal activity, or purchased with proceeds of unlawful activities by the appellant, namely theft and or fraud.

[25] According to the respondent, when seeking both the preservation order as well as forfeiture, the amounts in the bank accounts of the appellant were proceeds of criminal activity, and could be wiped out through use by the appellant, to the detriment of the Fund. Similarly too, the vehicles, which were purchased through proceeds of criminal activity, stand to be devalued through use, is left in the control of the appellant, again to the detriment of the Workman's Compensation Fund. The house too having been purchased through proceeds of criminal activity, should be preserved and forfeited as proceeds of criminal activity. It needs mention that Ms. Ntsoko never filed any claim in respect of all the aforesaid property registered in her name.

[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.

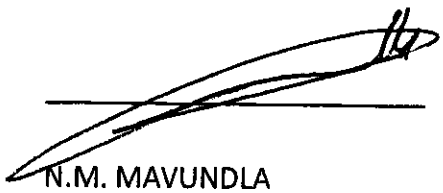
[27] In my view, regard being had to the above evidence placed before the Respondent, and before the Court, and the response of the appellant to the allegations leveled against him, the inference to be drawn is that the evidence was overwhelming and making it irresistible to infer and conclude that the 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.

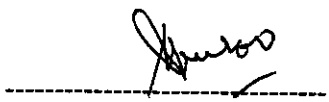
[33] In the result I conclude and order that the appeal must fail and it is dismissed with costs.



N.M. MAVUNDLA

JUDGE OF THE HIGH COURT

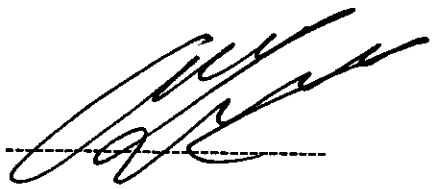
I agree



W. R. C. PRINSLOO.

JUDGE OF THE HIGH COURT

I agree



A.A. LOUW

JUDGE OF THE HIGH COURT

HEARD ON THE : 25 / 02 / 2015

DATE OF JUDGMENT : 23 / 04 / 2015

APPELLANT'S ATT : OLIVIER, CRONJE & STIGLINGH ATTORNEYS

APPELLANT'S ADV : ADV. S.J. COETZEE

RESPONDENT'S ATT : STATE ATTORNEYS PRETORIA

RESPONDENT'SADV : ADV. T. MASHALANE.