



IN THE HIGH COURT OF ESWATINI

HELD AT MBABANE

CASE NO. 781/2023

In the matter between:

THE DIRECTOR OF PUBLIC PROSECUTIONS

APPLICANT

In re:

THE DIRECTOR OF PUBLIC PROSECUTIONS

APPLICANT

And

CELANI DLAMINI

1ST RESPONDENT

RETISHE (PTY) LTD

2ND RESPONDENT

ZUNGU K.JEANETTE

3RD RESPONDENT

**In re: (Toyota Hilux Dakar registered JH 21 ZW GP; Jeep SUV registered
KS 34 GP and Ford Range KY 56 RFGP.**

JUDGEMENT

Neutral citation: *The Director of Public Prosecutions vs Celani Dlamini & 2 others [781/2023] SZHC 08 (5th February 2024).*

Coram: *S.M. MASUKU J*

Dates of heard: *7th November 2023*

Date delivered: *5th February 2024*

Summary: *Civil Law and Practice – An Application filed in terms of section 50 of the Prevention of Organized Crimes Act 2018 (POCA) for a declaratory order that the vehicles (Property) described in the Notice of Motion be forfeited to the State on grounds that the property concerned is an instrumentality of an offence referred to in the schedule and/or is the proceeds of unlawful activities.*

Discussed: *The procedure required under Part VI11 and Part IX of POCA considered,*

Held: *The applicant has proved its case on a balance of probabilities that the property concerned is an instrumentality of an offence referred to in the schedule and/or is the proceeds of unlawful activities. Property declared forfeited to the State. Costs granted in favour of the Applicant.*

Background

- [1] On the 21st February 2023 the Eswatini Royal Eswatini Police is said to have received information that two vehicles white Ford Rangers registered KY 56 RF GP and DS 47 FT GP with stickers written '**Open serve**' on their bodies were on their way to Ngwenya Border Gate from Ka-Ncesi area carrying a consignment of dagga. It is alleged that someone alerted the drivers of the said Ford Rangers that the police were on their tail so the drivers decided to turn back before reaching the border and disappeared without trace.
- [2] Investigating Police Officer Assistant Superintendent Isaac Dlamini in charge with duties to investigate the trafficking of dagga as well as the prevention of drug related crimes confirmed affidavit that the same vehicles would later pass through Ngwenya Border without checking out with Immigration and Customs officials. The information gathered, he said was shown by CCTV footage sourced from the border. It showed the vehicles crossing at high speed into the Republic of South African side.
- [3] On the 1st March 2023 the police alleged to have received further information to the effect that three vehicles KY 56 RF GP, DS 47 FT GP (Ford Rangers) and JN 21 ZW (Toyota Hilux) were at Ka-Ncesi area loaded with dagga ready to be transported out of the Kingdom to the Republic of South Africa. The information (it is said) was shared with the Hhohho Regional Anti-Drug Police Unit who deployed a team of detectives to the area at the 1st Respondent's homestead. The police officers conducted a search after introducing themselves to the 1st Respondent who was with his wife.

- [4] A lot of dagga was found inside the 1st Respondent's house. They found three vehicles parked outside the homestead of which they also conducted a search. They discovered five (5) bags of dagga stashed in a **Grey Toyota Hilux** registered **JN 21 ZW GP** (Toyota Hilux) They found thirteen (13) blocks of dagga in a **Jeep Cherokee** registered **RS 34 WW GP** (Jeep Cherokee) and a total of 37 bags of dagga were found from the **white Ford Ranger KY 56 GP** (Ford Ranger).
- [5] The dagga weighed a total of 930.6 kg. The police seized the vehicles and dagga. All the three vehicles are a subject matter of the forfeiture application in *casu*. The 1st Respondent together with his wife one Sebenzile Dlamini were then charged for being in unlawful possession of dagga.
- [6] The matter was referred to the Asset Forfeiture Unit of the police investigating the property that was allegedly utilized to commit the offences in question. These vehicles (the property) were accordingly detained and statements recorded from the 1st Respondent and his wife who were allegedly cautioned in terms of the judges rules. The 1st Respondent indicated he borrowed the Toyota Hilux from a certain Mr Khumalo of South Africa. He pointed out that the Ford Ranger had been left at his home by a certain Murale Steve of the Republic of South Africa. It is not denied by the 1st Respondent that all the motor vehicles in question were all loaded with dagga, collectively weighing 930.6 Kilograms. This includes dagga loaded in the Jeep Cherokee.
- [7] The Eswatini Police Financial Investigators were also roped in, they are said to have visited members of the Police services at Oshoek border to verify the registered owners of these motor vehicles. They discovered that the Toyota Hilux was registered in the name of Retishe (Pty) Ltd of Vosloorus South Africa (the 2nd Respondent) the Ford Ranger was registered in the name of

one Zungu K.Jeannette (the 3rd Respondent) of Ekurhuleni area South Africa, whilst the Jeep Cherokee was registered in the name of one Nkhambule N.Sifiso who said is a resident of Skom- Extension 3 Mbabane. All three registered owners of the vehicles confirm ownership of them and have opposed the forfeiture application.

- [8] The police investigations revealed further from a statement given by Sifiso Nicholas Nkambule whom it is alleged was cautioned in terms of the judges rules recorded that; he was given the Ford Ranger by one Nathi Zungu of Kempton Park, who is the husband of the 3rd Respondent. Nathi was apparently charged on the 6th May 2021 for possession of dagga whilst driving a different vehicle registered HR 72 SX GP. It is alleged he was later convicted by the Mbabane Magistrate's Court and found guilty of possessing 306.4 kilograms, sentenced to a fine of E15000-00 (Fifteen thousand emalangeni).
- [9] The police investigation further revealed that, after they had duly cautioned one Sebenzile Dlamini the wife of the 1st Respondent, she pointed out that the Toyota Hilux belonged to her husband. She stated that the 1st Respondent had exchanged it for his old car. The Applicant submitted that this then showed that although the motor vehicle was registered in the 2nd Respondent's name it no longer belonged to the said company but to the 1st Respondent. The Applicant alleged that this court should conclude that the 1st and 2nd Respondent are part of the syndicate that smuggled dagga out of the Kingdom of Eswatini.
- [10] Police investigations revealed further that a certain Mario Mavinge usually drove the Ford Ranger which allegedly belonged to one Sifiso Nkambule his business partner. In his statement Mario allegedly after being cautioned in

terms of the judges rules, stated that he had been asked by Sifiso on several occasions since the year 2022 to drive the motor vehicle through the border.

- [11] The Applicant implored the court to take note that this was done because the motor vehicle would leave the Kingdom without checking out through the border's official system. To avoid being detected, the Applicant submitted that Sifiso would then ask his colleague Mario to drive the car through the border. This the Applicant says, confirmed that this motor vehicle was part of the fleet used by the syndicate to illegally smuggle dagga out of the Kingdom of Eswatini.
- [12] The Toyota Hilux is alleged to have been sold by the 2nd Respondent without any change of ownership being carried out. This raised a confusion so that the 2nd Respondent alleging to be the owner could move an application at the Magistrate's court for its release. The Jeep apparently belongs to the 1st Respondent although on paper its registered owner is Sifiso Nkhambule.
- [13] The Investigating Police Officers averred that the dagga was destined for the Republic of South Africa. The 2nd Respondent provided a physical address in Gauteng. 5698 Detective Constable Celani Magongo wrote an affidavit that he personally proceeded to Vosloorus in Gauteng accompanied by 3973 Inspector Xolile Kunene. Their aim was to establish whether the 2nd Respondent was in existence and the nature of the business it was conducting if any.
- [14] The location given 1408 Makgaba Street is alleged to be resident of a certain lady called Livhuwani Gundula, a residential flat belonging to her with no business offices for the 2nd Respondent. There were no trading licences in the premises or records of business income for the 2nd Respondent. A small taxi

business is said to have been found being run by a certain Malatji of local taxis that ferry customers for a fee. No delivery runs on sight.

- [15] 5698 Detective Constable Magongo. (Magongo) averred that their investigations revealed that at the Immigration department there were no records of entry and departure of the Toyota Hilux yet the vehicle departed through Ngwenya border gate on the 17th August 2022 being driven by one Samkeliso of Maphalaleni. The 1st Respondent departed on the 21st February 2023 and returned on the 26th February 2023 through Ngwenya border as a pedestrian. Whilst his wife Sebenzile Dlamini recorded in her statement that the Toyota Hilux belonged to her husband (the 1st Respondent) after he had exchanged it with a sedan he used to have. Sebenzile alleged that the 1st Respondent had been driving the Toyota Hilux for sometime.
- [16] The Investigation as averred by Detective Constable Magongo revealed that the 2nd Respondent company is a front for running the drug smuggling business. The stickers of the '*business*' written '*open serve*' are used to disguise the drug trafficking vehicles as those carrying legitimate business activities.
- [17] Detective Constable Magongo averred further that like Tebogo Malatji, the 1st Respondent and his wife Sebenzile also opened a business account No.63022595566 with First National Bank under the company name Khomanani (Pty) Ltd on the 30th September 2022. Investigations revealed by Magongo is that this account is used by the 1st Respondent to launder ill-gotten money. Account activities indicate deposits from unknown sources disguised as payments from sales. The 1st Respondent is also linked to one Sifiso Nkambule who also has an account at First National Bank No.6278993339, which received deposits from unknown sources referenced as "*confidential*"

and “*donation*”. The 1st Respondent has been paying numerous amounts into Sifiso’s account.

- [18] The investigation reported by Detective Constable Magongo further revealed that the 2nd Respondent granted authority for the Toyota Hilux to enter Eswatini to avoid customs restrictions. Magongo submitted that the suspects are dealing in dagga and the motor vehicles are both instrumentalities and proceeds of unlawful activities.
- [19] There are also findings on lifestyle audits and net worth analysis made against the 1st Respondent. Magongo alleged that the 1st Respondent (as part of syndicate) earns a living through proceeds from drug trafficking. Most of the funds he received were from cross-border deposits which showed that they were deposited by his South African counterparts for stock of dagga prior to the delivery of the loads of dagga discovered at his homestead.

The Respondents’ Responses

- [20] In response to the allegations above, Tebogo Colbert Malatji (Malatji) the managing Director of the 2nd Respondent filed an affidavit opposing the forfeiture application.
- [21] In essence he denied the allegations made by Assistant Superintendent Isaac Dlamini (Dlamini) and Detective Constable Magongo. He stated that Magongo did not conduct an investigation and Dlamini’s affidavit is conjecture and speculative, the assertions he said, are not substantiated.
- [22] On the main, Malatji for the 2nd Respondent averred that through out all the affidavits he had filed regarding this matter, he has maintained that; no one

had permission from the 2nd Respondent to utilize the motor vehicle to store dagga. As a person responsible for all 2nd Respondent's assets, he does not even know the 1st Respondent who is alleged was in possession of the motor vehicle. The 1st Respondent he said, is not even an employee of the 2nd Respondent. In any event he said, the 1st Respondent had no permission to be in possession of the motor vehicle, let alone load any dagga on it. He said if the police officers were more vigilant the vehicle would not have come to Eswatini.

- [23] The 3rd Respondent Jeanette Zungu (Zungu) filed an affidavit opposing the forfeiture application. She admitted being the legal owner of the Ford Ranger. Like Malatji for the 1st Respondent denied the rest of the allegations made against her.
- [24] She maintained that no one had permission from her to utilize the motor vehicle to store dagga. As an owner she did not know how her vehicle got to be in Eswatini. She denied knowledge of the 1st Respondent who is alleged to have been in possession of the vehicle. In any event, she said the 1st Respondent had no permission to be in possession of the vehicle let alone to load any dagga on it. She blamed the laxity of the South African Police Service (SAPS), and submitted that had they been vigilant, the vehicle would not have crossed to Eswatini.
- [25] Zungu acknowledged that SAPS and the REPS came to investigate her but did not question her in relation to the vehicle. Had they done so they would have known that she did not deal in dagga.
- [26] The 1st Respondent did not file any answering affidavit to the forfeiture application besides the serious allegations said to have been made by him

against the 2nd and 3rd Respondents regarding the vehicles and the allegations of illegal dealing in dagga.

- [27] The 1st Respondent connected himself to director Mr Malatji in his recorded statement (Annexure G) of the preservation application which was not challenged by the Respondents. The 1st Respondent stated that the owners of the vehicles (the 2nd and 3rd Respondents) who both confirmed their ownership of the two of the vehicles were his friends. The 1st Respondent does not refer to them as his business partners. However, contrary to the information obtained from the immigration officials at the border when the vehicles crossed to Eswatini, it was reported their business was a work-related trip.
- [28] Contrary to what the 1st Respondents said about himself and the rest of the Respondents regarding connecting himself with the rest of his partnership with them, a certain Mr Khumalo claimed he handed over the Ford Ranger to the 1st Respondent. There is however no confirmatory affidavit deposed to by the 1st Respondent collaborating what Khumalo claimed. The existence of Khumalo is left in doubt. The 1st Respondent does not mention his knowledge of Khumalo. Zungu does not state that he reported the missing Ford Ranger to any of the police in South Africa or Eswatini. There is doubt that she was not aware of the whereabouts of the vehicle.
- [29] In reply to Malatji's answering assertions, the Applicant stated that when the Police visited the 2nd Respondent's premises Vosloorus, South Africa he was present when they interviewed the proprietor of the premises found there one Luvhuwani. He can not therefore deny knowledge of Luvhuwani. He apparently did not raise any objection when Luvhuwani introduced herself as owner of the residence and when she further explained that Malatji only used the address for receiving mail and nothing more. It is alleged by the Applicant

that even the sedans found in the premises did not have company stickers. The Applicant says this should prove that the vehicles were for the local taxi business confirmed by Luvhuwani.

- [30] In reply to Zungu's answering affidavit, the Applicant stated that neither Zungu nor her husband Nkosinathi Zungu ever reported any vehicle missing to the police. The Applicant submitted that this is because Zungu was aware of the whereabouts of the Ford Ranger.

This Application

- [31] The application before court is brought under Part IX of the **Prevention of Organized Crimes Act, 2018 (POCA)**. The application follows proceedings brought under part VIII of the POCA where a preservation of Property Order was granted by this court on the **28th March 2023** against the same property being a Toyota Hilux, the Jeep and the Ford Ranger (as fully described earlier in this judgement).
- [32] The preservation order was served on the Respondent's attorneys on the **29th March 2023** in compliance with Section 43 (1) (a) of the POCA. A notice of preservation of the property was published in the gazette in terms of section 43 (1) b of the POCA. The Respondents' reacted by filing their notice to oppose and their affidavits on the **14th April 2023** in terms of section 43 (3) of the POCA.
- [33] The Respondents filed a rescission application which was eventually dismissed on the **29th June 2023**. The present application is the final to be decided in the series of applications above.

- [34] It has to be acknowledged early enough in this judgement that the POCA proceedings are unique in that the Act makes provisions for its own process and procedures. The rules of this court apply only where there is a *lacunae*.

Purpose of the Application and issues for determination

- [35] The Application is in terms of Section 50 of the POCA for a declaratory order that the vehicles (property) be forfeited to the State on grounds that the property is the proceeds of unlawful activities and instrumentality of an offence referred to in the schedule. Section 50 (1) allows an applicant to make such an application in respect of the property that is subject to a preservation order whilst that order is still in force.
- [36] The issues for determination by this court are (i) whether the applicant has proved that the property is proceeds of unlawful activities and instrumentality of an offence referred to in the schedule. (ii) Whether the Applicant is entitled to the orders it prayed for in the Notice of Motion. Section 52 of the POCA empowers the High Court to grant a forfeiture order in terms of section 52 of the POCA if the court on a balance of probabilities finds that the property is an instrumentality of an offence referred to in the schedule or are the proceeds of unlawful activities as defined in section 2 of the POCA.

The POCA

- [37] The POCA is one legal instrument that has been developed, aimed to reduce organized crime. The preamble of the South African version observe that; (a) criminal activities present a danger to public order and safety and economic stability and have the potential to inflict social damage; and (b) South African common law and statutory law fail to deal adequately with criminal activities

and also fail to keep pace with international measures aimed at dealing with such activities.

'Its scheme seeks to ensure that no person convicted of an offence benefits from the fruits of that or any related offence, and to ensure that property that is used as an instrumentality of an offence is forfeited' (civil forfeiture) see Nkabinde J's Judgement, in the South African case of Simon Prophet v The National Director of Public Prosecutions case CCT 56/05 at paragraph 59.

[38] The Preamble of our POCA reads; *"to introduce measures to combat organized crime and criminal gang activities... provide for the recovery of the proceeds of unlawful activities, forfeiture of assets that have been used to commit an offence or assets that are the proceeds of unlawful activities..."*

[39] It should be observed that the POCA is a drastic piece of legislation whose purpose, object and provisions should not generally offend section 19 (2) of the constitution of the Kingdom of Eswatini, which is the fundamental rights and freedoms of the individuals enshrined in our constitution. An unrestrained application of POCA may violate this right. Constitutional provisions in section 19 (2) requires that;

'(2) A person shall not be compulsory deprived of property or any interest in or right over property of any description except where the following conditions are satisfied-

(a) ...

(b) *The compulsory taking of possession or acquisition of the property is made under a law which makes provision for-*

(i) ...

(ii) *a right of access to a court of law by any person who has an interest in or right over the property;*

(c) *the taking of possession or the acquisition is made under a court order.*

[40] *Prima facie*, the provisions of the POCA are well within the confines of section 19 (2) (b) (ii) (c) of the Constitution Act 2005. The following sections of the POCA covers the constitutional conditions in my view;

40.1 In terms of section 43 (3) of the POCA, a person who has an interest in property preserved must file a Notice of Intention to oppose accompanied by an affidavit indicating his defence providing the particulars under section 43 (4) (a) – (e) of the POCA. (underlining added).

40.2 In terms of section 43 (3) (d) the opposing party must state whether the person admits or denies that the property concerned is an instrumentality of an offence or the proceeds of unlawful activities and further section 43 (3) (e) says he must state;

(i) *facts on which the person intends to rely on in opposing the making of a forfeiture order or applying for an order referred to in sub paragraph (c) (ii) and the*

(ii) *basis on which the person admits or denies the property concerned is an instrumentality of an offence or the proceeds of unlawful activities.*

40.3 In terms of 43 (6) of the POCA a person who does not give notice in terms of subsection (3) accompanied by an affidavit in terms of subsection (5) within the period referred to in subsection (4) is entitled-

- a) *to receive , from the Director of Public Prosecutions, notice of an application for a forfeiture order in terms of section 50 [2] or*
- b) *subject to section 51 to participate in proceedings concerning an application for a forfeiture order.*

40.4 In terms of section 51, it is only a person who is not aware of the existence of a preservation order that may apply to the High Court for condonation of that failure and leave to give a notice accompanied by the required information.

40.5 The application may be made before or after a forfeiture application is made but before judgement in terms of section 51 (2) of the POCA.

40.6 In terms of section 51 (3) of the POCA, the applicant may be condoned if he has shown he was unaware of the preservation of property order or that it was impossible for the applicant to give the notice and he has an interest in the property subject to the preservation.

[41] The Applicant submitted in *casu* that the only known interested parties are the Respondents and were served with the applications. They filed their defence and further the preservation order was duly published per the requirements of the POCA.

[42] When it comes to the forfeiture application section 52 (4) of the POCA requires any person whose interest in property concerned is affected by a forfeiture order made in the absence of that person under subsection (3), may within twenty one days after acknowledge of that order, apply for variation or rescission of the order.

[43] Section 52 (5) of the POCA provides that the order for forfeiture by default may be rescinded or varied in good cause shown.

Forfeiture

[44] Section 52 (1) of the POCA provides; *The High Court shall, subject to section 54, make the forfeiture order applied for under section 50(1) if the court finds on a balance of probabilities that the property concerned.*

(a) *is an instrumentality of an offence referred to in the schedule.*

(b) *is the proceeds of an unlawful activities.*

[45] The POCA defines “property” as money or any other movable, immovable, corporal or in corporal thing and includes any rights, privileges, claims and securities and any interest in the property and all proceeds from the property.

[46] Section 2 of the POCA defines ‘instrumentality of an offence’ as follows;

“Instrumentality of an offence means any property which is used in the commission of an offence at anytime before or after the commencement of this Act, whether committed within Eswatini or elsewhere”.

[47] The standard of proof that must be discharged before a property is said to have been an instrumentality of the offence in the higher standard of certainty in proof on a balance of probability (see Simon Prophet v The National Director of Public Prosecutions CCT 56/05 paragraph 55).

[48] The South African Supreme Court of Appeal enunciating the forfeiture procedure in that jurisdiction (their Act bears similarities to our POCA) in the appeal case of National Director of Public Prosecutions v (1) R O Cook properties (pty) LTD. (2)37 when it considered 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... [T] the property must play a reasonable direct role in the commission of the offence. In a real or substantial sense of the property must necessarily be for the manufacturing process or to manufacture scheduled substances and drugs, particular methamphetamine”.

[49] In Simon Prophet v NDPP 2007 (2) BCLR the South African Constitutional Court cited with approval the factors laid down by the Supreme Court of Appeal in the RO Cook judgement, in measuring the strength and extent of the relationship between the property sought to be forfeited and the offence, and assessing the extent of the involvement of the property in the offence. The Supreme court had regard to;

- (a) whether the use of the property in the offence was deliberate and planned or merely incidental and fortuitous;*
- (b) whether the property was important to the success of the illegal activity;*
- (c) the period for which the property was illegally used and the extent of its use;*
- (d) whether its illegal use was an isolated event or had been repeated; and*
- (e) whether the purpose of acquiring , maintaining or using the property was to carry out the offence.*

[50] In support of its finding that the property was an instrumentality of an offence the Supreme Court of Appeal found that:-

“The property, although used by the appellant as his home, was adapted and equipped (by the fitting of an extractor fan and other laboratory paraphernalia) to unlawfully manufacture drugs from chemical substances. Its use was deliberate and planned and important to the success of illegal activities, which could not be conducted openly. So far as the spatial use of the house it concerned, almost the entire house was used either to store chemicals and equipment, facilitate or make possible the commission of the offence”. See also Gillespie street Durban (pty) Ltd and Another; (3) See Vuranyan 2004 (8) BCLR (SCA) at paragraph 31.

- [51] The enquiry takes full account of the relevant circumstances of each case, I shall return later in this judgment to assess these factors and the applicable facts.

Proportionality

- [52] The Constitutional court in the Simon Prophet case (supra at paragraph 58). enunciate that ‘civil forfeiture provides a unique remedy used as a measure to combat organized crime. It rests on the legal fiction that the property and not the owner has contravened the law. It does not require a conviction or even a criminal charges against the owner. This kind of forfeiture is in theory seen as remedial and not punitive. The general approach to forfeiture once the threshold of establishing that the property is an instrumentality of an offence has been met is to embark upon a proportionality enquiry – weighing the severity of the interference with individual rights to property against the extent to which the property was used for the purpose, of the commission of the offence, bearing in mind the nature of the offence.

Proceeds of unlawful activities

[53] Section 2 of the POCA defines proceeds of unlawful activities in terms of POCA to mean;

“Any property or service, advantage, benefit or reward that was derived, received or retained, directly or indirectly in Eswatini 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 and included property which is mingled with the property that is proceeds of unlawful activity.

[54] The Applicant submitted that the property applied to be forfeited is clearly proceeds of unlawful activities. The Applicant described this case as ‘work of an organized group as all persons involved had a role to play in the trafficking of dagga and that the only way to protect the country from such organized crime in the forfeiture of the proceeds as well as the property employed in the commission of the offence.

Relevant circumstances of the case

[55] **First, was the use of property in the offence deliberate and planned or merely incidental and fortuitous?** Assistant Superintendent Issac Dlamini in his confirmatory affidavit submitted that the property had been under surveillance of their investigation since September 2022. The investigation uncovered that the syndicate involving the Respondents were using different registration numbers on the vehicles to transport dagga to South Africa.

[56] The vehicle would approach Ngwenya border in a convoy and not report to immigration, customs officials and the police. The vehicle would be driven

at high speed out of the country, Investigation carried out revealed for example that the white Ford Ranger single cab with canopies registered KY 56 RF GP and DS 47 FT GP had sticker on them written 'Open serve'. The vehicles formed part of the fleet used for trafficking dagga by the syndicate. The vehicle used the stickers as a decoy to distract the attention away from their on going real business, The Applicant submitted that this was now a trend and not a single and isolated trend. The surveillance went on until they leased the property in March 2023.

- [57] The evidence brought by the Applicant reveals that through out this period the syndicate activities were deliberate, planned with careful precision. To demonstrate this assertion on the 17th August 2022 the first property being the Toyota Hilux Dakar registered JN 21 ZW GP was seen departing though the Ngwenya Border gate driven by Liswati but had no correspondent entry date. On the 16th March 2023 the same vehicle entered through Ngwenya border and departed on the same day. On the same day a Volkswagen vehicle driven by a South African National spotted the same registration plates JN 21 ZW GP departed the border post.
- [58] The Respondents who claimed ownership of the vehicle were not seen as actively involved or are not in the 'picture' when the vehicles are driven around. The Applicant submitted that, this is so because they wanted to take full advantage of the fact that they know that innocent third parties are given a special preference in law, e.g the right not to be deprived of their property arbitrarily. When they were fully aware of what was going and the whereabouts of their vehicles.

- [59] The court observes that none of the Respondents (though claiming ownership of the vehicles) in any of their responding affidavits informed the court for example that as soon as they discovered that they had lost their vehicles they reported their loss to the police in the country or in South Africa. They all stated, that they had not authorized the persons from which the vehicle were seized to drive the vehicles, let alone to use it for the transportation of dagga or any illegal substance. The evidence placed by the applicant proves on a balance of probabilities that they were involved and are part of the unlawful enterprise although working behind the scenes.
- [60] **Was the property used important to the success of the illegal activities of the Respondents?** When the first Respondent was arrested, a search was conducted in the residence at Ka-Ncesi area where the Toyota Dakar (JN 21 ZW GP) was found parked in the yard. Upon inspection, it was found with five (5) bags of dagga.
- [61] The second property. Jeep SUV Registered KS 34 WW GP also found at the 1st Respondent's homestead was discovered loaded with 13 bags of dagga. The last property, Ford Ranger KY 56 RF GP also found at the 1st Respondent's homestead was discovered loaded with (37) bags of dagga. The total weight of the bags combined are close to 1 tonne (930.6 kg to be exact).
- [62] The court concludes that the applicant has in this case proved on a balance of probabilities that the vehicles were all used to convey the dagga and there were the only means in the Respondents' enterprise to promote their illegal activities. The vehicles were important to the success to their illegal enterprise. In the circumstances of this case, if there were no vehicles, the dagga would not have been transported.

- [63] **The period for which the property was illegally used and the extent of its use.** The applicant submitted that an inference should be drawn for the record of surveillance carried out by the investigating officers from September 2022 to March 2023. The record in Annexure 'K' for example showed a history of the Toyota Hilux which was found loaded with dagga at the 1st Respondent's residence. The entry and departures as shown in the registration numbers enquiry file shows a great frequency in March 2023.
- [64] The trend was that even the registration numbers of the vehicle used would be changed. The Applicant demonstrated that the Identity number of the 1st Respondent 9109166100248, once crossed to South Africa driving a motor vehicle registered KS 34 WW GP and BB 14 YK GP which registration was later changed to YSD 964 BH which was the vehicle found with 497 kg of dagga in South Africa.
- [65] The Toyota Hilux JN 21 ZY GP for example was driven by Tebogo C. Malatji the Managing Director of the 2nd Respondent on the 16th March 2023. Director Malatji had otherwise laid claim of ownership for and on behalf of the 2nd Respondent on the Toyota Hilux, yet it was found with 1st Respondent's possession at his homestead with 5 bags of dagga. Director Malatji's foot print is seen in the records having driven the Toyota in and out on the 16th March 2023 though he denies authorizing the 1st Respondent to possess the vehicle.
- [66] The Applicant submitted that a reasonable inference ought to be drawn from Isaac Dlamini's affidavit that the 1st Respondent once crossed to South Africa driving a motor vehicle which was changed its registration numbers and later found with 497 kg of dagga. The court concludes that a reasonable inference,

ought to be drawn that the property was used for illegal activities with extended use.

[67] **Was the illegal use of the vehicles an isolated event or had been repeated?**

The unchallenged confirmatory affidavit of Assistant Superintendent Isaac Dlamini stated that they started investigating the Respondent's activities in September 2022 when they received information that this syndicate was transporting dagga from Ka-Ncesi area to South Africa. In October 2022 their investigation uncovered that the syndicate used different registration numbers on the vehicles transporting the dagga. In November 2022 after monitoring the movements of these vehicles, they searched one of the vehicle carrying YSD 964 BH registration number and found dagga weighing 997 kg. On the 21st February 2023 in the very early hours of the morning (0330 hours) two white Ford Rangers one of them KY 56 RF GP (Property in question) were being followed and later that day crossed the border without stopping through immigration and customs official. In March 2022 information was received that the three vehicles (all subject matter of the application were loaded with dagga for South Africa).

[68] The evidence (it should be accepted) shows that the loading and transportation of large quantities of dagga from Eswatini to South Africa was not an isolated event and had been repeated through out this period of surveillance.

[69] **Was the purpose of acquiring, maintaining or the use of the property to carry out the offence?** The Applicant submitted that although Tebogo Malatji the 2nd Respondent's director claimed that the Toyota Hilux was used to conduct business for the company in Vosloorus South Africa an investigation conducted by the joint police team led by Constable Magongo visited the premises at the address given. They found that this was a resident

of the Luvhuwane who confirmed to know Malatji who she said did not stay there but uses the address for receiving mail as well as to promote dagga business. The Investigating team noted that this was site suitable for dagga trade in that it is located in a buzzy tarven. They recorded that this was residential and not business premises, no trading licences nor was there any business offices or records of business income. .

- [70] Responding to these allegations, Mr Malatji did not challenge his presence at Vosloorus during the investigation. On the allegations about the business premises, he simple denied the allegations and put the Applicant to strict proof. His response was that Detective Magongo was just peddling on hearsay about Ms Livhuwani. He denied knowledge of her. Mr Malatji avoided respond to all the allegations about the business that was conducted on the premises.
- [71] Jannette Zungu (3rd Respondent) who claimed to be the owner of the Ford Ranger found with stickers written 'open serve' which was found with dagga bags at the 1st Respondent's homestead did not venture any explanation about the business that the Ford carried out and the allegations that it is used to transport dagga.
- [72] I am compelled to conclude that the Respondents acquired and maintained the vehicles for no apparent use other than to carry out the illegal enterprise of transporting dagga from Eswatini to South Africa. I conclude further that the Applicant has proved on a balance of probabilities that the vehicles are instrumentality of an offence under the POCA.

- [73] The Applicant finally submitted that the vehicles to be forfeited are **proceeds of unlawful activities**. The Applicant states that although the Respondents claimed to have been running legitimate business, none of them proved it.
- [74] When the 1st Respondent was investigated he informed the investigators that he ran a chicken farm without substantiating his claim. The Applicant submitted that the 1st Respondent is not known to work anywhere but was able to build a homestead at ka-Ncesi and also purchase the Jeep Cherokee. He however had given a statement to the police that he was unemployed. Constable Magongo stated that when he analyzed the 1st Respondent's bank statements, it appeared mainly to have consisted of cross border deposits from South Africa. The Applicant submitted that the deposits are receipts of the dagga activities and not from a chicken business.
- [75] The 2nd Respondent is the registered owner of the Toyota Hilux. This company is not known in Eswatini. Mr Malatji submitted it conducts its business in Vosloorus Gauteng providing cleaning services. Investigation revealed that the address given was a residential place with no such a business. The Applicant submitted that there is reasonable grounds to believe that the only business that the 2nd Respondent is involved in is the smuggling of dagga from Eswatini to South Africa and that the vehicle was purchased through proceeds of dagga smuggling.
- [76] The 3rd Respondent's motor vehicle is the Ford Ranger. This vehicle is said to have been part of the vehicles that did not stop at the border gate and was found loaded with dagga at the 1st Respondent's homestead. The applicant submitted that there is reasonable belief that the vehicle is proceeds of criminal activities.

- [77] I find that non of the Respondents have brought evidence to demonstrate their day to day legitimate business activities. They made unsupported claims about their legitimate business without confirmatory affidavits from independent witnesses. I conclude that the property provided a benefit directly or indirectly to the unlawful activities of the Respondents. The property mingled with the proceeds of their unlawful activities.

Belated Points of law raised for the first time at the hearing of the matter.

- [78] For the first time since the beginning of the application, the Respondents' counsel raised points of law from the bar in response to Applicant's counsel's arguments.
- [79] The points were referred to annexures that constituted of statements made by some of the Respondents. Annexures which dealt with Eswatini Revenue Authority enquiries on the vehicles and entries made by the border officials. Counsel submitted that the court should be guided by section 16 (2) of the Civil Act and section 22 of the Civil Evidence Act in dealing with that evidence. Counsel submitted that the allegations contained in the annexures constituted hearsay evidence.
- [80] The objection and the attempt to raise the points of law was vehemently opposed by the Applicant. The Applicant argued that the court should not allow the Respondents to spring a surprise and raise the points at the tail end of litigation from the bar without prior notice.
- [81] The Applicant argued that, there had been ample opportunity for the Respondents to raise the points during the course of the pleadings. The Respondents should have dealt with the points in their affidavits filed in terms of section 43 (3) challenging the preservation order. They should have raised

the points in their rescission application or in their affidavits resisting the forfeiture application. The Respondents did not raise the points under section 50 (5) of the POCA that deals with dispute of facts.

- [82] The court heard the parties on the application to raise the points and the objection by the Applicant. It ruled that although a party to litigation has the right to raise points of law virtually at any stage of the litigation, it cannot be raised in a manner that would ambush the other party to its prejudice. Points of law in application proceedings may be raised by following rule 18 (12) (c). It provides, if a party intends to raise a question of law only he shall deliver notice of his intention to do so, within the time stated in paragraph (b) of that rule. The Respondents had not done so at any of the stage of the series of applications that came before this court. The points came across as an afterthought and were dismissed.

Appointment of *curator bonis* by the court

- [83] The property was placed under the effective control of 5564 Detective Constable Enock Maseko pending the finalization of the forfeiture proceedings and judgement in this case. This was pronounced under the prevention order granted by this court on the 28th March 2023.
- [84] The appointment of Constable Maseko was made in terms of section 46 (i) (a) (i) and (ii) namely to assume control over the property and take care of the property.
- [85] Section 49 (1) of the POCA provides that when the High Court has made a preservation of property order it may vary or rescind the order for reasons set out thereon.

- [86] The Respondents filed a rescission application which was dismissed by default judgement handed down by the court on the 29th June 2023. The *curator bonis*'s appointment was therefore not tempered with and stood as granted in March 2023.
- [87] Section 52 (2) of the POCA provides that the High Court may, when it makes a forfeiture order or at anytime thereafter, make ancillary orders it considers appropriate, including orders for and with respect to facilitating the transfer to the State of the property forfeited. The court exercises a wide range of discretionary powers permissible under the auspices of orders it considers appropriate.
- [88] Ancillary to the main forfeiture orders, the Applicant in *casu* applied that Detective Maseko be retained as *curator bonis* to perform all functions specified in the POCA. If appointed, it would mean that the officer has to perform a wide range of functions under the POCA.
- [89] The functions of a *curator bonis* are vast and include *inter alia* taking custody of all property in respect of which he is appointed as well as documents relating to the property. Save as otherwise provided, for in the POCA, the Administration of Estates Act, 1902 apply in respect of an appointed *curator bonis* under the POCA. The *curator bonis* may be called upon to provide security for his functions. He may be entitled to make reasonable provision for legal expenses.
- [90] The Respondents objected to the appointment of Constable Maseko and prayed that an independent person be appointed as such.
- [91] The court observe that although the functions of the *curator bonis* are elaborate in terms of the POCA, and in the Administration of Estates Act where applicable (see section 81 of POCA), the Applicant did not give sufficient motivation on its application to retain Constable Maseko. For

example the court was not informed of his knowledge and capacity to perform the functions, beyond taking possession and safe keeping of the property. The court was not told of the resources the police department possess to adequately support Constable Maseko in performing his duties etc.

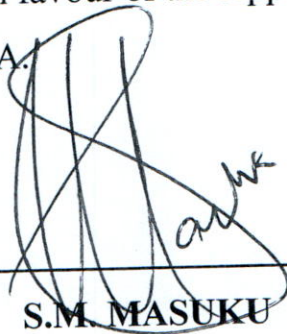
- [92] On the other hand, the Respondents were unable in their papers to substantiate the qualities of an alternative choice save to state that the *curator bonis* office requires an independent person with no interest in the matter.
- [93] The POCA establishes a Criminal Asset Recovery Fund under Part XI of the Act and a Criminal Assets Recovery Committee under Par XII. The forma exercises control over the fund being monies derived from fulfilment of confiscations and forfeiture orders. The latter's functions are of an administrative and advisory nature to Cabinet in connection with all the aspects of confiscation or forfeiture.
- [94] There seem to be a gap however in so far as the required qualities of the *curator bonis*, his functions and how he should relate to Criminal Asset Recovery Fund and the Asset Recovery Committee. The POCA does however, contemplate the promulgation of Rules for the High Court and Magistrates Court to regulate the proceedings contemplated in Parts IV and VIII or regulating other relevant matters of the Act. The High Court rules once promulgate should close the gap.

Conclusion and forfeiture order

- [95] The court concludes that in the totality of the admissible evidence before court, the Applicant has proved on a balance of probabilities that the property concerned is an instrumentality of an offence referred to in the schedule and/or is the proceeds of unlawful activities.
- [96] The court makes the following orders;

1. It declares forfeited to the State in terms of Section 50 of the Prevention of Organized Crimes Act 2018 (POCA) the property, which is presently the subject matter of a preservation of property order granted by this court on the 28th March 2023, namely:
 - i) **Toyota Hilux Dakar registered JN 21 ZW GP**
 - ii) **Jeep SUV registered Ks 34 WW GP**
 - iii) **Ford Ranger KY 56 RF GP**
2. That 5564 Detective Constable Enock Maseko appointed by this Court in terms of the order granted on the said **28th March 2023** is directed to continue to act as such with authority to perform all the functions specified in the POCA.
3. That the officer shall have all such powers, duties and authority as provided for in the POCA and in the order, including such powers, duties and authority reasonably incidental thereto. The expenditure reasonably incurred in the execution of the duties by the officer shall be paid from the proceeds of the forfeited property.
4. That in terms of Section 58 (2) of the POCA, the property shall vest in the officer appointed as its custodian in terms of the preservation of property order on behalf on the State upon the granting of the order.
5. That the appointed officer is authorized to:
 - 5.1 Dispose of the property by private sale or other means.
 - 5.2 To deduct fees to cover for expenditure incurred in respect of the property and provide proper accounting for carrying out his work.

- 5.3 Deposit the balance of the proceeds into the Criminal Assets Recovery Account No. **10001620705** established under Section 65 of the POCA, held at the Eswatini Central Bank Mbabane.
- 5.4 Perform any ancillary act which, in the opinion of the officer but subject to any directions of the Criminal Assets Recovery Committee established under Section 68 of the POCA, are necessary.
6. That any person whose interest in the property concerned is affected by the forfeiture order, may within 15 days after he or she has acquired knowledge of such order, set the matter down for variation or rescission by the Court.
7. Costs are granted in favour of the Applicant in terms of Section 83 (1) and (2) of the POCA.



S.M. MASUKU

JUDGE - OF THE HIGH COURT

For the Applicant : Mr Melusi Lukhele from the DPP's Chambers.

For the Respondents: Mr S. Gumedze of V.Z.Dlamini Attorneys.