IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE LOCAL DIVISION, MTHATHA

Case no. 348/12

REPORTABLE

In the matter between:

THE NATIONAL DIRECTOR

OF PUBLIC PROSECUTIONS **Applicant**

and

TUTU NDOLOSE **Respondent**

JUDGMENT

STRETCH J:

[1] The subject matter of this application is a TLB Volvo tractor with registration number [……] ("the tractor") which was seized by the South African Police on 16 November 2011 near Kei Bridge.

[2] On 22 February 2012 and in terms of section 30(2) of the Prevention of Organised Crime Act 121 of 1998 ("POCA"), Hinxa AJ granted an order that the tractor should be preserved under the control of one Nqabomsi Mdutyana from the East London Asset

Forfeiture Unit ("the AFU") until the order expires or pending the conclusion of a forfeiture application.

[3] On 11 July 2012 the applicant duly delivered a forfeiture application which the respondent opposes.

[4] It is common cause that the tractor was operated by an employee of the respondent (one Ceba) in the vicinity of the Kei River on 16 November 2011.

[5] According to the applicant, Ceba was using the tractor to mine sand without authorisation or the requisite permit.

[6] The respondent denies that Ceba was mining sand. According to the respondent, Ceba took the tractor to the Kei River to wash it as it was going to be repaired. Alternatively, says the respondent, even if it were found that Ceba was mining sand, this conduct is not illegal because:

(a) The sand falls under the jurisdiction of the tribal authority.
(b) The tribal authority can do with this sand as it pleases.
(c) In this case, the tribal authority was selling the sand to enhance its own development.

[7] The respondent furthermore contends that the applicant's preservation order has expired as the applicant failed to timeously institute its forfeiture application in terms of section 40 of POCA.

[8] The respondent's counsel also raised for the first time in argument before me as a point *in limine* that I should ignore the applicant's replying papers because:

(a) They were delivered out of time.
(b) The applicant ought to have applied for condonation and for leave to deliver the affidavit before delivering it *mero motu.*

[9] The applicant's response to this point raised *in limine* is that:
(a) Its application for condonation forms part of its replying affidavit.
(b) The deponent to the affidavit (Mr Kingsley who is a deputy director with the National Prosecuting Authority and the provincial head of the AFU in the Eastern Cape) only became aware of the contents of the East London file "recently" and found out that a reply was not delivered because the erroneous view existed that the matter could be argued without it.

[10] Having heard argument on behalf of both of the parties with respect to this point, I granted condonation and received the replying affidavit as I was of the view that it was in the interests of justice to do so. Having perused the affidavit, I was in any event satisfied that the respondent was not prejudiced by the late delivery thereof, particularly in that the affidavit consists in the main of legal argument and in my view, amounts to little more than written argument (albeit on oath) delivered earlier than usual.

The duration of the preservation of property

[11] The contention that the preservation order has expired was not seriously pursued in argument before me, and correctly so.

[12] Section 40 of POCA, which traverses the duration of preservation of property orders reads as follows:

> 'A preservation of property order shall expire 90 days after the date on which notice of the making of the order is published in the *Gazette* unless –
>
> (a) There is an application for a forfeiture order pending before the High Court in respect of the property, subject to the preservation of property order;
>
> (b) There is an unsatisfied forfeiture order in force in relation to the property subject to the preservation of property order; or
>
> (c) The order is rescinded before the expiry of that period.'

[13] The preservation order granted on 22 February 2012 and published in the *Gazette* on 20 April 2012 invites any party (and in particular the respondent) intending to oppose *the* (my emphasis) application for a forfeiture order to enter an appearance giving notice of such intention in terms of section 39(3) of the Act within 14 calender days of service of the preservation order on him.

[14] In my view the use of the definitive in referring to *the* order as opposed to *an* order makes it clear that the application for the forfeiture order is pending before the court as envisaged in section 40(a) of the Act. In fact, the notice in terms of section 39(1)(b) of the Act which was served on the respondent on 24 May 2012 in compliance with the rules of this court makes it clear that the applicant intended applying for a forfeiture order, and that the preservation order would remain in force until the application for the forfeiture order had been finalised. In this notice the respondent's

attention is also drawn to the 14 day time limit available to him within which to oppose the application for a forfeiture order, compliance with which would entitle the respondent to 14 days' notice of the hearing of the forfeiture application, which notice he would otherwise not be entitled to, and which notice he would otherwise not be given, and which application he would otherwise in essence be barred from opposing.

[15] It is common cause that the respondent's notice to oppose was delivered out of time on 12 July 2012.

[16] Strictly speaking it is the respondent then, who ought to be applying for upliftment of the bar referred to in the order which was served on him, which application is more fully described at section 49(3) as an application for leave to enter an appearance in terms of section 39(3) which application this court has a discretion to grant, on good cause shown, with an appropriate costs order.

[17] In my view then, the contention that the preservation order has expired is really nothing less than the pot calling the kettle black, and was appositely abandoned by counsel arguing the matter before me.

Whether sufficient evidence exists to justify the making of a forfeiture order

[18] Section 50 of the Act, which deals with the circumstances in which this court would be justified in making a forfeiture order, reads as follows:

'(1) The High Court shall, subject to section 52, make an order applied for under section 48(1) if the Court finds on a balance of probabilities that the property concerned-

(a) Is an instrumentality of an offence referred to in Schedule 1;
(b) Is the proceeds of unlawful activities; or
(c) Is property associated with terrorist and related activities.

…..

(4) The validity of an order under subsection (1) is not affected by the outcome of criminal proceedings, or of an investigation with a view to institute such proceedings, in respect of an offence with which the property concerned is in some way associated.'

[19] The relevant portions of section 52 of the Act dealing with exclusion of interests in the property read as follows:

'(1) The High Court may … when it makes a forfeiture order, make an order excluding certain interests in property which is subject to the order, from the operation thereof…

(2A) The High Court may make an order under subsection (1), in relation to the forfeiture of an instrumentality of an offence … if it finds on a balance of probabilities that the applicant for the order had acquired the interest concerned legally, and –

(a) neither knew nor had reasonable grounds to suspect that the property … is an instrumentality of an offence …'

[20] It is common cause that the basis of this forfeiture application is that it is alleged that the tractor is “an instrumentality of an offence” referred to in schedule 1 of POCA.

[21] Section 24F of the National Environmental Management Act 107 of 1998 (“NEMA”) prohibits the commencement or continuation of certain activities in the absence of appropriate authorisation. These activities are listed in Government Gazette R544 published on 18 June 2010. Item 18 of this list prohibits the following activity:

‘The infilling or depositing of any material of more than 5 cubic metres into, or the dredging, excavation, removal or moving of soil, sand, shells, shell grit, pebbles or rock from

(i) A watercourse;
(ii) The sea;
(iii) The seashore;
(iv) The littoral active zone, an estuary or a distance 100 metres inland of the high-water mark of the sea or an estuary, whichever distance is the greater –

but excluding where such infilling, depositing, dredging, excavation, removal or moving

(i) Is for maintenance purposes undertaken in accordance with a management plan agreed to by the relevant environmental authority; or
(ii) Occurs behind the development setback line.’

[22] A person convicted of an offence in terms of section 24F(2) of NEMA is liable to a fine not exceeding R5 million or to imprisonment for a period not exceeding ten years, or to both such fine and such imprisonment.

[23] Item 33 of schedule 1 of POCA accordingly has the effect of bringing the tractor (if the offence is established) into the ambit of the legislation dealing with an offence for which a forfeiture order can be applied, as the listed offence is one for which the punishment may be a period of imprisonment exceeding one year, without the option of a fine, as described in the schedule.

[24] The applicant has contended that this court ought to find as a fact that the respondent's employee used the tractor on 16 November 2011 to dredge, excavate, remove and/or move sand from the Kei River, which is a water course. In the event of material factual disputes existing in this regard, it is contended in the applicant's reply that this application ought to be referred to oral evidence for those specific issues to be traversed. In the absence of a substantive application delivered in terms of section 52 of POCA, the applicant argues that I ought to adjudicate only on the following two issues:

(a) whether the tractor is an instrumentality of the offence;
(b) whether the respondent was aware that it was being used for this purpose.

[25] The respondent:

(a) denies that his vehicle was "excavating" sand; alternatively,

(b) contends that sand excavation at the Kei Bridge is permitted by the Amahlubi Tribal Authority under whose territorial jurisdiction and administrative authority the "Kei Bridge sand" falls, and which sand this authority sells for its own revenue.

Whether factual disputes exist

[26] The contention that the sand falls under a tribal authority was not pursued in argument before me and I assume that it has, properly so in my view, been abandoned.

[27] Much was made in argument as to whether the respondent has been convicted of a criminal offence, whether the volume of the sand exceeded five cubic metres and whether affidavits deposed to on the applicant's behalf were commissioned by independent commissioners.

[28] I do not intend traversing these arguments in detail. They were not raised on the papers. But for cursory reference to the absence of a criminal conviction, they were not mentioned in the respondent's heads of argument either, the purpose of which is to identify and expand on the crisp issues of fact and law which the parties intend to address when the matter is argued. It is in any event clear that a criminal conviction is not a condition precedent to forfeiture, and property may be forfeited even when there is no charge pending (see *NDPP v RO Cook Properties* 2004 (8) BCLR 844 (SCA) at 853F).

[29] In my view, the preliminary issue which requires determination in this application is whether the applicant has proved the actual commission of the offence, on a balance of probabilities. It is only if this question is answered in the affirmative, that it becomes necessary to traverse further contentions.

The evidence

[30] The only documents which traversed the factual issue of the commission of the offence is the statement of Thembekile Ndabambi, who according to his affidavit is employed as an assistant manager at the compliance and enforcement section of what I presume to be the Department of Economic Development and Environmental Affairs ("DEDEA"), and that of Robert Stegmann, who is employed at the same place in the same capacity.

[31] Ndabambi says on oath that on 16 November 2011 he was in the process of crossing the Kei River bridge when he noticed a front loader back actor machine working very close to the river collecting sand and making a heap. He, Gouws and Stegmann who were in his company decided to investigate as the activity was a listed one which could only be undertaken with authorisation from his office. Upon arrival at the scene he ordered the driver of the back actor to stop the machine and to switch off the engine. The driver was not in a position to furnish him with authorisation. The driver, Joe Ceba, introduced himself and supplied his personal details. Thereafter Ndabambi informed him that he had committed an offence by contravening section 24F of NEMA "(as amended)" to wit, undertaking listed activity 18 (the removal and dredging of sand next to a water course) without authorisation. Ceba advised him that he was employed by the respondent. Ndabambi informed Ceba that he was under arrest and informed him of his constitutional rights. Thereafter he instructed him to drive the front loader back actor to the Kei Bridge Police Station where a docket was opened.

[32] Stegmann says on affirmation that after Ceba had been arrested he asked him who he was working for and how long he had been working at the site where he had been apprehended. Ceba replied that he was working for the respondent and that he had been mining at the site for about three weeks, averaging anything between zero and five truck loads per day.

[33] The affidavit and the statement which I have referred to barely meet the requirements of acceptable evidence in a matter of this nature. I say so for the following reasons:

(a) Kingsley, who has been authorised by the NDPP to launch this application, has in his own affidavit (most of which is hearsay but which I accept was intended to be nothing more than a precis of the applicant's case) stated that Thembekile Ndabambi, Johanna Gouws and Robert Wayne Steggman are the three people who approached the respondent's employee who was using a suspicious looking vehicle and appeared to be digging sand and making sand heaps.

(b) Mark Deacon, who is a member of the South African Police Services seconded to the East London AFU has deposed to a similar statement, to which he has attached five black and white photographs which he describes as "copies of the photograph depicting the activity". These photographs, individually described, portray a tractor not participating in any obvious activity in the first photo, a pile of sand in the vicinity of the front of a tractor in the second photo, tyre marks in sand on a river bank in the third photo, three heaps of sand in the fourth photo

and an image which cannot be described with any certainty in the fifth photo, save to say that there appears to be a bushy area and a hill in the background thereof. Of particular concern to me is an averment which he then makes in his affidavit which reads thus:

> 'Ndolose confirmed to the police that he is the registered owner of the TLB machine and that Ceba is his employee and was digging and loading the sand on his instructions.'

(c) There is nothing before me to indicate where Deacon could have obtained this damaging and potentially damning hearsay information from. There is also nothing before me to suggest that any of the hearsay which has been raised by these two deponents is confirmed by the two deponents who actually attended the scene, or vice versa.

(d) Neither Kingsley nor Deacon were ever at the scene. With respect to Ndabambi, who apparently did attend the scene, his affidavit was commissioned by Hendrina Johanna Gouws, who, according to Kingsley and Deacon, attended the scene with him and is thus a crucial witness as to what was seen and experienced at the scene, and clearly has an interest in the matter. Item 7 of the regulations made in terms of section 10 of the Justices of the Peace and Commissioners of Oaths Act 16 of 1963 ("the Oaths Act") states that a commissioner of oaths shall not administer an oath or affirmation relating to a matter in which he has an interest. In this regard it has been held that both precedent and principle point to this regulation as being peremptory and that non-compliance renders the act of attestation void and deprives the document of its validity as an

affidavit. The reason for the regulation is that a person attesting an affidavit is required to be unbiased and impartial in relation to the subject-matter of the affidavit. If that person's position is such that this qualification is prima facie absent there exists a danger that this person may have influenced the deponent with regard to the subject-matter of the affidavit (see *Radue Weir Holdings Ltd t/a Weirs Cash & Carry v Galleus Investments CC t/a Bargain Wholesalers* 1998 (3) SA 677 (E) at 679H and 680G).

(e) It is trite that in application proceedings affidavits are not only a substitute for pleadings in an action, but they also take the place of essential evidence which would otherwise be led at a trial. In this regard I refer to *Transnet Ltd v Rubenstein* 2006 (1) SA 591 (SCA) at 600G*; Minister of Land Affairs and Agriculture v D&F Wevell Trust* 2008 (2) SA 184 (SCA) at 200D*; MEC for Health, Gauteng v 3P Consulting (Pty) Ltd* 2012 (2) SA 542 at 550G – 551C). As such it is imperative that the source of information be furnished in the document, failing which that information, in my view, serves to be considered as *pro non scripto*. Where an affidavit sets out facts based on hearsay information, the deponent must state that the allegations of fact are true to the best of his or her information, knowledge and belief, and must also state the basis of this knowledge or belief. Failure to state the source of the information or grounds of belief in the original affidavit is an irregularity which is so serious that it has been held that it cannot even be cured in reply (see *Syfrets Mortgage Nominees Ltd v Cape St Francis Hotels (Pty) Ltd* 1991 (3) SA 276 (SE)).

(f) It is simply not open to a party to merely annex documentation to an affidavit and then to request the court to have regard to it. What is required is the identification of the portions thereof on which reliance is placed and an indication of the case which is sought to be made out on the strength thereof (*see D&F Wevell Trust supra* at 200C*; Van Zyl v Government of the Republic of South Africa* 2008 (3) SA 294 (SCA) at 306D-E).

(g) In my view the same applies to the statement of Stegmann which appears to have been attested by the manager of his own department, seized with the compliance with and the enforcement of environmental legislation. I refer to this document as a statement as opposed to an affidavit (which is a sworn as opposed to an affirmed statement in writing) because it is not clear at all what the document purports to be and what weight ought to be attached to it, if anything at all. This is so because:

(aa) Whereas the document reflects that the deponent has no objection to taking the prescribed oath and considers the oath to be binding on his conscience, the person who attested the statement states that the declaration was "affirmed".

(bb) There is also no indication *ex facie* the document as to whether the person who attested the statement is in fact a commissioner of oaths. All that the statement reflects in this regard is a signature at the foot thereof, followed by the following:

'J. Pienaar

Manager: Compliance and Enforcement

DEDEAT

50613596'

(cc) This is not in compliance with regulation 4(2) of the Oaths Act which makes it peremptory for the commissioner of oaths to print his full name and business address below his signature and to state his designation and the area for which he holds his appointment as a commissioner of oaths, or the office held by him if he holds this appointment as a commissioner *ex officio.*

[34] All in all, there is no reliable evidence before me to suggest, even on a preponderance of probability, that the respondent's employee committed any offence. As against this lack of information, stands the properly attested to, direct evidence on oath of the respondent's employee, Joe Ceba, who had not only significantly left his tractor at the Kei Bridge police station the night before for safe keeping, but who states uncategorically that he had been digging a foundation for one Sotobe's homestead when one of the tractor's pipes sprang a leak and that he took the tractor to the river to clean it for repair purposes. This is confirmed by the properly attested evidence on oath of Sotobe himself as well as that of the respondent who confirms that this was indeed the nature and the purpose of his employee's work and the use of the tractor on that particular day in the vicinity where they had been seen.

[35] It is only in the situation where a matter cannot properly be decided on affidavit because material factual disputes exist that a party or the parties can, in appropriate circumstances, apply to the court for it to be referred to trial or for oral evidence to be led on the material issues in dispute *ex facie* the affidavits. It is in any event so that as a general rule an application for the hearing of oral evidence must be made *in limine*. In the application before me, whilst referral to oral evidence is alluded to in the somewhat belated reply, such an application was not made *in limine* or at all.

[36] I am in any event of the view that there is nothing inherently improbable in the innocent explanation which the respondent's employee has properly placed before this court for the tractor having been seen where it was on the day in question. Over and above this, the applicant has not produced anything cogent or acceptable in legal proceedings on motion to refute this explanation. In the absence of even the slightest proof of the commission of a crime, the instrumentality or otherwise of the tractor does not need to be addressed, and the application for forfeiture falls to be dismissed.

Costs

[37] The respondent did not comply with the provisions of either sections 39(3) or 49 of POCA with respect to his late entry of appearance. As his very appearance in this matter has been conditional upon the leave of this court which has been granted in the interests of justice, I have a discretion as to whether, in these particular circumstances, costs should follow the result.

[38] In the exercise of this discretion I am of the view that it is appropriate for this court to express its disapproval of the respondent's tardiness in complying with time constraints imposed for good reason by legislation governing matters of this nature. In the premises, I am not inclined to make any order as to costs.

ORDER:

The application for a forfeiture order is dismissed.

_____

I T STRETCH **27 March 2014**
JUDGE OF THE HIGH COURT

For the applicant: Mr Jakavula

Instructed by: The State Attorney, Mthatha

Ref: 244/12-A5 (Mrs Dlanjwa)

For the respondent: Mr Bodlani

Instructed by: Messrs Mgxaji Inc., Mthatha

Ref: SLM/nz/TUTU/0001