IN THE NORTH WEST HIGH COURT

MAFIKENG

CASE NO.:1094/12

In the matter between:

THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS **Applicant**

and

CHARLES JOCOBUS STRYDOM **1st Respondent**

KAREL JACOBUS BURGER STRYDOM **2nd Respondent**

CIVIL MATTER

KGOELE J

DATE OF HEARING	**:**	**22 March 2013**
DATE OF JUDGMENT	**:**	**23 May 2013**
FOR THE APPLICANT	**:**	**Advocate L. Van Dyk**
FOR THE RESPONDENT	**:**	**Advocate L. Lourens**

JUDGMENT

KGOELE J:

A. INTRODUCTION

[1] On 26 July 2012 the applicant applied and was granted, on an *ex parte* basis, a preservation of property order in terms of section 38 of the Prevention of Organised Crime Act, 121 of 1998 (**POCA**).

[2] The respondents filed a notice to oppose the application on 29 August 2012. The applicant filed an application for a forfeiture order in terms of section 48 of POCA on 21 September 2012. The matter was on the court roll for 4 October 2012.

[3] On 4 October 2012 the respondents requested a postponement in order for them to file their opposing affidavits. The matter was postponed to 25 October 2012. Their opposing affidavits were filed on 24 October 2012. The matter was postponed for arguments to the 14 March 2013.

B. NATURE OF THE APPLICATION

[4] Applicant seeks an order forfeiting the property to the State in terms of section 48 of POCA, to wit, money and two vehicles belonging to the respondents respectively. The respondents opposed the application.

C. CIRCUMSTANCES UNDER WHICH THE PROPERTY WAS SEIZED

[5] The first respondent was arrested more than once on charges of being in possession of stolen goods. One such an occasion was on 12 December 2011.

[6] During the first occasion, the first respondent was driving a yellow LDV with registration numbers and letters FPJ 544 NW on the grounds of the Lanxess Mine in Rustenburg when he was spotted by the security

manager, Cornelius Hendrik Botes (**Botes**). Botes stopped the yellow LDV and found stripped copper on the back of it. The first respondent explained that he bought the copper from someone.

[7] The first respondent was arrested on a charge of being in possession of suspected stolen goods. He pleaded guilty on the said charge and was sentenced to pay a fine of R10 000 or twelve months' imprisonment which was wholly suspended for 5 years.

[8] Two weeks after this sentence the police received information that the first respondent and two other males were loading copper onto two vehicles at the residence of the first respondent. Warrant Officer Christopher Ntollo Buchlungu (**Buchlungu**) went to the house and found the first respondent and his wife as well as two males who became known as Vincent Strydom (**Strydom**) and Herman James (**James**) on the premises.

[9] In front of the gate Buchlungu saw the yellow LDV with registration numbers and letters FPJ 544 NW, which was involved in the previous incident. In the garage of the house he saw a blue bakkie with registration numbers and letters HRY 406 NW. He also noticed a scale in the garage with stripped copper on.

[10] Buchlungu asked to whom the yellow LDV belonged and Strydom answered that it belonged to the first respondent. He went to the yellow LDV and discovered that it was loaded with stripped copper. Buchlungu realized that the first respondent, Strydom and James were about to load the blue bakkie with copper when they arrived on the scene.

[11] While Buchlungu questioned James and Strydom about the copper the first respondent and his wife ran away to the neighbours' house.

Buchlungu went to the house and found the first respondent and his wife hiding in separate closets. Buchlungu arrested them and took them back to their house. They searched the house and in a safe in the kitchen they found an amount of R311 600 in cash. The cash and the two vehicles were seized and booked into the SAP 13 store.

[12] Strydom and James told Buchlungu that they went to Brits earlier that day with the two vehicles loaded with copper and sold it to Enviro. They went back for a second load of copper when the police arrived at the house. The owner of Enviro, Stephanus Paul Pretorius (**Pretorius**) confirmed that the first respondent sold copper earlier that day. Pretorius attached a print out to his statement showing numerous transactions between him and the first respondent.

[13] The registration numbers of the vehicles that delivered the copper at Enviro appeared on the print out. One such registration number is FEJ 544 NW. The one vehicle used on more than one occasion by the first respondent registration number is FPJ 544 NW. It was submitted that it is a mistake on the printout and that it should be FPJ 544 NW. The number FEJ 544 NW was checked on the e-Natis system and no record was found. It was established that both vehicles were registered in the name of the second respondent who is the son of the first respondent.

C. SUBMISSIONS

Applicant's submissions

[14] The applicant submissions are as follows. It was submitted by the applicant that both the vehicles have a direct link to the carrying out of the offence, and is not merely incidental to the carrying out of the offence and forms part of the offence.

[15] The yellow LDV with registration numbers and letters FPJ 544 NW was used more than once to commit the same offence, i.e. transporting copper of which the first respondent could not give a satisfactory explanation of being in possession thereof.

[16] The blue bakkie was used earlier the same morning to transport copper to Brits and the first respondent, Strydom and James were busy loading a second load when the police arrived at the house of the first respondent. It must be emphasized at this stage the first respondent never denied being in possession of stripped copper.

[17] When he was charged for being in possession of suspected stolen goods for the incident of the 12 December 2011 after he was arrested on the grounds of the Lanxess Mine, he pleaded guilty and admitted that he was found in the unlawful possession of goods in regard to which there was a reasonable suspicion that the said goods had been stolen and was unable to give a satisfactory account of such possession.

[18] In respect of the incident at his house where stripped copper was found on the yellow LDV and more stripped copper in the garage, he did not dispute this fact in his opposing affidavit.

[19] Therefore it is clear that the vehicles were used to transport the copper to Brits where it was sold as scrap to Enviro. The vehicles were deliberately chosen by the first respondent to transport the copper. The vehicles therefore have a direct link to the carrying out of the offence, i.e. of being in possession of stolen goods, and are not merely incidental to the carrying out of the offence. It is submitted that the vehicles are indeed instrumentalities of an offence and therefore liable to be forfeited to the State.

[20] It was further submitted that the money that was found in the safe of the first respondent is the proceeds of crime. The explanation which the first respondent gave to the police about the money was that he derived it from the selling of some of his businesses. In his opposing affidavit the first respondent stated that he got the money from his brother who bought a house from him.

[21] According to Pretorius, the owner of Envirocycle, he deals with the first respondent, who is the owner of Malie Scrap on a regular basis. On the morning of the 23 March 2012, when he arrived at his business he found the yellow LDV and the blue bakkie and noticed that they already off loaded the copper cable. The value of the cable was R99 660.51. Pretorius attached a print out to his affidavit showing numerous transaction between him and Malie Scrap during March 2012. From 1 March 2012 to 17 March 2012 the amount which was paid to Malie Scrap was R544 101,68.

[22] The first respondent is known to the police as a dealer and seller of copper without being a licensed second hand dealer as prescribed by the Act on Second Hand Goods, Act 6 of 2008. It is further clear from the statement of Pretorius that the transactions between him and Malie Scrap are usually in cash. As the business of the first respondent is not registered for tax purposes it is more likely that he would keep the money in a safe at his home instead of paying it into a bank account where huge amounts of money can be detected.

[23] The explanation of the first respondent that he got the R311 600 from his brother from selling property to him is not true. It is clear from the affidavit of Nkosiphendule Mradla (**Mradla**) that the property to which

the first respondent referred is still registered in his own name and that no legitimate sale agreement between him and his brother exist.

[24] The applicant further submitted that the sale agreement which is attached to the opposing affidavit of the first respondent is fabricated in a desperate effort to explain the cash amount in the safe of the first respondent. According to the applicant it is highly improbable that property which the first respondent bought for R66 000 during 2010 would be sold for R320 000 in 2012. It was submitted that there can be no other explanation for the money than being the proceeds of the unlawful activities of the first respondent.

[25] As far as the issue of an innocent owner is concerned, the applicant submitted that the respondent can only succeed with the innocent owner defence if he can show on a balance of probabilities that he acquired the property legally and he neither knew nor had reasonable grounds to suspect that the property was an instrumentality of an offence.

[26] Further that it is highly unlikely that the second respondent did not know that the first respondent used the vehicles for his unlawful activities. The yellow LDV was previously used by the first respondent to transport goods suspected to be stolen, for which he was arrested and charged. Keeping in mind that the second respondent is the son of the first respondent he should have known that the first respondent is likely to use the vehicle for unlawful activities, and yet he borrowed the vehicle to the first respondent

[27] It is highly unlikely that the first respondent would need two vehicles at the same time if he had, on his version, “vehicle trouble”. The only

reasonable explanation for the use of two vehicles was to transport the copper in huge volumes to the Enviro in Brits.

[28] It was further submitted that keeping in mind that the yellow LDV was previously used under similar circumstances and the fact that the second respondent is the son of the first respondent, he ought to have known that the first respondent used the vehicles for unlawful activities.

[29] On the issue of proportionality the applicant submitted that the forfeiture of the property will not be disproportionate on the following grounds:

29.1 this was not the first time that the first respondent was arrested while being in possession and transporting copper. The first respondent was arrested just three months prior to his arrest in March 2012;

29.2 theft of copper in Rustenburg is rife and amounts to huge losses for mines in the area;

29.3 the first respondent earned more than R500 000 from Enviro between 1 and 17 March 2012 which shows that it is a lucrative business;

29.4 according to the e-natis printout on both vehicles it shows that the first respondent bought the vehicles without finance;

29.5 It is submitted that the respondent derived the money from unlawful activities which placed him in a position to buy the property without finance and to keep huge amounts of cash in a safe at his house.

Respondent's submissions

[30] Counsel for the respondent submitted the following on behalf of the two respondents. Applicant want this Court to believe that the first respondent is this person, whom have been involved in theft of copper cable or more accurately, being in possession of suspected stolen property, to wit copper cable on numerous occasions, however they can only give one account of where he pleaded guilty and does not even go further. The first respondent, was actually on several occasions been excused by the District Courts, as well as the Regional Courts, due to the fact that the state does not have cases against him.

[31] Buchlungu, wish the applicant and this Court to believe, that he came to the property and saw the yellow LDV bakkie and only afterwards, realised that there were copper on the back of the bakkie, which is highly unlikely, due to the fact that he allegedly received information that the respondents were loading copper into two vehicles. What is strange according to the respondent's counsel is the fact that, in the event that one suspects someone to be busy loading copper onto vehicles, one's first instinct as a police officer will be to put someone at the vehicles and to ensure that the reason why one is there are indeed so, which Buchlungu never did. The only reason for this alleged information was due to the fact that the SAPS of Rustenburg needed one or the other kind of success and they were under pressure and after they did not do their work properly, they referred this matter to a civil seizure of the respondent's property, which is easier, due to the fact that they do not have to proof, beyond reasonable doubt, but only on a balance of probabilities.

[32] The respondents' counsel submitted further that the applicant applied for the property of the first and second respondents to be forfeited to the state, due to the two points:-

- the applicant believe that the second respondent's vehicles were instrumentally in the committing of the alleged crimes, which the first respondent was busy committing;
- the applicant, secondly believe that the money which they seized was the proceeds of the alleged criminal activities of the first respondent

[33] Both these points are wrong and the respondents submit the following to this Court:-

- The applicant just allege that the second respondent ought to have known that the first respondent were using the said vehicles to commit crime, we ask this Honourable Court, How? Because the first respondent were ones caught and convicted after he pleaded guilty and promised everyone that he is very sorry and that he will never again be involved in that and that this was a once off in which he tried to make a fast buck
- Furthermore, the applicant hammers on the fact that this was a cash sale of the first respondent to his brother and his wife, however what they fail to mention is that in what condition the property was when the first respondent bought it and that the building erected did increase the value of the said property, furthermore what the state fails to mention is that the first respondent's brother and his wife had problems and therefore the property was not registered onto their names and it is slanderous to allege that a deed of sale was fabricated by the first respondent and his attorney.

[34] According to the respondents' counsel it is further astonishing that the applicant tried to convince this Court that you need a vehicle to possess suspected stolen property, in other words, if the first respondent did not borrow the said vehicles, he would not have allegedly committed the said offence, if the applicant's answer is no he wouldn't have then, yes the vehicles are an instrumentality of an offence, however this is not alleged by the applicant and therefore it is submitted that the applicant's answer to this question would be affirmative and therefore it is submitted that the vehicles is not an instrumentality of an offence.

[35] The applicant submitted that the words of **Nkabinde J** in **Prophet v NDPP 2006 (2) SACR 525 (CC)** is applicable here, which cannot still be understood, because of the fact that the vehicle in this application was not used as the applicant submitted, on several occasions. Therefore it cannot be said that it was appointed, arranged, organised or furnished and neither was it adapted or equipped to enable or facilitate the alleged commission of offences.

[36] The first respondent never denied being in possession of stripped copper cable, because it is in itself not an offence to possess stripped copper cable of any copper cable for that matter, furthermore it is also not an offence to convey any copper cable. Therefore it is the respondent's submission that it was not necessary for the him to have denied anything.

[37] The first respondent's counsel submitted that the money found in the safe of the first respondent was not the proceeds of the alleged crime, but as stipulated, the proceeds of the sale of his property to his brother

and his wife. According to him the deed of sale of the property is a binding legal document and that it is shocking and slanderous that the applicant submits that the document is a fabrication.

[38] Further that if the applicant did a bit more digging, they would have discredited their own case, due to the fact that the property was not bought as it is now by the first respondent, alterations have since been made, the building, etc. and therefore, it is obvious that the first respondent would want more for his property than when it was bought. The reason for not being registered into the name of the first respondent's brother and his wife is simple as mentioned above, they are having marital problems and did not want it to be registered as yet.

[39] It is the second respondent's submission, that he could not have known and it cannot be accepted from him to have known or reasonable have expected to have known that the vehicles were used or would be used for unlawful activities. The first respondent is the father of the second respondent and this need to be taken into account, when looking at what the second respondent ought to have known or suspected. The second respondent could not and should not have suspected that the vehicles were to be used for suspected illegal activities.

[40] On the issue of disproportionate the respondents' submission is that the forfeiture of the property in the first place against the first respondent, will definitely be significantly disproportionate and secondly against the second respondent, be significantly disproportionate and will amount to a punishment to both and hence-forth, unconstitutional.

[41] Lastly that the applicant did not prove on a balance of probabilities that in the first place the vehicles were instrumentally used in committing the alleged activities and furthermore, that the money was not the proceeds of criminal activities. A request is made that this Court should not order that the property be forfeited to the state.

D. THE LAW

[42] **Chapter 6** of POCA provides for the forfeiture to the State of proceeds of unlawful activities and instrumentalities of crime. Unlike the provisions of **Chapter 5**, civil forfeiture applications are not conviction based, and a criminal prosecution is not a prerequisite for the granting of a forfeiture order.

[43] The power to grant a forfeiture order is subject to two qualifications;

43.1 The civil forfeiture must be proportionate: it must not constitute an arbitrary deprivation of property in contravention of section 25(1) of the Constitution;

43.2 **Section 52** provides that, when the High Court makes a forfeiture order in terms of **section 50(1)**, it may exclude certain interests in specified circumstances (the so-called "innocent owner defense").

[44] An "instrumentality of an offence" is defined as "any property which is concerned in the commission of an offence". What constitutes an instrumentality of a criminal offence has been the subject of much debate in our Courts and appears to be settled.

[45] The Supreme Court of Appeal defined the meaning of 'instrumentality of an offence' in **NDPP v R O Cook Properties 2004 (80 BCCR 844 (SCA)** and held 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 and substantial sense the property must facilitate or make possible the commission of the offence."

[46] Borrowing the phrases from **Cook**, **Nkabinde J** held in the **Prophet** matter that the immovable property was an instrumentality in that it "was appointed, arranged, organized, furnished and adapted or equipped to enable or facilitate illegal activities".

[47] In the case of **Mohunram and another v NDPP 2007 (2) SACR 145 (CC)** the Constitutional Court found that the use of the property had to be a necessary part of the offence that was committed. It was not possible to commit the offence without using the property.

[48] The Supreme Court of Appeal per Howie in the matter of **NDPP v Geyser and another 2008 (2) SACR 103 (SCA)** in considering what constitutes an instrumentality of an offence held:

> "to be an instrumentality of an offence the property concerned must by definition in POCA, be 'concerned in the commission' of that offence. As the cases have interpreted that definition, the property must facilitate commission of the offence and be directly causally connected with it so it is integral to the commission of the offence".

[49] "**Proceeds of unlawful activities**" is defined in section 1 of POCA as:-

> "Any property of any service advantage, benefit or reward which was derived, received or retained, either directly or indirectly, in the Republic or elsewhere, at any time before or after the commencement of this Act, in

connection with or as a result of any unlawful activity carried on by any person, and includes any property representing property so derived."

[50] "**Property**" is defined as:-

"money or other movable, immovable, corporeal or incorporeal thing and includes any rights, privileges, claims and securities and any interest therein and all proceeds thereof."

[51] "**Unlawful activity**" is defined as:-

"conduct which constitutes a crime or which contravenes any law whether such conduct occurred before or after the commencement of this Act and whether such conduct occurred in the Republic or elsewhere."

[52] The Supreme Court of Appeal in **Cook** approached the definition of proceeds of unlawful activities differently from the definition of instrumentalities of an offence. The Supreme Court of Appeal found that in this instance a restricted interpretation of the definition is not necessary because the risk of unconstitutional application is smaller. The court further found that the words "in connection with" in the definition require some kind of consequential relation between the return and the unlawful activity. In other words, the proceeds must in some way be the consequence of the unlawful activity.

[53] **Section 48** read with **section 50** of POCA provides that subject to **section 52** for the forfeiture of property subject to a preservation order if the Court is satisfied on a balance of probabilities that the property constitutes an instrumentality of a criminal offence.

[54] **Section 52(1)** of POCA provides for the court to when it makes a forfeiture order, make an order excluding certain interest in property which is subject of the order, from the operation thereof.

[55] **Section 52(2) A** reads as follows:-

> "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 in the property 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".

[56] **Section 52** must be read with the provisions of **section 1(2)** and **(3)** which provides as follows:

> "For the purposes of this Act, a person has knowledge of a fact if-
>
> (a) the person has actual knowledge of the fact; or
>
> (b) the Court is satisfied that:
>
> (i) the person believes that there is a reasonable possibility of the existence of that fact; and
>
> (ii) he or she fails to obtain information to confirm the existence of that fact."

[57] **Section 1(3)** reads as follows:-

> "For the purposes of this Act a person ought reasonably to have known or suspected the fact if the conclusions that he or she ought to have reached

are those which would have been reached by a reasonably diligent and vigilant person having both:

(a) the general knowledge, skill, training and experience that may reasonably be expected of a person in his or her position; and

(b) the general knowledge, skill, training and experience that he or she in fact has."

[58] In the matter of **NDPP v Gerber 2007 (1) SACR 384 (W)** the court referred to the judgments of the Supreme Court of Appeal in **Cook** and found that:-

"this section burdens the owner with an onus to prove certain facts on balance of probabilities before the court can make an exclusionary order. Although the Constitutional Court referred to this loosely as creating an 'innocent owner' defense, a literal reading of section 52(2A)(a) would suggest that innocence is not enough…".

[50] In **Cook** the court was of the view that property owners cannot be supine. The respondent can only succeed with the innocent owner defense if he can show on a balance of probabilities that he acquired the property legally and he neither knew nor had reasonable grounds to suspect that the property was an instrumentality of an offence.

[60] The Constitutional Court has held that the proportionality enquiry requires a:-

"weighing [of] the severity of the interference with individual rights to property against the extent to which the property was used for the purposes of the commission of the offence, bearing in mind the nature of the offence."

This is a "factor based approach" and the Court indicated that the following factors may be relevant to such an enquiry:

60.1 whether the property is integral to the commission of the crime;

60.2 whether the forfeiture would prevent further commission of the offence and its social consequences;

60.3 the nature and use of the property;

60.4 the effects of the forfeiture of the property on the respondent; and

60.5 whether the “innocent owner” defense is available to the respondent.

[61] The purpose of a proportionality enquiry is to ensure that the forfeiture to the State does not constitute arbitrary deprivation of property nor violate other constitutional rights. The proper application of a proportionality analysis weights the forfeiture on the one hand against the purposes it serves on the other. The Constitutional Court has held that the primary purpose of forfeiture is to deter persons from using or allowing their properties to be used for crime.

[62] Forfeiture also serves other broad societal purposes. These are:-

62.1 removing incentives for crime;

62.2 eliminating or incapacitating some of the means by which crime may be committed; and

62.3 advancing the ends of justice by depriving those involved in crime of the property concerned.

[63] The Constitutional Court dealt with the issue of proportionality in the **Mohunram** case and found that:-

> "…the purpose of the proportionality enquiry is to determine whether the grant of a forfeiture order would amount to an arbitrary deprivation of property in contravention of s 25(1) of the Constitution.

[64] It was further held in **Prophet**'s case in the Supreme Court of Appeal that:-

> "A mere sense of disproportionality should not lead to a refusal of the forfeiture sought. To ensure that the purpose of the law is not undermined, a standard of 'significant disproportionality' ought to be applied for a court to hold that a deprivation of property is 'arbitrary and thus unconstitutional, and consequently refuse to grant a forfeiture order."

[65] In regard to the proportionality question the Supreme Court of Appeal found in the case of **Geyser** that:-

> "The primary question, therefore, is not: would forfeiture constitute punishment (whether excessive or at all), but: would forfeiture have more that the necessary remedial affect?"

E. <u>ANALYSIS</u>

[66] In terms of section 50 (4) of POCA the outcome of criminal proceedings do not affect the validity of a forfeiture order. The removal of the case against the first respondent is an administrative action, and was part of the criminal trial against the first respondent. This removal does not have an impact on the civil action in terms of POCA against him.

[67] A careful reading of the supporting affidavit of Buchlungu reveals that Buchlungu went to the yellow LDV after he questioned Strydom and

James, and only then, noticed that the copper cables were covered with a black cover. This copper was underneath the cover already loaded into the yellow LDV. The statement by the respondent's counsel that it is strange that of all a sudden there is an allegation that the copper was in the yellow LDV, whereas this was not mentioned earlier by him when he came to the property is therefore misleading and further, not the correct reflection of his statement.

[68] The respondent's counsel further submitted that the applicant did not mention how he came to the conclusion that the blue bakkie was about to be loaded. This statement as well looses sight of the fact that Buchlungu alleged in his affidavit that he found the blue bakkie in the garage as well as stripped copper cable. Furthermore, Strydom stated in his affidavit, which was filed in support of the application for a preservation order, that they returned from Brits after they delivered the first load of copper and were about to load copper on the "blue bakkie" when the police arrived.

[69] Of importance is the fact that the first respondent never denied being found in possession of stripped copper in his opposing affidavit. The respondent's counsel further submitted that it was not necessary for the first respondent to have denied anything because possession of stripped copper cable or any copper cable is not an offence. This submission unfortunately demonstrates the lack of understanding on the type of offence the first respondent was charged with. The papers before this court including those submitted during the preservation application clearly indicates that the first respondent was arrested previously and now for possession of stolen property for which he could not give a satisfactory explanation of being in possession

thereof. It suffices to say that one of the incidents the applicant is relying on in this application is the incident of the 12 December 2011, wherein he was charged with a similar offence. It is common cause that the first respondent pleaded guilty, was found guilty and sentenced in that matter accordingly. The suspected stolen property he was found in possession of is in both these incidents, stripped copper cables. The incident the applicant is relying on in the current application occurred two weeks thereafter. The fact that the first respondent and his wife ran away when Buchlugu arrived crowns it all. This clearly shoes that they knew that there was something illegal taking place at their home.

[70] The next question to be considered is whether the two vehicles (property) are instrumentalities of the offence. The first respondent's submission that he will still have committed the alleged offence, even though he did not have the vehicles concerned in this matter is devoid of merit. Evidence before this court clearly shows that the yellow LDV with the registration number FPJ 544 NW was used more than once to commit the same offence. When the first respondent was arrested for the matter he was convicted of, he was driving this vehicle. In respect of the incident at his house, the copper was found loaded in this vehicle again. Furthermore, there is evidence that this vehicle also, was used earlier in the morning on the same day to transport the copper to Brits. As far as the blue bakkie with the registration number HRY 406 NW is concerned, according to Pretorius, the owner of the place where the copper was sold, together with Strydom and James, this vehicle was used on that same morning before Buchlungu arrived to transport copper as well to Brits. When Buchlungu arrived, copper was being loaded on it with the aim of transporting it to Brits again. It

is also clear that this car too was used more than once in the commission of the offence.

[71] Taking into consideration the distance between Rustenburg and Brits, which is generally known to be more than 20km at the least, coupled with the fact that the amount and weight of the copper that was transported to Brits on the date of the current incident and even on the previous incident, it is obvious that it was impossible for the first respondent to convey these goods with his hands or carrying it on his back or his head. He needed a vehicle and hence on both occasions he was using same. The fact that he was using two vehicles during the current incident and further that this was for the second trip, clearly demonstrate how voluminous the copper was. I therefore agree with the applicant that, in the circumstances of this matter, it was not possible that he could have committed this offence without the use of the two vehicles. In my view, the conveyance of the copper with the two vehicles, brought these particulars vehicles within the definition of instrumentality of an offence.

[72] The first respondent's submission in as far as the money is concerned is that the money found in his safe by Buchlungu is not the proceeds of crime, but of a sale of his property to his brother and his wife. A deed of sale purportedly signed by the parties is annexed to the papers before court. Applicant's submission is that the Deed of sale has been fabricated by the respondent to explain the huge amount of cash in his possession.

[73] A closer look at the Deed of Sale in question reveals that it was signed on the 15th day of March 2012. This is eight days before the money

was found in his safe. Although provided for in the document itself, no witness signed this important document. Paragraph 1 and 6 thereof are mutually destructive. In paragraph 1 it is alleged that:-

> "*the whole purchase price of R320 000-00 which is inclusive of R5000-00 towards transfer costs has been already paid to the seller in cash on 15 March 2012"*.

Paragraph 6 thereof alleges that:

> "*transfer of the property will be passed by the seller's attorney around the 15th June 2012*." *The purchasers shall, within 7 days of being requested to do so*, *pay to the seller's attorney all normal costs of* "*transfer of the property*, *including transfer duty and stamp duty including survey charges etc*."

If what is contained in paragraph 1 is the true reflection of the intention and what transpired between the parties, obviously the other part of paragraph 6 that deals with transfer costs would have been deleted or not included at all in this agreement.

[74] The very same house which is the subject matter on the deed of sale was according to the first respondent registered in the name of the first respondent on the 24/2/2011. It is still currently registered in his name. When it was brought from a previous owner the respondent paid R66 000-00 for it. Applicant submitted in this regard, correct in my view, that it is quiet strange that a year later it was sold by the first respondent for about R320 000-00.

[75] The other disturbing aspect in as far as the issue of the money is concerned is the fact that the first respondent when he was requested by Buchlungu to give an explanation of his possession thereof, he said that he derived it from the selling of some of his businesses. This version has subsequently changed to the fact that he got the money from his brother who bought a house from him. Furthermore, the fact that the first respondent's brother and his wife were having marital problems that is why the house is not registered in their name was indicated for the first time during the arguments and in the heads of the respondent's counsel. Nowhere does it appear in the pleadings in this matter.

[76] I find it highly improbable that the first respondent will keep such a huge amount of money which he derived from a sale of his house, which according to him is not proceed of his business practice, for a period of eight days in his safe without taking it to the bank when housebreakings are so endermic in our country and hardly shows any signs of abating. I am of the view that taking all of the considerations I had mentioned in the preceding paragraphs the applicant is correct in his submissions that no legitimate sale agreement between him and his brother exist.

[77] The value of the cable was R99 660.51. Pretorius attached a print out to his affidavit showing numerous transaction between him and Malie Scrap during March 2012. From 1 March 2012 to 17 March 2012 the amount which was paid to Malie Scrap was R544 101,68. The first respondent is known to the police as a dealer and seller of copper without being a licensed second hand dealer as prescribed by the Act on Second Hand Goods, Act 6 of 2008. It is further clear from the

statement of Pretorius that the transactions between him and Malie Scrap are usually in cash. As the business of the first respondent is not registered for tax purposes it is more likely that he would keep the money in a safe at his home instead of paying it into a bank account where huge amounts of money can be detected. Taking all of the above considerations I am of the view that there can be no other explanation for the money than being the proceeds of the unlawful activities of the first respondent.

[78] The onus as far as the defence of "innocent owner" is concerned is on the respondents. The second respondent is the son of the first respondent. The applicant's contention is that it is highly unlikely that he did not know that the first respondent used the vehicles for his unlawful activities. The respondent's submission is that this submission by the applicant is far-fetched. I do not agree. Instead I agree with the submission that it is highly unlikely that the first respondent would need two vehicles at the same time if he had, on his own version, "vehicle trouble". It is clear that the second respondent knew or at the least, as a reasonable person, ought to have known that the first respondent needed the vehicles (two at the same time) for his business dealings. The only reasonable explanation for the use of the two vehicles was to transport copper in huge volumes to Brits. It was not long that the first respondent was arrested and convicted of the offence of possession of a suspected stolen property, when his (second respondent) vehicle was used. It is highly unlikely that the second respondent did not know about this arrest and conviction of the first respondent. The relationship between them, of father and son, ticks the scale heavily towards the fact that the second respondent at the least ought to have known or been aware of what business practice the first respondent was

conducting for his living, for him to be able to pay for or buy the two vehicles registered in his (second respondent) own name.

[79] According to the records of Enviro, the yellow LDV was regularly used to transport goods to Enviro and therefore the second respondent ought to have known that the first respondent used the vehicle for these unlawful activities. From the evidence before court it is clear that the first respondent used these vehicle for his personal use. It is therefore more probable that the vehicles were bought by the first respondent for his own personal use, and only registered them in the name of the second respondent.

[80] The respondents' submissions in as far as the issue of proportionality is concerned is that the forfeiture of the property in this matter will significantly be disproportional, amount to punishment and furthermore unconstitutional if granted against them. Unfortunately the respondents are only making this submission in a form of a bare statement without supporting it with facts or giving reasons why.

[81] I can do no more than agree with the submission of the applicants as enumerated in paragraph 29 of this judgment that the forfeiture of the property will not be disproportionate in this matter. A proper balance of the rights of the respondents against the purpose a forfeiture serves on the other hand heavily weighs towards the granting of a forfeiture order. It is a well known fact that our country has a huge problem of copper theft. Persons like the first respondent contributes to the perpetuation of this offence. Not only that, they also have a tendency to avoid paying taxes by firstly, not registering their businesses as

required by law and secondly, keeping huge sums of money in their possession and not in the bank. Their illegal activities are therefore also not easily detected or traced by the law enforcement officials. The respondents did not take the law seriously because it is quite clear that this illegal activity continued even after the first respondent was convicted and sentenced. The suspended sentence too did not deter the first respondent in particular to continue with this illegal dealings. This is evident by the fact that he was again found committing a similar offence hardly two weeks after his conviction. I am unable to imagine in what type of a case would a forfeiture order be made if the property in this matter is not declared forfeited to the state taking into consideration that the respondents had shown a tendency of being persons who despises the legal system of our country and the law enforcement agencies. In my view, the forfeiture in this matter will undoubtedly serve the following broad societal purposes:-

- removing an incentives for crime;
- eliminating or incapacitating the means by which the first respondent can commit the crime; and
- advancing the ends of justice by depriving those involved in crime of the property concerned.

[82] I am thus satisfied that the applicant had on a balance of probabilities proved that the two vehicles that are subject matter of this application are indeed instrumentals of the offence, that the money that was found in the house of the first respondent is the proceeds of unlawful activities, further that the second respondent ought to have known that the first respondent used the vehicles for unlawful activities, and lastly

that it will not be disproportionate to declare the property in this matter forfeited to the state.

G. ORDER

[83] Consequently the following order is made:-

83.1 The draft forfeiture order which appears on pages 90-92 of the paginated papers is made an order of court.

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A M KGOELE
JUDGE OF THE HIGH COURT

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