

National Director of Public Prosecutions v Adan 2015 JDR 0117 (ECP)

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Citation	2015 JDR 0117 (ECP)
Court	Eastern Cape Local Division, Port Elizabeth
Case no	1759/2013
Judge	E Revelas J
Heard	August 28, 2014; September 10, 2014
Judgment	January 13, 2015
Appellant/ Plaintiff	National Director of Public Prosecutions
Respondent/ Defendant	Mohamed Ali Adan Abdulahi Mursal Adan In re: Cash seized from Arladi Wholesalers on 10 June 2013

Summary

Criminal law — Prevention of crime — Forfeiture order — Application for in terms of s 48 of Prevention of Organised Crime Act 121 of 1998 (POCA) — Money is proceeds of unlawful activities — Order granted.

Judgment**Revelas J:**

[1] The applicant seeks a forfeiture order in terms of section 48(1), read with section 50(1) of the Prevention of Organized Crime Act, 121 of 1988 (the POCA). The property in terms of which the forfeiture order sought is cash in the amount of R323 545.00. The cash as aforesaid was seized by members of the Asset Forfeiture Unit of the South African Police Services (SAPS) at a store called Arladi Wholesalers (Arladi). The applicant contends that the money is the proceeds of illegal activities. The respondents contend that they are partners in running Arladi and that

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the money is their property, being the proceeds of their legitimate business. The money was seized on 10 June 2013.

[2] On 25 June 2014 a preservation order was granted by Plasket J in respect of the property. This order was followed by the respondent's application to set aside the order and also to reconsider it. When the applicant brought the application for forfeiture, it was agreed that the matter proceed, as one application. The respondents' opposition to the preservation and forfeiture applications had many procedural shortcomings but these were overlooked so that the matter could proceed.

[3] Several disputes of facts arose on the papers. The respondents argue that the applicant should have foreseen the disputes of fact and proceeded by way of

trial. Since the only procedure provided for by the POCA is an application the question became more complex and the application was postponed so that arguments could be prepared on whether the matter should be referred to oral evidence or not. Having considered the matter and for the reasons set out further herein, I am of the view that the disputes of fact are not *bona fide* and that they could not have been foreseen by the applicant. A brief overview of the versions and facts relied on by the parties is necessary to understand the arguments.

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[4] The applicant's case is that as part of a joint operation between the police and the port authorities, Arladi was investigated for possible evasion of paying duty and excise on the cigarettes being sold in the store. They acted on information received from an informant. It was established that cigarettes were being sold so cheaply in the store that it was hardly like that any duties and excise was payable.

[5] In support of its application the application *inter alia*, relied on three affidavits deposed to by Bronwyn Julies who, as a shallow agent, entered Arladi on 15 May 2013, 8 June 2013 and 10 June 2013 (the date of the seizure of the property) respectively, and purchased Savannah cigarettes from Arladi. She paid R80.00 per carton on all three occasions and was not given any receipt for her purchases on any of the three occasions. On the third occasion, the R200.00 note with which Julies paid for two cartons of Savannah cigarettes, was marked. The police then formed the view that the sale of Savannah cigarettes were unlawful and they went in and seized the cash under consideration. According to Warrant Officer Mallet, who was part of the joint operation, the note was later retrieved from a box containing the cash takings of the day. This third transaction with the marked R200.00 note was conceded by Julies with Mr Mustafa Xasan, an employee of Arladi Wholesalers, and the purchase was captured on a video camera, showing Mr Xasan with the note in his hand.

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[6] As stated, Julies never received any receipt for the purchases which lead to the seizure of the property. In fact, there was no indication that Arladi Wholesalers ever issued any receipts to any of their patrons. It was not in dispute that inside the shop there is an area which is cordoned off and secured with steel plates, to which entry is gained through a steel gate which is operated electronically. Inside this area is another area where the police found boxes of cigarettes and coins. There were also boxes with airtime coupons and cash which were the proceeds of the sale of airtime. This was not seized by the police. No keep books of account or stock records were found. Only invoices relating to the purchases of cigarettes were found. The aforesaid items were all photographed.

[7] The invoices were for the purchase of substantial quantities of Savannah and Chigaco cigarettes from an entity called Cellular Fanatix. Bank deposit slips reflecting deposits from Arladi Wholesalers to British American Tobacco were also found. The applicant, through a consultant to the Tobacco Industry of Southern Africa (TISA), Mr Carel van der Riet, explained why it is maintained that the respondents are selling cigarettes illicitly.

[8] The illicit nature of the cigarette sales is inferred as follows: A carton of Savannah cigarettes contains ten packets of cigarettes (twenty cigarettes per packet). If a carton cost only R80.00, it means that the cigarettes cost R8.00 per packet. According to Mr van der Riet, excise

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duty was R10.92 at that time. If VAT were to be added to that amount, it gives one R12.45 as the cost per packet, and that is only what is payable to the fiscus, before a profit is even made. It was common cause that the cigarettes were not counterfeit and were manufactured by Gold Leaf Tobacco Corporation and distributed by Gwaai Marketing (Pty) Ltd in Gauteng. If one considered the

additional transport costs involved in distributing the cigarettes, it is not realistically possible to sell Savannah cigarettes at R8.00 per packet, unless the applicable taxes are excluded. The logical inference to be drawn is that no excise duty was paid in respect of the cigarettes in question. It is also common cause that the respondents are not registered as VAT vendors and do not pay VAT. They contended that they unsuccessfully tried to become VAT vendors because of their refugee status, and attached some correspondence between their alleged accountant, Mr Ebrahim Schmidt and an alleged official of SARS. There is, however an e-mail from another official from SARS, Mr S Mhlanga, according to whom it was entirely possible for Arladi register for VAT and that compulsory registration was the best route to follow. This advice was given in November 2011 but not heeded.

- [9] It was further not in dispute that the respondents are unable to produce the usual accepted and required documentation kept by a *bona fide* business, such as books of account, records of sales, payments, creditors, debtors and the like. The respondents' case is simply that they sell Savannah cigarettes which were purchased by them from Cellular

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Fanatix for R152.00 per carton and they sell them for R160.00 or R162.00 per carton of ten packets.

- [10] The respondents vehemently denied that the shallow agent (Julies) was charged R80.00 per carton when she bought the cigarettes. According to them, on the third occasion Julies bought only one carton of Savannah Cigarettes at R160.00, and not two for R160.00 as she stated. The existence of the marked R200.00 note is also disputed. According to the applicant, it was retrieved with the cash confiscated on 10 June 2013.
- [11] The respondents further dispute that the police found two safes on the premises and in the area where the cigarettes are sold. One safe was locked and one open (the manager Mr Abdul did not have the key for the second one). According to respondent, there was only one safe. According to the applicant, there was a cash register in the front of the shop where goods, other than cigarettes are sold. The respondents dispute this as well.
- [12] The respondents also dispute that the money seized was found in the enclosed area where the agent said she purchased the cigarettes for R80.00 per carton. The respondents also dispute the allegations as to where the police found the R323 545.00 in cash. According to the applicant the aforesaid amount comprised of different amounts found in separate places in the enclosed area as follows:

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1. R9145.00 was found in a cardboard box for the taking of the day. The R200.00 not was lying on top of the notes.
 2. R144 000.00 was found on the floor under the counter near the open safe.
 3. R75 000.00 was found in a black bag on the top shelf of the safe.
 4. R89 800.00 was found in a plastic bag on the bottom shelf of the open safe.
- [13] As noted from the above summary, the respondents have placed many aspects in dispute. The most important dispute of fact relating the determination of this application, is about the price at which Arladi sells Savannah cigarettes in cartons to the public. This was also the shared view of both counsel for the respective parties when the matter was argued. The respondents have, apart from confirmatory affidavits, produced little by way of engaging with the applicant's allegations and actual evidence put forward by them, other than denials and putting the applicant to the proof thereof.

[14] A court has a discretion whether or not to make an order that a matter be referred to oral evidence. If this were to take place in this case, the trial court will be tasked to decide the narrow question whether Bronwyn Julies bought two cartons of Savannah cigarettes from Xasan at R80.00 per carton, on 10 June 2013, or for R160.00 per carton. There is

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no indication on the papers that she was lying. Several police officials deposed to the fact that her purchases were part of an investigation into the alleged illegal sale of cigarettes at the store in question. In the circumstances, one would have expected the respondents to proffer better evidence to substantiate the basis other than denials to substantiate their opposition.

[15] The respondents only filed confirmatory affidavits deposed to by Xasan and Abdul, as well as numerous persons stating that they were Somali refugees and that Arladi sold Savannah cigarettes to the public at R160.00 per carton. In a trial, the aforesaid persons would probably all confirm this under oath.

[16] In these circumstances, the value of numerous persons deposing to identical confirmatory affidavits must be looked at with caution. The respondents rely solely on such affidavits. In the absence of very important and basic documentation pertaining to their business activities they are unable to prove that they charge their customers R160.00 per carton of cigarettes.

[17] The respondents are not in a position to dispute that Bronwyn Julies entered the store to buy cigarettes. Mr Xasan is clearly seen holding the R200.00 in a photograph. The respondents are also unable to dispute

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that the bundles of cash which appeared in the photographs were not found in the secured area.

[18] The invoices of Cellular Fanatix appear rather suspect. The applicant submitted that they could easily have been manufactured for purposes of appearing to comply with the provisions of the Customs and Excise Act, 91 of 1964. Section 102 of the Customs and Excise Act imposes a duty on the respondent to keep records from where they obtain their Savannah stock. The relevant part of section 102 reads:

"Any person selling, offering for sale or dealing in importable excisable goods or fuel levy goods or any person removing the same or any person having such goods entered in his books or mentioned in any documents referred to in section 75(4A) or 101, shall when requested by an officer, produce proof as to the person from whom the goods were obtained"

[19] More importantly, some of the invoices reflect incorrect VAT amounts. For instance, on one of the invoices the value added tax is not R5 600.00 per invoice, but in fact R6384.00. There are other invoices with similar errors. In a two week period in May 2013, R76 000.00 exchanged hands between Arladi and Cellular Fanatix, and that was just for Savannah cigarettes. Laher, the owner of Cellular Fanatix, was unable to provide any proof of payment to him by Arladi for the Savannah cigarettes. In a legitimate, ongoing business relationship, Laher would have been able to produce a body of corresponding documentation as proof of that relationship.

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[20] Warrant Officer Michael Damens of the Port Elizabeth Financial and Asset Forfeiture Investigating Unit analyzed some of the invoices. Apart from the flawed invoice given as an example, there were also other invoices in May and June 2013 which contained similar discrepancies. Damens concluded that the confusing figures on the invoices indicate that something suspicious was going on at Arladi's. The respondents produced no records of stock, no receipts, no delivery notes or any of the kind of documents usually associated with such transactions.

[21] It is very significant that the cigarettes were sold in secure area where large amounts of cash were found. The respondents have no receipts for any of their sales, which in itself is in contravention of the applicable legislation. They do not pay VAT. They kept no books of account. They simply have no proof that the cartons are sold for R160.00 to the public. They made no attempt to show that their business is legitimate either. The respondents were not even in the shop when Julies made the purchases. In my view, the applicant did not incur any obligation to prove beyond reasonable doubt in a trial, that the cigarettes in question were sold for R80.00, to justify the seizure and forfeiture of the cash in question. It is simply not open to a party, such as the respondents, in the circumstances of this case, to simply dispute virtually every allegation made by its opponent, without putting forward any facts or evidence in support of its stance.

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[22] Having considered the matter carefully, I am of the view that it is unnecessary to refer the matter to oral evidence. On the probabilities, the respondents are trading in contravention of the Tobacco Products Control Act, the Customs and Excise Act and the tax laws of the country. The R80.00 charged per carton of cigarettes is in contravention of section 4A of the Tobacco Products Control Act, 83 of 1993. The property in question can thus be deemed to be the proceeds of unlawful activities, and is thus liable to be forfeited.

Order

[23] An order is made in terms of the draft order attached to the applicant's application for forfeiture dated 1 October 2013.

E REVELAS

Judge of the High Court

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Counsel for the Applicant,	Adv FH Hack, instructed by State Attorneys.
Counsel for the Respondents,	Adv AC Moorhouse, instructed by MSA Attorneys.
Dates Heard:	28 August 2014 & 10 September 2014
Date Delivered:	13 January 2015