



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

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The National Director of Public Prosecutions v Moyane (474/2021) [2022] ZASCA 79 (31 May 2022)

Today the Supreme Court of Appeal (SCA) handed down a judgment upholding, with costs, an appeal against the decision of the Gauteng Division of the High Court, Pretoria (the high court).

The issue before the SCA concerned the question of whether a Volkswagen 364 Scirocco motor vehicle with registration number FGC 937 MP (the vehicle) represented 'the proceeds of unlawful activities' and/or was 'an instrumentality of an offence' within the meaning of the Prevention of Organised Crime Act 121 of 1998 (the Act), and so liable to forfeiture under s 50(1)(a) of the Act.

The vehicle was first registered in the name of Moyane and shortly thereafter in the name of one Albert Mathews Sithole (Sithole), who was the second respondent in the court of first instance. Sgt Ngwenyama investigated how the vehicle was acquired, first by Moyane and later by Sithole. His investigation revealed the following: The vehicle initially belonged to Palm Motors, a Volkswagen dealership in White River. According to Ms Juanita Anne Brinkman (Brinkman), a salesperson of Palm Motors, who was involved in the sale of the vehicle to Moyane said, the latter had initially wanted to have the vehicle registered in Mr Gideon Casey Mchirawondu's name (Mchirawondu). Mchirawondu was with Moyane when the terms of sale of the vehicle were discussed. But that became impossible as Mchirawondu died before Palm Motors could source the vehicle. It was thus registered in Moyane's name. Moyane denied that he had told Brinkman that the vehicle, once sourced, was to be registered in Mchirawondu's name. He contended that Brinkman must have misunderstood him because right from the beginning, he told her that he was the purchaser of the vehicle and that it was to be registered in his name. Payment for its purchase price emanated from various third parties, who on the in the instruction of Moyane made into dealership account. As the SCA had alluded, within three months of acquiring the vehicle, in June 2010, Moyane transferred it into Sithole's name for no consideration.

In September 2011, the appellant, the National Director of Public Prosecutions (NDPP), applied for and was granted a preservation order in terms of s 38 of the Act in respect of the vehicle by the high court on the basis that the vehicle was an instrumentality of an offence and/or the proceeds of unlawful activities. In subsequent forfeiture proceedings in terms of s 48(1) of the Act, the high court (per Mavundla J sitting as court of first instance) found that the vehicle was an instrumentality of unlawful activity and ordered its forfeiture to the state. On appeal, the full court, of the same Division, in a majority judgment (per Louw J and Jordaan J concurring), upheld the appeal, set aside the order of the court of first instance and replaced it with an order dismissing the application with costs. In contrast, Fisher J dissented and, in a minority judgment, held that she would have dismissed the appeal with costs. Aggrieved by the order of the full court, the NDPP sought and obtained special leave of appeal from this Court.

It was accepted by the parties in the appeal before the full court that the NDPP's case, based on the allegation that the vehicle was an instrumentality of an offence was not sustained by the evidence on which the NDPP relied. Therefore, the matter was adjudicated based on whether the NDPP had established that the vehicle was the proceeds of unlawful activities, namely money laundering. The

SCA agreed that was the correct approach, and it approached the issues in this appeal on the same basis.

Following this, the SCA held that the appeal turned on whether the evidence adduced by the NDPP in support of its case established that the concerned vehicle represented the proceeds of unlawful activities. Relying on case law, the SCA held that this was so because, in terms of s 50 of the Act, the onus was on the NDPP to prove on a balance of probabilities that it was entitled to a forfeiture order. Accordingly, the SCA held that the proceeds must in some way be the consequences of unlawful activity.

In the SCA's view, the full court's approach to assessing the evidence was flawed. Accordingly, the SCA held that the evidence adduced by the NDPP in support of its case established that the vehicle was the proceeds of crime. Hence, the case for the NDPP was that the vehicle was acquired through money laundering.

In addition, the SCA held that it was not satisfied that a real, genuine and bona fide dispute of fact existed in this matter. Thus, Moyane's averments regarding the source of funds for the purchase of the vehicle and his explanation why, shortly after its acquisition, he caused it to be registered in the name of Sithole were of general nature and failed substantially to address the facts he disputed. The SCA found that he failed to produce documents to support his claims that the monies that were paid into the dealership's account on his instruction were from legitimate sources. According to the SCA, these were all matters within his knowledge.

Furthermore, the SCA found that Moyane made bald allegations unsupported by any evidence or reason and which were designed simply to attempt to create a dispute of fact. Given that, Moyane's denials and averments failed to destroy the factual foundation of the NDPP's case and were insufficient to raise a real, genuine or bona fide dispute regarding the facts alleged by the NDPP. Hence, the court of first instance correctly rejected them.

In the SCA's view, the NDPP had made out a case for the relief it sought, and that from the totality of the facts, there was an inescapable inference that the funds were derived from unlawful activities and that the vehicle was thus shown to have been the proceeds of crime. Moreover, the fact that shortly after its acquisition, it was registered in the name of Sithole showed that the whole purpose was to conceal or disguise its ownership.

Finally, the SCA held that full court should have approached the application upon the foundation that Moyane had failed to raise real, genuine and bona fide disputes of fact in relation to the source of funds used to finance the acquisition of the vehicle and the reason for its registration in the name of Sithole. As a result, the appeal succeeded.

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