



**IN THE HIGH COURT OF SOUTH AFRICA
(EAST LONDON CIRCUIT DIVISION)**

CASE NO. 62/2022

Reportable	Yes / No
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In the matter between:

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS

Applicant

and

MPUMZO MICHAEL MSIMANGO

1st Respondent

MARIUS HARMSE

2nd Respondent

ELANORE HARMSE

3rd Respondent

JUDGMENT

ZILWA J

[1] In this matter the applicant seeks an order, in the main, that certain property, namely, a 2017 V250D Mercedes Benz Avantgarde V Class with registration number JZ 82 BD GP and VIN WDF44781323313604 (the property), be preserved in terms of section 38(2) of the Prevention of Organised Crime Act, 121 of 1998 (POCA), which is currently

in the possession of the South African Police Service on the basis that it constitutes proceeds of unlawful activities, to wit, corruption and/or money laundering. The application is opposed by the respondents. The main answering affidavit is deposed to by the second respondent, with the first respondent merely filing a two page confirmatory affidavit. No confirmatory affidavit has been filed by the third respondent.

[2] The factual basis laid by the applicant for the contention that the property is the proceeds of unlawful activities is that the probity of the manner of the acquisition of the property gives rise to reasonable grounds to believe that the property or the amount of R328 000,00 that is part of its purchase price is the proceeds of unlawful activities, to wit, a gratification from corruption, money laundering, and/or that the R328 000,00 is an instrumentality utilised to facilitate the commission of money laundering.

[3] The stated purpose for the order sought is to ensure that the property or the R328 000,00 in it is preserved pending an application for a forfeiture order in terms of section 58 of POCA.

[4] The applicant also seeks an order in terms of section 38(1) of POCA prohibiting any person with knowledge of the order from dealing in any manner with the property. A further order is also sought in terms of section 40 of POCA placing the property in the effective control of the police SAP13 officer at the SAPS Identification Centre in East London until a forfeiture application by the applicant is concluded.

[5] A summary of the factual matrix set out by the applicant for the conclusion that the property or the amount of R328 00,00 that was paid as part of the purchase price thereof, is proceeds of unlawful activities, is set out below.

[6] During the Covid 19 Pandemic it became necessary for government departments, inclusive of the Eastern Cape Department of Education (the Department), to acquire services, which included personal protective equipment (PPE). The Department embarked on the process of the acquisition of the PPE on an emergency basis, which necessitated deviation from the normal tendering processes.

[7] The Department's Chief Director of the Supply Chain Management section was the second respondent. Once evaluation and selection of candidates for the provision of the needed PPE had been completed, second respondent signed off the appointment letter that was sent to the successful supplier of the services required.

[8] One of the companies that was awarded a tender by the Department for the supply of PPE to the value of R4 066 513,95 was KUPS Trading with the registration number 2006/173325/23. After it had been verified that the contract had been successfully executed and the PPE had been delivered, KUPS Trading was paid the aforesaid amount in full on 31 August 2020.

[9] The sole member of KUPS Trading is one Siggibo Makupula (Makupula).

[10] On 7 July 2020 Makupula ordered a Mercedes Benz V250D Avantgarde vehicle from a Mercedes Benz dealership known as Ronnies Motors (Ronnies). The price tag for the motor vehicle was R1 459 863, 85. As part-payment for the motor vehicle Makupula had transferred a sum of R305 000,00 to Ronnies' bank account in July 2020.

[11] On 11 September 2021 Makupula paid a further deposit of R328 000,00 on the motor vehicle (hereinafter referred to as the first Mercedes). That amount of R328 000,00 was paid from the money that had been paid into KUPS Trading account by the Department on 31 August 2020 referred to above.

[12] Makupula failed to settle the outstanding amount on the first Mercedes. He eventually informed Ronnies that he and his "business partner" had decided to buy a cheaper vehicle from Star Motors in Qonce. Ronnies then charged Makupula an amount of R60 000,00 as penalty for costs incurred and they reimbursed Makupula the remainder of the money that had been paid as a deposit (R633 000,00) in the sum of R573 000,00.

[13] The deposit of R633 000,00 paid for the first Mercedes consisted of the first payment of R305 000,00 which had come from the second respondent's Standard Bank account and the second payment of R328 000,00 which had been paid from KUPS

Trading First National Bank account into which the Department had deposited tender payment amount of R4 066 513,95.

[14] During December 2020 the first respondent was a salesman at Qonce Star Motors. While doing an inspection on all motor vehicles with a mileage over a certain figure he came across the first Mercedes at the dealership. He discovered from the workshop records that it belonged to the second respondent. He then called the second respondent and offered to evaluate the motor vehicle for him in the event of him being interested in upgrading same. He then valued the first Mercedes at R573 000,00 and offered the second respondent an opportunity to trade in for another V series 220 Mercedes Benz with registration number HXY 074 EC (the second Mercedes) which was valued at R850 000,00.

[15] According to the first respondent, the second respondent accepted the deal but later changed his mind, on the basis that the first Mercedes would be purchased privately by someone else and that he (the second respondent) would purchase the second Mercedes not on a trade in basis anymore. The purchase of the second Mercedes was successful but in April 2021 the second respondent again arrived at Star Motors and requested the first respondent to look for a V250 Mercedes as he was unhappy with the power of the second Mercedes, which was a V220. He further requested the first respondent to place the second Mercedes on the sales lot at Star Motors and sell it on his behalf at a value of R800 000,00.

[16] First Respondent indeed put the second Mercedes in the sales lot and sold it to a new customer. He found the V250 series required by the second respondent at the Land Rover dealership in Sandton, Johannesburg for an amount of R889 995,01 (the third Mercedes). First respondent then showed the third Mercedes to the second respondent who expressed satisfaction with it. Second respondent then informed the first respondent to deposit the R800 000,00 amount, which was the sale price of the second Mercedes, into the bank account of Land Rover, Sandton from whom the third Mercedes had been sourced. First respondent complied with that instruction. First respondent then transferred the remainder of the purchase price from his own account in two payments of R50 000,00 and R39 995,01. First respondent explained that he had made those payments from his own account as he intended to obtain his commission directly from the second respondent hence he had registered the third Mercedes (the property) in his own name. First respondent then caused second respondent to make and sign a purchase agreement. Second respondent agreed and paid first respondent R150 000,00 in cash to seal the deal for the acquisition of the property.

[17] The Sales Manager of Star Motors, one Gregory Hubbard, confirms that he had evaluated the first Mercedes and offered second respondent R573 000,00 for it as a trade in and that the second Mercedes was valued at R850 000,00, in respect of which the second respondent was supposed to pay and did pay a sum of R277 000,00 as the settlement price thereof.

[18] Subsequent to this arrangement, second respondent told them that he wanted to change the deal as his “business partner” would be buying the second Mercedes from them (i.e. Star Motors) and he no longer wanted to trade in the first Mercedes. Hubbard then invoiced the second Mercedes at the full price of R849 999,99, which then necessitated payment of the balance of the purchase price in the sum of R573 000,00. That balance was paid in full by Makupula on 23 February 2021. According to Hubbard, whose contention is confirmed by the E-natis records, the second Mercedes was then registered in the third respondent’s name (third respondent being the wife of the second respondent). However, at the time of the seizure of the property it was registered in the name of the first respondent.

[19] Hubbard further contend that in April 2021 the second respondent had requested them (i.e. Star Motors) to place the second Mercedes onto their sales lot and sell it on his behalf at R800 000,00. They did so and found a customer who wanted to purchase the vehicle in a financed deal. Star Motors wanted to facilitate the transaction, so they purchased the second Mercedes directly from second respondent for R800 000,00. They then invoiced the new customer on the same day. The second respondent instructed them to deposit the R800 000,00 into the account of the dealership where the property was being sold, i.e Land Rover, Sandton. Indeed details of the bank account of Land Rover, Sandton reveal that R800 000,00 was received from Star Motors on 17 May 2021.

[20] The applicant contends that given the fact that the Department at which second respondent worked as a Chief Director in its Supply Chain Management section had

awarded the tender to Makupula / or KUPS Trading and that KUPS Trading had then paid over, at least R328 000,00, for the acquisition of vehicles, which were later on either sold or traded in to acquire the property, there are reasonable grounds to believe that the property or the R328 000,00 is the proceeds of unlawful activities as set out above, hence present application.

[21] After the facts set out above had come to the fore a criminal case under the docket registered as Zwelitsha CAS 93/10/2021 was referred the Assets Forfeiture Unit by the South African Police Services in relation to the property. Further investigations with regard to such criminal case are still ongoing.

[22] In his opposition to the relief sought by the applicant the second respondent contends that he did not play any active role in the awarding of the tender to KUPS Trading and that the tender itself was above board. In his answering affidavit he states that during June 2020 he learnt from his work colleague called Dabi that his (Dabi's) cousin was trading in his 2015 model Vito Mercedes Benz for the latest model at Ronnies. After viewing the vehicle at Ronnies he offered to buy it for a price of R305 000,00 which he paid into Ronnies' bank account on 7 July 2020. He further states that *"insofar as the source of funds that I used to pay the purchase price of R305 000,00 on 7 July 2020 and the sum of R277 000,00 to Star Motors for the V220 Vito Mercedes Benz, I aver that I used my own savings on my access bond account Standard Bank account number"*

[23] On 9 July 2020 he went back to Ronnies to sign the sale agreement with “the owner”, Makupula. He then took ownership of the vehicle (the first Mercedes). The vehicle had not yet been transferred to Ronnies. During December 2020 he took the vehicle to Star Motors, a franchise of Ronnies, in King Williams Town for assessment and he dealt with the first respondent who was a salesman there. The latter suggested that the mileage of the vehicle was too high and he offered to get him a newer version thereof. He later got him a V220 Vito Mercedes Benz for R850 000,00 in January 2021 (the second Mercedes)

[24] With regard to the amount of R305 000,00 the second respondent contends that no deposit was paid to him by Makupula to purchase the property. Instead Makupula used his (the second respondent's) R305 000,00 to re-purchase his (Makupula's) vehicle from Star Motors, which he had traded-in. Therefore he was in possession of his money (R305 000,00), for the vehicle that he had purchased from Ronnies that belonged to him (Makupula).

[25] He concludes that the R328 000,00 that was paid to Ronnies towards Makupula's new vehicle cannot constitute a gratification to him (second respondent) as he had nothing to do with it. He had used his own savings from his access bond account at Standard Bank to pay the purchase price of R305 000,00 on 7 July 2020 and R277 000,00 to Star Motors for the second Mercedes

[26] The second respondent further contends that he did not even know that Makupula had a company that had tendered for PPE in the Department of Education because he (second respondent) was not involved in the appointment of the company. The latter contention is demonstrably untrue in that, as already pointed out above, he is the one who actually signed off on the appointment of Makupula's company that was awarded the tender. Second respondent further denies that he ever suggested to Mr Hubbard that Makupula was his business partner.

[27] Regarding the acquisition of the property, second respondent's version is that during May 2021 he had requested the first respondent to source for him a 2017 250 Vito Mercedes Benz, to which request the first respondent acceded. He found the required vehicle at a motor vehicle dealership called Trendtrade in Sandton, Johannesburg at a price of R950 000,00. He had then requested the first respondent to trade-in the second Mercedes, which was immediately sold for R800 000,00 by Star Motors.

[28] The R800 000,00 was then used to pay for the property at the Trendtrade vehicle dealership. He advised the second respondent that he would pay the balance of R150 000,00 when he received his 13th cheque in June 2021. He paid first respondent the R150 000,00 during July 2021. The latter had told him that he had purchased the property and was waiting for him to pay the balance of R150 000,00. He requested the first respondent to organise a new front grill for the property before he (first respondent) could pass transfer of the motor vehicle to him. At the time the property was seized it was still in first respondent's possession for the installation of the new grill and was, as such, a

bona fide possessor, while he and his wife were the owners of the property. This contention belies the common cause fact that at the time of its seizure the property was registered in the name of first respondent. He denied that the property was purchased with funds that are proceeds of crime or an instrumentality of an offence.

[29] There is no explanation as to why the property that is allegedly owned by the second and third respondents is registered in the name of the first respondent. Neither is there any explanation as to how the first Mercedes remained registered in the name of Makupula throughout, despite its alleged sale to Star Motors and later to the second respondent. Even more bizarre is the contention that the same Makupula later repurchased his own same motor vehicle from Star Motors and paid R266 000,00 more than what he had sold it for six months earlier, paying the purchase price to Star Motors rather than to second respondent who was the alleged owner thereof. The motor vehicle was thereafter allegedly given by Makupula to Dabi free of charge. The same Dabi is a co-employee of the second respondent and a cousin to Makupula. There is no confirmatory affidavit by Makupula filed by the respondents confirming any of the contentions made by them about him.

[30] I am satisfied that the contention made by the applicant in support of the application are well-founded and that the respondents' averments to the contrary simply do not pass muster and they stand to be rejected out of hand.

[31] In *National Director of Public Prosecutions v Van Staden*¹ the SCA pointed out that the provisions of the Act are designed to reach far beyond organised crime and apply also to cases of individual wrong doing.

[32] In *National Director of Public Prosecutions v R O Cook Properties and Others*² the Court, dealing with what constitutes proceeds of unlawful activities, stated that there must be a proximal link between the unlawful activity and the return. This means that the proceeds must in some way be the consequence or result of the unlawful activity. With regard the requirements of property that constitutes instrumentality of an offence the Court held that the link between the crime committed and the property must be reasonably direct, in fact it should be a *sine qua non* in the commission of the offence. The property must be functional to the commission of the offence, not merely incidental to the commission thereto.

[33] In *National Director of Public Prosecutions v Botha N.O and Another*³ the Constitutional Court found that once property had been acquired through unlawful means and therefore was the proceeds of unlawful activities, the person who acquired it has no legal right to that property.

¹ 2007 (1) SACR 338 (SCA) at para [1].

² 2004 (2) SACR 208 (SCA).

³ 2020 [ZACC] handed down on 26 March 2020.

[34] In *NDPP v Mohammed NO and Others*⁴ the Court, in setting out the purpose or objective of the Act remarked *"The present Act (in particularly chapters 5 and 6 thereof) represents the culmination of a protracted process of law reform which has sought to give effect to South Africa's International obligation to ensure that criminals do not benefit from their crimes. The Act uses two mechanisms to ensure that property derived from crime or used in the commission of crime is forfeited to the State. These mechanisms are set fourth in chapter 5 (comprising sections 12 to 36) and chapter 6 (comprising sections 37 to 62). Chapter 5 provides for the forfeiture of the benefits derived from crime but its confiscation machinery may only be invoked when the "defendant" is convicted of an offence. Chapter 6 provides for forfeiture of the proceeds of and an instrumentality used in crime, but is not conviction based; it may be invoked even where there is no prosecution."* It is the provisions of chapter 6 that are relevant to the current proceedings.

[35] As already indicated above, the second respondent in this matter was the final and main signatory on the part of the Department which awarded Makupula a tender for the sum of R4 066 513,95. On the evidence on record it emerges clearly that an amount of R328 000,00 that was paid by Makupula from the monies that he was paid in respect of the tender ended up being part of the purchase price that was paid by the second respondent for the property. The amount was laundered through various sales transactions until it was embedded in the property. Given the fact that the second respondent claims to have no acquaintance or connection with Makupula and given the absence of any tangible explanation as to how the amount referred to ended up

⁴ 2002 (4) SA 843 (CC).

embedded in the property, the only reasonable inference that can be drawn is that such amount constitutes a corrupt gratification in a corrupt and money laundering venture that is the subject of current investigations by the police.

[36] In *National Director of Public Prosecutions v Seevnarayan*⁵ it was held that the theme of the chapter in the Act that deals with preservation orders is about the instrument of crime. It is the instrumentality of the offence and not the person of the offender that takes centre stage. The primary focus of the inquiry is not the role played by the owner of the property, but rather the role of the property itself in the commission of the crime or the furtherance of a crime regardless of the identity of the actual perpetrator who used the property as an instrument.

[37] On the evidence on record I am satisfied that the applicant has succeeded to discharge the *onus* that rests on it to prove there are reasonable grounds to believe that the property is indeed an instrumentality of an offence that is the subject of ongoing investigation by the police as envisaged in section 38(2) of POCA.

[38] In the result the following order shall issue;

1. The property that is a 2017 V250D Mercedes Benz Avantgarde V Class with registration numbers and letters JZ 82 BD GP and VIN WDF44781323313604 (the property), which is currently in the possession of the South African Police


⁵ 2004 (2) SACR 208 (SCA) para [22].

Service (SAPS) is hereby preserved in terms of section 38(2) of the Prevention of Organised Crime Act 121 of 1998 (POCA);

2. Subject to the provisions of this order, all persons with knowledge of this order are prohibited in terms of section 38(1) of POCA from disposing of, dissipating, interfering with, taking possession of or; control over, diminishing the value of, pledging or otherwise hypothecating, attaching or dealing in any other manner with the property to which this order relates.
3. The SAPS SAP13 officer in charge at the South African Police Service identification centre at 59 Paterson Street, Arcadia, is hereby appointed to take control of the property until the expiration of this order in terms of section 40 of POCA or until the conclusion of a forfeiture application instituted by the applicant in respect of the property.
4. The property is to remain under the care of the SAP13 officer for safe keeping.
5. The applicant shall, in terms of section 39 of POCA, cause notice of this order, in the form set out in annexure A to the draft preservation order filed of record by the applicant, to be published in the Government Gazette as soon as practicable after the issue of this order.
6. The applicant is directed to give notice of this order and annexure A to all persons who become known to the applicant to have interest in this matter.
7. Any person who has an interest in the property and who intends:
 - 7.1 Opposing the application for an order forfeiting the property to the State;
 - or

- 7.2 Applying for an order excluding his or her interest from a forfeiture order in respect of the property, must enter an appearance giving notice of such intention in terms of section 39(3) of POCA.
8. Such notice shall be delivered to the applicant:
 - 8.1 In the case of any person specifically identified for service in terms of this order, within fourteen (14) calendar days after such service; and
 - 8.2 In the case of any other person, fourteen (14) calendar days after the date upon which a notice of this order was published in the Government Gazette.
9. A notice in terms of section 39 must contain full particulars of the chosen address for the delivery of documents concerning such further proceeding in this matter and must accompanied by an affidavit setting out:
 - 9.1 Full particulars of the identity of the person giving notice;
 - 9.2 The nature and extent of his or her interest in the property concerned;
 - 9.3 Whether he or she intends opposing the making of the forfeiture order, or whether he or she intends applying for an order excluding his or her interest in that property from the operation of the order;
 - 9.4 Whether he or she admits or denies that the property concerned is an instrumentality of an offence referred to in schedule 1 of POCA, or is the proceeds of unlawful activities and the basis for such defence; and

- 9.5 If he or she intends applying for the exclusion of his or her interest from the operation of the forfeiture order, the basis for such application.
10. Any person who is affected by the order may, on good cause shown, apply for the reconsideration thereof. Such application shall be made upon 72 hours notice (or such shorter period as the Court may determine on good cause shown) the applicant or all other persons identified in this order as being persons who may have an interest in the property, and must be made not later eight (8) days that after the person applying for reconsideration becomes aware of the existence of the order, or within such further period as the Court may consider reasonable, bearing in mind the underlying objectives of Chapter 6 of POCA.
11. The respondents are ordered to pay the costs of the application jointly and severally, the one paying the others to be absolved from liability.



P ZILWA

JUDGE OF THE HIGH COURT

BHISHO

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Date Heard:

11 August 2022

Judgment Delivered:

20 September 2022