THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable
Case No: 1146/2017

In the matter between:

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS **APPELLANT**

and

KALMAR INDUSTRIES SA (PTY) LTD **RESPONDENT**

Neutral citation: *National Director of Public Prosecutions v Kalmar Industries SA (Pty) Ltd* (62/17) [2017] ZASCA 142 (2 October 2017)

Coram: Navsa ADP, Leach and Majiedt JJA and Ploos van Amstel and Schippers AJJA

Heard: 17 August 2017 and 27 September 2017

Delivered: 2 October 2017

Summary: Forfeiture of property : Section 50(1) of the Prevention of Organised Crime Act 121 of 1998 : whether property, a lifting platform and equipment alleged to have been stolen, susceptible to seizure : whether NDPP ought to have become involved in commercial dispute.

ORDER

On appeal from: Eastern Cape Local Division of the High Court, Port Elizabeth (Plasket J sitting as court of first instance):

The following order is made:

1 The appeal is dismissed with costs.

2 The wasted costs occasioned by the respondent's failure to appear at the hearing of the appeal on 17 August 2017 shall be paid by the appellant's Bloemfontein and Johannesburg attorneys, jointly and severally; and shall not be recovered from the respondent.

JUDGMENT

Schippers AJA (Navsa ADP, Leach and Majiedt JJA and Ploos van Amstel AJA concurring):

[1] The principal issue in this appeal is whether a Swift 001 purpose-built lifting platform (the platform) and certain tools, equipment and other items (the equipment) were firstly, susceptible to a preservation of property order under s 38 of the Prevention of Organised Crime Act 121 of 1998 (POCA) and consequently, to a forfeiture order in terms of the provisions of s 48 read with s 50 of POCA. The court a quo found that they were not, and held that the appellant (the NDPP) had not met the jurisdictional requirements for the grant of both a preservation of property order and a forfeiture order.

Factual background

[2] The background to the forfeiture application can be shortly stated. The respondent (Kalmar) is a wholly-owned subsidiary of Cargotec Corporation (Cargotec), a company incorporated in Helsinki, Finland, which carries on business as a manufacturer and supplier of port lifting equipment. In 2008 Kalmar concluded a written agreement with Transnet Ltd (Transnet) to supply and deliver inter alia, 22 rubber tyred gantry cranes (RTGs) to Transnet at the Port of Ngqura (the harbour). In terms of the contract, the warranty period on the painting of each RTG was seven years after the delivery date.

[3] In 2010 an inspection of the RTGs revealed that they were corroded and Kalmar accepted a warranty claim to refurbish them. Kalmar agreed with Transnet that the warranty work on all 22 RTGs would commence in October 2012 and be completed in 18 months, ie by April 2014. Kalmar then engaged the services of Q6 Management Projects Africa (Pty) Ltd (Q6) as a subcontractor, to provide a solution to the refurbishment of the RTGs, referred to in the papers as 'the rust project'.

[4] Mr Douglas Reed (Reed), a shareholder of Q6 and the manager of the rust project, said that Q6 had agreed to do the project at an estimated cost of R1.24 million plus VAT per RTG and to that end, designed and commissioned the platform. Reed said that the platform was built for Q6 by Storm Engineering at a cost of some R2.4 million. Q6 claimed that it was the owner of the platform and that it had paid all the costs relating to the research, design and fabrication thereof, save for one payment of R229 824, that the parties had agreed Kalmar would pay and which was a bridging funding arrangement only.

[5] The platform is a utility vehicle which is more effective than scaffolding. It is essentially a lifting platform secured by guard rails which is assembled, moved into position and secured to a RTG. Workmen are then lifted on the platform to those sections of the RTG which require refurbishment. The platform was designed in compliance with national legislation governing occupational health and safety, more specifically, the regulations relating to lifting machines and lifting tackle. The Department of Labour approved the use of the platform in the harbour on certain conditions, inter alia, that it could only be operated by trained and certified platform drivers; and that moving or supporting of persons in suspension on the platform had to be done under supervision of Q6, Transnet or Kalmar. The platform was moved to an area in the harbour designated by Transnet for the rust project (the site), which, Reed said, was fenced and secured at the instance of Q6, and the project commenced around August 2012.

[6] In December 2012 Q6 completed the refurbishment of RTG No 19, which was handed to Kalmar and returned to Transnet. The next RTG (No 20) was completed in February 2013. However, on 8 February 2013 Q6 informed Mr Anton Burchell (Burchell), the Managing Director of Kalmar, that it was exercising a lien over RTG No 20, as a result of a dispute about payment to Q6 by Kalmar. Reed said that on 23 February 2013 RTG No 20 had been illegally removed from the site, but that Transnet had returned it to the site later that night. On 28 February 2013 Burchell and a Kalmar employee returned to the site and demanded that RTG No 20 be released, which was refused.

[7] Reed claimed that on 8 April 2013 the locks and fence to the site were cut and that Kalmar's employees removed RTG No 20. Q6 laid a criminal charge of theft with the police, apparently because RTG No 20 was subject to a lien by Q6.

On the same day Transnet informed Q6 that its access to the harbour had been withdrawn and it was forced to leave the site. Reed claimed that Kalmar continued using the platform and other equipment belonging to Q6 in the rust project. Q6 laid a second charge of theft in respect of the platform and the equipment. Reed alleged that Kalmar stole Q6's property and used it as its own. Both theft charges were laid in September 2014. Mr Vicus Luyt (Luyt), a director of Q6, stated that when the platform and equipment were taken by Kalmar, he approached a mediator to resolve the dispute, which yielded no results; and that Q6 then 'followed a criminal path in order to expedite recovery of [its] clearly stolen property'.

[8] Burchell denied the theft charges and that Q6 owned the platform. Kalmar's opposition to the forfeiture application may be summarised as follows. The costs of refurbishing the first RTG had not been finalised between the parties due to Q6's failure to furnish supporting documentation of its costs to Kalmar. Reed had undertaken to finalise the pricing of the remaining RTGs by 7 January 2013, which he failed to do. Kalmar did not sign-off on RTG No 19, because the work was defective and documentation relating to, inter alia, the warranty on paintwork was outstanding. Despite this, Kalmar paid Q6 what was owing to it in respect of RTG No 19. Kalmar subsequently cancelled the subcontract with Q6. There was no agreement entitling Q6 to exercise a lien over Transnet's property. Transnet, and not Kalmar, had removed RTG No 20 on 8 April 2013 to a new site in the harbour, allocated by Transnet to Kalmar to continue with the rust project.

[9] According to Burchell, Kalmar did not use the platform after Q6 had been removed from the site by Transnet. The subcontractor who succeeded Q6 had used it for a brief period, but was asked by Transnet to cease doing so. Burchell alleged that Kalmar paid all the costs in relation to the manufacture and commissioning of

the platform and that it was agreed between him and Reed that Kalmar owned it. According to Burchell, the value of the platform is R229 824 - the amount Kalmar had paid to Storm Engineering.

[10] In February 2015 the sheriff of the court, together with Reed and other employees of Q6, went to the site where the rust project was being continued, dismantled the platform and removed it. On 10 February 2015 the NDPP obtained a preservation of property order, ex parte, in respect of the platform and equipment, and launched the forfeiture application on 6 February 2015.

The applications under POCA should never have been brought

[11] Section 38(1) of POCA authorises the NDPP to apply to a high court, ex parte, for a preservation of property order; and s 38(2) enjoins the court to make such an order if there are reasonable grounds to believe that the property concerned is an instrumentality of an offence referred to in Schedule 1 to POCA, or the proceeds of unlawful activities.

[12] Section 48(1) provides that if a preservation of property order is in force, the NDPP may apply to a high court for an order forfeiting to the State the property subject to the preservation order. Section 50(1) of POCA, in material part, reads:

'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 . . . .'

[13] The first question that arises is why did the NDPP apply on the strength of these provisions to the court a quo for preservation and forfeiture orders under

POCA? The documents available to the NDPP, even before the preservation application was launched on 10 February 2015, all pointed to a commercial dispute between two contracting parties: Q6 and Kalmar, not to the commission of a crime.

[14] Thus, in his affidavit annexed to the founding papers in the preservation application, Luyt referred to correspondence sent on behalf of Q6 to Cargotec in September 2014, relating to the need to redress Q6's rights to recovery of its property (the platform and equipment) and the outstanding issues surrounding the agreement. Likewise, Reed's affidavit makes it clear that the dispute between the parties was commercial. Q6 claimed ownership of the platform and equipment, and payment for work done under the rust project; and it alleged that the parties had agreed in July 2012 that the refurbishment would cost Kalmar R1.24 million for each RTG. Kalmar, on the other hand, claimed that Q6 did not comply with the agreement: Q6 failed to present invoices showing the costs of refurbishment or warranty certificates from the paint supplier relating to the first RTG (No 19); and that Reed had not made good on his promises since November 2012 to furnish evidence of Q6's actual costing. Burchell claimed that Kalmar had paid for the assets on site. Burchell denied that Q6 had any lien in respect of RTG No 20, and proposed that Kalmar pay Q6 the sum of R434 873.40 by 8 February 2013 for its release.

[15] In addition, Burchell's warning statement on behalf of Kalmar dated 20 January 2015, relating to the theft charges, placed it beyond doubt that the dispute between Q6 and Kalmar was purely commercial. That statement essentially contains Kalmar's version set out above. In the statement Burchell said that Kalmar had agreed to pay all start-up costs to Q6 or the various suppliers directly; and that Transnet had removed RTG No 20 and the equipment from Q6's

possession and returned them to Kalmar, after various meetings between Transnet, Kalmar and Q6 and threats of civil action. Burchell went on to say that Q6 failed to take legal action for the delivery of the platform (it had threatened to approach the high court for that relief on more than one occasion); neither did Q6 take any action against Transnet.

[16] Even the facts upon which the NDPP relied for the contention that the platform and equipment were instrumentalities of an offence (and for the claim that they constituted the proceeds of unlawful activities), underscored the commercial nature of the dispute. The founding affidavit stated that Kalmar caused Q6 to be ejected from the site when it refused to pay for the work Q6 had done and disregarded its lien over a refurbished RTG (No 20). Kalmar then 'unlawfully appropriated to itself' the platform and equipment and used them for the further refurbishment of Transnet's RTGs. Despite demand, Kalmar refused to restore the property to its owners.

[17] But the contention that Kalmar had unlawfully appropriated the platform and equipment was unsustainable on the evidence: there were real disputes of fact as to whether Kalmar had stolen the platform and equipment and whether they were instrumentalities of an offence or the proceeds of crime. Kalmar's version was that the costs of refurbishment had not finally been agreed upon, so there could be no lien over RTG No 20 and no theft, and further that Transnet had removed the RTG (the first theft charge). Kalmar alleged that it had paid all the start-up costs in relation to the rust project, including those relating to the platform and the equipment and that it was the owner thereof (the second theft charge). The court a quo proceeded on the assumption that the platform and equipment had been stolen, but made it clear that theft was in dispute and had not been proved. And having

regard to the commercial nature of the dispute between Q6 and Kalmar, it could hardly have been contemplated that such theft could be proved.

[18] Furthermore, the NDPP knew or must have known that there were numerous, genuine disputes of fact which could never have been resolved on the papers. Those disputes related to the terms of the agreement between Kalmar and Q6; ownership of the platform and equipment; the return of RTG No 20 to Transnet; the circumstances under which Q6 was ejected from the site; and the use of the platform and equipment by Kalmar thereafter. The caution by this Court that motion proceedings 'are all about the resolution of legal issues based on common cause facts', was simply ignored.[1] The disputes had to be determined on Kalmar's version: its denial of the allegations by Q6 could not be said to be far-fetched or clearly untenable.[2] So, for example, on Q6's own version, the costs of refurbishment of the RTGs had never been finalised and warranties relating to the paintwork were outstanding, and it resorted to criminal proceedings when mediation to resolve the contractual disputes had failed.

[19] But more fundamentally, the commercial dispute between Q6 and Kalmar was far removed from the objectives of POCA, which according to its long title, was enacted, inter alia, to combat organised crime, money laundering and criminal gang activities; and to prohibit certain acts relating to racketeering activities.[3] And the dispute had nothing to do with the purposes of civil forfeiture of property under Chapter 6 of POCA, which include removing incentives for crime; deterring persons from using or allowing their property to be used in crime; eliminating or

[1] *National Director of Public Prosecutions v Zuma* [2009] ZASCA 1; 2009 (2) SA 277 (SCA) para 26.
[2] *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634E-635C.
[3] *National Director of Public Prosecutions & another v Mohamed NO & others* 2002 (2) SACR 196 (CC); 2002 (4) SA 843 (CC) para 14.

incapacitating the means by which crime may be committed; and advancing the ends of justice by depriving those involved in crime of the property concerned.[4]

[20] On this basis alone, the appeal falls to be dismissed. Given the commercial dispute, it is hardly surprising that since Q6 laid charges of theft some three years ago, the NDPP has still not decided whether to institute criminal proceedings against Kalmar or Burchell. Instead, scarce public resources and valuable time were wasted on an application for a preservation order; and thereafter a forfeiture order, both of which were doomed to failure from the outset, because the platform and equipment were neither instrumentalities of crime, nor the proceeds of unlawful activities.

[21] An 'instrumentality of an offence' is defined in POCA as

'. . . any property which is concerned in the commission or suspected commission of an offence at any time before or after commencement of this Act, whether committed within the Republic or elsewhere.'

[22] This Court has held that in giving meaning to the term, 'instrumentality of an offence', the focus is not on the wrongdoer, but on the role the property plays in the commission of the crime. The question is whether a functional relation between property and crime has been established.[5] The property must play a part, in a reasonably direct sense, in those acts which constitute the actual commission of the crime in question.[6] The word 'instrumentality' itself suggests that the property

[4] *National Director of Public Prosecutions v RO Cook Properties (Pty) Ltd; National Director of Public Prosecutions v 37 Gillespie Street Durban (Pty) Ltd & another; National Director of Public Prosecutions v Seevnarayan* 2004 (2) SACR 208 (SCA) para 18.
[5] *Cook Properties* fn 4 para 21; *NDPP v Mohamed* fn 3 para 17.
[6] *Cook Properties* fn 4 para 32.

must be instrumental in and not merely incidental to the commission of the offence.[7]

[23] In *Cook Properties*,[8] Mpati DP and Cameron JA said that the words 'concerned in the commission of an offence', must

'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. . . . In a real or substantial sense the property must facilitate or make possible the commission of the offence.'

[24] Thus, the courts have held that the following were instrumentalities of offences: a houseboat with particular attractions to lure minors into falling prey to sexual offences;[9] a ski-boat and diving equipment used to harvest perlemoen unlawfully and the vehicle used to convey that perlemoen;[10] a house specially adapted and equipped to manufacture or conduct a trade in drugs;[11] and a house used to sell liquor unlawfully.[12]

[25] The facts upon which the NDPP relied for the contention that the platform and equipment were instrumentalities of the crime of theft - that Kalmar caused Q6 to be ejected from the site when it refused to pay for the work Q6 had done; that Kalmar disregarded Q6's lien over RTG No 20 and used the platform and equipment for the further refurbishment of Transnet's RTGs; and that Kalmar refused to restore them to Q6 - did not establish that the platform or the equipment

[7] *Cook Properties* fn 4 para 31.
[8] Ibid, affirmed in *Prophet v National Director of Public Prosecutions* 2006 (2) SACR 525 (CC); 2007 (6) SA 169 (CC) para 56.
[9] *DPP (NSW) v King* [2000] NSWSC 394 para 22, cited in *Cook Properties* fn 4 para 34.
[10] *National Director of Public Prosecutions v Engels* 2005 (1) SACR 99 (C) paras 39-40.
[11] *Prophet v National Director of Public Prosecutions* 2005 (2) SACR 670 (SCA) paras 28-29; *National Director of Public Prosecutions v Parker* 2006 (1) SACR 284 (SCA) paras 20-23 and paras 39-43.
[12] *Van der Burg & another v National Director of Public Prosecutions & another* [2012] ZACC 12; 2012 (2) SACR 331 (CC) para 31.

had been used to commit any offence, let alone theft. The term 'instrumentality' denotes that the property concerned must serve as an instrument or means to achieve a particular end - the commission of an offence. That is the only sense in which the concept 'instrumentality of an offence' is employed in POCA, and why forfeiture under POCA constitutes civil *in rem* proceedings: it is the property itself that is proceeded against as if it were living and not inanimate.[13] Put differently, instrumentalities are treated as a form of 'guilty property'.[14]

[26] In this case the platform and equipment were not instrumentalities of the crime of theft, but the very things alleged to have been stolen, as the court a quo correctly held. In other words, the platform and equipment were the objects of the alleged theft: they were not used as a means to commit or facilitate the crime of theft.

[27] The NDPP did not meet the jurisdictional requirement in s 50(1)*(a)* of POCA for the grant of a forfeiture order, and the court a quo rightly dismissed that application and discharged the preservation order.

[28] Neither were the platform and equipment the 'proceeds of unlawful activities', which, POCA states,

'means any property or any service, advantage, benefit or reward which was derived, received or retained, 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.'

[29] POCA defines 'unlawful activity' as meaning

[13] *Brooks & another v National Director of Public Prosecutions* [2017] ZASCA 42; 2017 (1) SACR para 16.
[14] *United States v Bajakajian* 524 US 321 (1998) at II.

'. . . 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.'

[30] The definition 'proceeds of unlawful activities' essentially requires that the property in question be 'derived, received or retained' in connection with or as a result of an unlawful activity.[15] The accrual of property, advantage or reward must, directly or indirectly, flow from the unlawful activity in some way.[16]

[31] The NDPP's claim that the platform and equipment constituted the proceeds of crime is absurd. First, the NDPP failed to establish, on a balance of probabilities, any criminal conduct on the part of Kalmar or Burchell. In this regard there are genuine disputes of fact, as outlined above. Second, the platform and equipment did not constitute property or an advantage or benefit derived, received or retained as a result of crime. They were not returns accrued from any unlawful activity. On the contrary, the platform was built by Storm Engineering and the equipment was brought to the site pursuant to the subcontracting agreement between Kalmar and Q6.

[32] The NDPP did not meet the jurisdictional requirement in s 50(1)*(b)* of POCA either. It follows that on this ground also, the application for a forfeiture order had to fail.

[33] What all of this shows, is that the applications for a preservation of property order and a forfeiture order, were ill-conceived and should never have been

[15] *Cook Properties* fn 4 para 64.
[16] *Cook Properties* fn 4 paras 71-72.

brought by the NDPP. They were far removed from the main purpose of POCA: to give effect to South Africa's international obligation to ensure that criminals do not benefit from their crimes.[17] In the result, limited public resources have been wasted, and the costs of the abortive POCA applications as well as the costs of this appeal will ultimately be borne by taxpayers. The NDPP's decision to apply in this case for preservation and forfeiture orders under POCA, is inexplicable, irrational, and must be severely deprecated.

Costs

[34] What remains is liability for the wasted costs occasioned by the respondent's failure to appear at the hearing of the appeal on 17 August 2017. When the appeal was called that day, only the NDPP was represented and the appeal had to be postponed and costs reserved. Pursuant to this Court's directive, the respondent's attorneys filed affidavits to explain what had occurred. It is common ground that on 13 June 2017 Mr Philip Botha (Botha) of JG Botha Attorneys, Kalmar's local attorneys, received the notice of set down of the appeal. Botha has stated on oath that on 15 June 2017, he sent the notice of set down via email to Mr Warren Sundstrom (Sundstrom) of McClarens, Kalmar's attorneys in Johannesburg, but was unable to explain why Sundstrom had not received that email. He stated that he had searched the email inbox on his computer for any indication of a failed transmission message regarding the email sent to Sundstrom on 15 June 2017, but found none; and that it appeared impossible to trace the route of that email as his email service was hosted by Google in the United States.

[35] Sundstrom, in his affidavit, stated that he did not receive the notice of set down via email from Botha on 15 June 2017. Had he received it, Kalmar would

[17] *NDPP v Mohamed* fn 3 para 16.

have been represented at the hearing of the appeal on 17 August 2017. McLarens appointed Mr Mogamat Nassiep (Nassiep), an information and communication technology expert, to conduct an independent enquiry on the relevant server to establish whether McLarens received the email of 15 June 2017, to which was attached the notice of set down of the appeal. In his affidavit Nassiep confirmed that McLarens did not receive the email sent by Botha.

[36] On the facts before us, we are not in a position to determine which firm of attorneys was responsible for the respondent's failure to appear at the hearing on 17 August 2017. What is clear, however, is that neither the NDPP nor Kalmar should be held responsible for the wasted costs incurred in relation to the proceedings of 17 August 2017. In the circumstances, fairness dictates that the appellant's Bloemfontein and Johannesburg attorneys should be held liable jointly and severally for the wasted costs of 17 August 2017.

[37] The following order is made:

1 The appeal is dismissed with costs.

2 The wasted costs occasioned by the respondent's failure to appear at the hearing of the appeal on 17 August 2017, shall be paid by the appellant's Bloemfontein and Johannesburg attorneys, jointly and severally; and shall not be recovered from the respondent.

A Schippers
Acting Judge of Appeal

Appearances

For Appellant:	H J Van Der Linde SC
	Instructed by:
	State Attorney, Port Elizabeth
	State Attorney, Bloemfontein
For Respondent:	C B Garvey
	Instructed by:
	McLarens Attorneys, Johannesburg
	J G Botha Attorneys, Bloemfontein