

NOT REPORTABLE

REPUBLIC OF NAMIBIA



**HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK
JUDGMENT**

CASE NO. POCA 02/2015

In the matter between:

THE PROSECUTOR-GENERAL

APPLICANT

and

JACO MARIUS KENNEDY

RESPONDENT

Neutral citation: *The Prosecutor-General v Kennedy* (POCA 02/2015) [2017]
NAHCMD 26 (06 February 2017)

Coram: ANGULA, DJP

Heard: 13 September 2016

Delivered: 06 February 2017

Flynote: Applications and motions – Prevention of Organized Crime Act 29 of 2004, S 61(1) (POCA) – Requirements for forfeiture of property — (1) It must be a property which is concerned in the commission of an offence and which is an instrumentality of the offence; or (2) begotten by proceeds of unlawful activities. Requirements for forfeiture of property to be prove on the balance of probabilities.

Summary: This is an application for forfeiture order of a property, a motor vehicle, in terms of section 61 POCA. The applicant contends that the property was an instrumentality concerning the commission of the offence of kidnapping and rape. The respondent opposed the application, denying that the property was an instrumentality in the commission of the said offences; and that the property was merely incidental to the commission of the alleged offences.

Held: Applying the definition of ‘concerned in the commission of an offence’ and an “instrumentality” as propounded in the *Cook Properties* matter, namely, with regard to the first requirement, it 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; regarding the second requirement of ‘instrumentality’ the property must be instrumental in, and not merely incidental to, the commission of the offence. For otherwise there is otherwise no rational connection between the deprivation of the property and the objective of the Act.

Held on the facts, and applying the *dictum* of *Cook Properties*, that the applicant has failed to prove on the balance of probabilities that the property was an instrumentality in the alleged commission of the offences of kidnapping and rape.

ORDER

1. The application is dismissed.

2. The applicant is ordered to pay two-thirds (2/3) of the respondent's taxed costs. The reduction of one-third (1/3) of the costs serves as a sanction against the legal practitioners for the respondent for the flagrant non-compliance with the Rules of this Court.

JUDGMENT

ANGULA, DJP:

Introduction

[1] This is an application for the forfeiture of property in terms of section 61 of the Prevention of Organized Crime Act 29 of 2004 ('POCA') by the Prosecutor-General, the applicant. The application is brought on the ground that the property, which is the subject matter of this application, is an instrumentality within the meaning of schedule 1 of POCA offences, namely kidnapping and rape. The property is a Volkswagen VW 250 – POLO 1.6 with registration number N100-289W ('the property', or "the car").

[2] The applicant is the Prosecutor-General of the Republic of Namibia acting in her capacity as such.

[3] The respondent is Jaco Marius Kennedy, an adult male who is charged with having committed the offences of kidnapping and rape on 3 January 2015 and was also the driver of the property that is alleged to be an instrumentality concerning the commission of the said offence.

[4] The applicant is represented by Ms Kazondunge from the office of the Government Attorney. The respondent is represented by Mr Isaacks from Isaacks & Associates. Both counsel filed heads of arguments for which the court would like to extend its appreciation for their diligence.

Background

[5] On 13 March 2015, upon an application by the Prosecutor-General, this Court granted a provisional preservation of property order. By agreement between the parties the provisional preservation order was confirmed by this Court on 24 April 2015. Section 59(1) of POCA provides that if a preservation of property order is in force, the Prosecutor-General may apply to this Court for an order forfeiting to the State the property that is subject to a preservation of property order. The property is presently the subject matter of the preservation of property order. On 11 September 2015 applicant launched this forfeiture application.

[6] It is common cause that the property is also the subject matter of a hire-purchase agreement between the respondent and First National of Namibia Bank. In terms of the preservation order, the applicant was ordered to serve the order on the respondent and as well on First National of Namibia Bank, Westbank branch. According to the return of service, the preservation order, apart from being served on the respondent, was also served on First National Bank on 15 May 2015.

[7] The application is opposed by the respondent. First National Bank did not oppose or intervene in these proceedings, despite the application papers and the preservation order being served on them.

Case for the applicant

[8] The applicant in her founding filed an affidavit in support of this application for the forfeiture order, and asked this court to consider that all the documents and annexures filed in support of the application for the preservation order be deemed to have been incorporated in her founding affidavit. Those affidavits, document and annexures form part of the court file in this matter.

[9] The complainant who is the victim of the alleged offences made a sworn statement to the police which is one of the annexures attached to the applicant's affidavit.

[10] According to the complainant, on 3 January 2015 at around 19h00 she sent a text message to her husband saying that they should meet in town at the park. She then left home and waited for a taxi at a certain four way stop junction in the area Otjomuise township. The applicant's point of departure has been deliberately withheld to protect her identity. Then a silver Polo sedan stopped by her. The driver (the respondent) asked her where she was going and she informed him that she was on her way to town. The driver told her that he was going to Khomasdal but he would not mind dropping her off in town. He told her to get into the car, which she did. She sat on the back seat behind the driver's seat. She noticed a man lying or sleeping on the front passenger seat with a beer bottle between his legs. He is later identified as Cloete and will be so referred in this judgment.

[11] They then drove along the Ramatex road towards the traffic lights at the intersection of the road to Khomasdal. She then noticed that the driver had a large beer bottle and further noticed that the driver took a sip from the beer. However, when the driver realised that she had seen him take a sip, he changed the position of the rear-view mirror. They then proceeded and passed the Vocational Training Centre. They proceeded further to the next traffic lights near Park Foods in Khomasdal. From there the driver proceeded to the area that the complainant described as Channel Seven Fourways, where the driver turned left. She then asked the driver where he was going. He responded

that he was going to drop off the man in the front seat at the Nurses' Home at Central Hospital.

[12] They drove towards a set of traffic lights, whereupon the driver drove to the gate giving access to the Mortuary area which is situated on the Central Hospital ground but the gate was closed. The driver hooted three times. There was no reaction. The driver then turned back to the traffic lights. He then turned left at the gate of the Blood Transfusion premises but that gate was also closed. He then turned left into Florence Nightingale Street going uphill and turned left towards the main entrance of Central Hospital Nurses' Home. When they entered the ground of the Central Hospital the driver turned right and drove past the outpatient entrance area and proceeded and then past the maternity ward of the Central Hospital. The complainant relates further that she recalled that they drove past the Training Centre which was situated on the right and then realised that it was bushy on both sides of the road. She then noticed a building on the left side, which they also drove past. She then saw two persons in front of the car wearing what she referred to as 'police reflector jackets'. Before the car could reach the two persons, the driver turned left.

[13] Thereafter the complainant noticed a bridge and a riverbed in front of them. She then asked the driver where he was going whereupon he immediately stopped the car. He got out of the car and opened her rear door. She asked him what he was doing whereupon he responded said that she had taken him and his friend for a ride. She says she did not understand what he was talking about. The driver ordered her to shut-up. He then pushed her to the left side of the seat and ordered her to take off her skirt, which she refused to do. She then opened the car door on the opposite side and screamed twice. She then scratched Cloete in the front passenger seat twice on his cheek, because according to her he had been sleeping all along. In the meantime the driver was pressing her legs down on the seat with his legs. The driver then produced a silver steak knife and pressed it on her neck and moved it around her neck and told her that he would kill her. The driver then pulled her skirt up and she felt that he was busy cutting her panties. She then felt his penis on her body. In the meantime he kept on throttling her. He bumped

her ribs with his knee and also punched her on the head with a fist. He also smacked her on her right eye. The driver then told her to suck his friend's penis. Then the friend removed his pants, whereupon the driver forcefully opened her mouth in order for her to suck his friend's penis. He threatened to cut off her hair, and that he would urinate on her. During the whole time the driver was strangling her; later she lost consciousness.

[14] When she regained consciousness she noticed two police officers behind the car. The police officers asked her if she knew the two men. She replied that she did not know them. The police officers informed her that they had found the two men on top of her. The driver then became aggressive towards the police officers and as a result he ended up being handcuffed by the police.

[15] According to the complainant, she was in pain; she could not sit properly, and her skirt was cut or torn. She could not breathe properly and her mouth was dry. She was later taken to Katutura police station. Later that evening the complainant was medically examined. The findings of the medical examination are recorded in the J88 Form that is attached to her sworn statement. On the Form it is recorded that the complainant's skirt and her underwear, were torn; that her vagina was bleeding and had a bloody discharge; and that her Fossa Navicularis had a tear and was bleeding.

[16] Mr Joseph Kandjimi Nzamene deposed to an affidavit. He is the supervisor of Vicmac Security Services. According to him, he was on duty that evening when the incident regarding the complainant took place. That evening at around 19h20 he was on duty on his way to the Nurses' Training Centre to visit the guards when he noticed a Polo vehicle parked in the bushes. He walked towards the Polo and heard a woman screaming. He went back to the road and contacted the police. Later when the police arrived he took them to the spot where the Polo was parked. On their arrival at the Polo they found one man having sex with the complainant. The man who was on top of the woman was totally naked while the other man had a knife in his hand, his trousers belt and zip were opened. Mr Nzamene went on to say that he observed that the complainant

had a scratch mark on her neck; she struggled to talk; her T-shirt was torn; and she cried and appeared to be exhausted.

[17] Constable Johannes Marungu who is working for the Emergency Response Unit of Khomas Region also deposed to an affidavit. According to him, he was on duty when he received through the radio a complaint that screams of a woman were heard in the bushes between Katutura and Central Hospital. He and his two colleagues drove to the scene and met security officer, Mr Nzamene, who showed them where the Polo was parked in the bushes. When they arrived at the scene, they found three people in the Polo: the complainant, who was lying on her stomach on the rear seat of the Polo; the suspect, who was later identified as Jaco Kennedy, the respondent in this matter, was on top the complainant with his penis inside the complainant. He was hitting the complainant on the head with a steak knife. When the police identified themselves he pulled out his penis from the complainant. He left the complainant with her skirt up, revealing her vagina. The respondent threatened the police officers that he would beat them up. He was later restrained and handcuffed. Upon inspection of the Polo, they found liquor bottles in the car. The police reinforcement arrived and arrested the respondent and took him to a police station.

[18] Warrant Officer Emilia Nambadi is employed by the Commercial Crime Division: Asset Forfeiture Unit of the Namibian Police. She also deposed to an affidavit. She states that as a result of the investigation conducted by members of the Namibian Police she believes that there is evidence indicating that the Polo was used as an instrumentality to commit the offences of kidnapping and rape. Warrant Officer Nambadi in essence repeated what has already been stated in the affidavits of the complainant and the security guard, Mr Nzamene, as well as Constable Michael Murungu.

Opposition by the respondent to the forfeiture application

[19] The respondent is opposing the granting of the forfeiture order. In his answering affidavit, the respondent raised two the points *in limine*. Firstly, that the affidavit by

Warrant Nambadi which is incorporated in the Prosecutor-General's affidavit, does not constitute a proper affidavit in terms of the Regulations Governing the Administering of an Oath or Affirmation. He points out that the relevant Regulation is peremptory, in that it uses the word "shall" by providing that the Commissioner of Oaths shall state his designation and the area for which he holds his appointment or the office held by him if he holds his office *ex officio*. The respondent points out in this regard that the Commissioner of Oaths for the affidavit of Warrant Officer Nambadi merely states a number and some abbreviation as the designation of the Commissioner of Oaths; that it failed to define the designation of the Commissioner of Oaths. Therefore the affidavit by Warrant Office Nambadi does not constitute an affidavit in terms of the law; thus it is not a valid affidavit. The respondent continues to assert that the said affidavit and the annexures attached thereto constitute hearsay evidence and thus the applicant has not placed facts before court to satisfy the court on the balance of probabilities that the property is an instrumentality of the alleged offences.

[20] The second point *in limine* concerns the alleged failure by the applicant to comply with the peremptory provision of Rule 131(1) (h) of the Rules of this Court which provides that all typed pleadings, notices and other court documents must contain page numbers which must be at the top right hand side of the page. The respondent asserts that the applicant's pleadings have not been numbered in compliance with the said Rule.

[21] Regarding the merits, the respondent denies that he ever stopped next to the road and offered the complainant a lift to town. According to him, what he remembers is that he stopped the vehicle at a certain four-way stop intersection, whereupon the complainant came near the car and asked him where they were heading to; that he informed her that they were driving to town whereupon she said she was also on her way to town. The respondent then informed her that he would not mind dropping her off somewhere in town near the area where she was going. The complainant then got into the car and the respondent drove towards town, which was his initial destination. The respondent states that he cannot remember all the details of the route they took on their way to town because he was intoxicated.

[22] The respondent recalls that on the way to town near Dorado Valley Complex, in the Dorado Park area, the complainant informed him that she would rather go and meet someone coming from Okahandja and asked him to rather drop her off near the Okahandja hikes spot in order for her to meet the person at that hike spot. He informed her that he could drop her at the hike spot and from there he would drive further to town; and that in doing so he would simply use the highway to drive to town. He then decided to take the tarred road between Central Hospital and Katutura Hospital, with the intention to exit from Katutura Hospital and then drop the complainant at the Okahandja hike spot. It is the respondent's case that throughout that time the complainant never asked him where he was going or said that she wanted to get out of the car. He recalls that his passenger, Cloete, urinated on his car's seat while he was sleeping; that when that happened he woke him up and scolded or reprimanded him for urinating in the car. The respondent says that it could be true that he, at some stage during the journey, might have mentioned to the complainant that he would drop Cloete off at his house. According to the respondent, on the way to the exit gate of Katutura Hospital, he stopped the car and instructed Cloete to get out of the car because he had urinated in the car.

[23] The respondent stresses that he never unilaterally changed the route but only changed the route because he was asked by the complainant to drop her off at the Okahandja hike spot near the Katutura hospital. He denies that he used the car in any way to kidnap the complainant. According to the respondent, the complainant had every opportunity to jump out of the car at various intervals when the car stopped, since she was sitting on the back seat of the car, because the doors of the car automatically unlock when the door handle is pulled.

[24] According to the respondent, the struggle which ensued between him and the complainant was because of the metal object with which the complainant hit him with on his head which he assumed was a knife which formed part of the cutlery which was in the car and which the complainant used to hit him on the head. He then directed vulgar words towards her and Cloete after he realised that his wallet was missing from the car.

According to the respondent, he never had any intention to detain, threaten or beat the complainant. He concedes that he might have pushed the complainant down to remove the knife from her.

[25] The respondent states that he cannot remember having ordered the complainant to remove her skirt, or throttled her, or pushing a knife against her neck, or cutting her panties, or hitting her, or smacking her on her right eye and strangling her until she passed out. According to the respondent, all those allegations are just fabrications.

[26] It is the respondent's contention that the applicant has failed to make out a case on the balance of probabilities; furthermore he denies that the applicant has failed to prove on the balance of probabilities that the respondent had the requisite intention to unlawfully deprive the complainant of her liberty of movement at any stage after the complainant got into the car.

[27] Regarding the contents of the J 88 medical report, the respondent states that such report does not prove that he had raped the complainant.

[28] With reference to the affidavit by security officer Mr Joseph Nzamene, the respondent points out that it does not specify the person who manhandled the complainant and who caused the skirt of the complainant to be torn and the handbag to be broken. Furthermore that Mr Joseph Nzamene failed to state exactly whom he saw having sexual intercourse with the complainant. The respondent went on to say that he found it strange that police officer, Marungu, in his affidavit alleged that when they arrived at the scene they made 'observations' that the respondent was standing at the back of the complainant and had his penis inside the complainant and was hitting her on the head with a silver knife; and that he threatened the complainant with a knife if she did not suck Cloete's penis. In this context the respondent points out that the applicant failed to state whether the police officers made those observations each one personally or individually, or whether they were conveyed to them by others.

[29] The respondent continues to submit that the only link between the property and the alleged offence is that the property was being driven prior to the alleged offences were allegedly committed. The link makes the property merely incidental to the alleged commission on the offences. The respondent therefore submits that the applicant has failed to prove on the balance of probabilities that the property was instrumental to the alleged offence of rape. The respondent submits further that the applicant has failed to make out a case explaining in what way the property was instrumental in the commission of an offence, in particular, rape; that the applicant merely made a case which demonstrates that the property might have been incidental to the alleged commission of an offence. The respondent further submits that the granting of the forfeiture order will constitute merely a pre-imposed or additional penalty in relation to the penalty for the alleged offence which the respondent is facing.

[30] Finally, the respondent submits that the prevention of kidnapping or rape is not related to any of the fundamental objectives of POCA; that POCA is aimed at stripping criminals of the proceeds of their crimes, the purpose being to remove the incentive for crime and to punish them and not serve as a pre-imposed penalty in pending criminal matters.

[31] The Prosecutor-General filed a replying affidavit which in broad strokes traversed and dealt with the assertions in the respondent's answering affidavit. Where necessary I will refer to its content when analysing the different versions.

Points *in limine* considered

[32] I will first consider the points *in limine* raised by the respondent before proceeding to deal with the merits of the matter. As mentioned earlier in this judgement, the first point relates to the commissioning of the affidavit of Warrant Officer Nambadi. Mr Isaacks for the respondent submits that the affidavits of Warrant Officer Nambadi does not constitute a proper affidavit in that it does not comply with the peremptory requirements of the Regulations governing the administration of Oaths or Affirmation. The Regulation in

question provides that the Commissioner of Oaths shall state his/her designation and the area for which he/she holds his/her appointment or the office held by him/her if he/she holds the office *ex officio*. In this respect Counsel points out that the Commissioner of Oaths for the affidavit by W/O Nambadi merely stated a number and some sort of an abbreviation as his designation. Counsel submits further that a mere number and an abbreviation do not properly and/or adequately define the designation of the Commissioner of Oaths; thus, so the argument goes, the Commissioner failed to state his designation. Therefore the affidavit is invalid and cannot be relied upon for the relief prayed by the applicant.

[33] In my view, there is no merit in this point *in limine*. As correctly pointed by counsel for the applicant, *ex facie* the affidavit, it is clear that the affidavit was commissioned by a police officer, who, by law, is a Commissioner of Oaths *ex officio*. The full names of the police officer are provided; his force number has been provided and his rank has been provided as "CST" which is commonly accepted as an abbreviation for 'Constable'. Furthermore, the police officer's area of appointment has been clearly indicated as 'Windhoek, Namibia', and his address as 'Bahnhof Street, Windhoek'. Finally the Commissioner of Oaths rubber stamped the affidavit with the Charge Office's stamp indicating the date when and the Charge Office where the affidavit was commissioned. In addition, the police officer inserted in handwriting the date on which the affidavit was commissioned. The point *in limine* stands to be dismissed.

[34] The second so-called point *in limine* is that the applicant failed to provide page numbers on her pleadings as stipulated by Rule 131(1) (h) of this court. Counsel for the respondent asks the court not to condone this non-compliance and that the court should as a result strike the matter from the roll. Technical objections to less than perfect conduct in the proceedings, in the absence of prejudice, should not be permitted to interfere with the resolution of real issues. The respondent does not allege any prejudice he suffered as a result of the applicant's non-compliance with the said rule. The applicant has explained in her replying affidavit that the omission of page numbers was due to oversight on her part and was not done purposely to prejudice the respondent or the court. She

asked for condonation for her omission. To strike the matter from the roll for such a trifling non-compliance will not be in accordance with the overriding objective of the rules of this court, namely to facilitate the just and speedy resolution of the real issues in dispute. This court has inherent jurisdiction to condone non-compliance with its rules where insistence upon exact compliance with the rules will result in injustice. In the exercise of such power the non-compliance by the applicant with the said rule is accordingly hereby condoned. In the result the point *in limine* is dismissed.

[35] I now proceed to consider the merits.

Issues for Determination

[36] The issue for determination in this application is whether the applicant has proved on a balance of probabilities that the property concerned is an instrumentality which is concerned in the commission of the schedule 1 offences, being kidnapping and rape.

Applicable law

[37] Section 61(1) of POCA, stipulates that the court must make the forfeiture order if the court finds on a balance of probabilities that the property is (1) an instrumentality of any of the offences referred to in schedule 1 of POCA or (2) was begotten by proceeds of unlawful activities. Section 1 of POCA defines 'instrumentality of an offence' as 'any property which is concerned in the commission or suspected commission of an offence at any time before or after the commencement of this Act, whether committed within Namibia or elsewhere'.

[38] The meaning and import of the term "instrumentality" has been explained by the South African Supreme Court of Appeal as follows:

'In a real and substantial sense the property must facilitate or make possible the commission of the offence. As the term "instrumentality" itself suggests (albeit that it is defined to

extend beyond its ordinary meaning), the property must be instrumental in, and not merely incidental to, the commission of the offence. For otherwise there is no rational connection between the deprivation of property and the objective of the act, the deprivation would constitute merely an additional penalty in relation to the crime, but without the constitutional safeguards that are a prerequisite for the imposition of criminal penalties'.¹ (the underling is mine for emphasis).

[39] It has been held that the proceedings under chapter 6 of POCA are not concerned with the wrongdoer but are focussed on the property that has been used to commit the offence.² Furthermore that the purpose of civil forfeiture is aimed at achieving certain objectives, namely removing the incentive for crime; deterring a person from using or allowing their property to be used in the commission of crime; eliminating or incapacitating some of the means by which a crime may be committed; and advancing the ends of justice by depriving those involved in the commission of crime of the property concerned.³

[40] The State or the Prosecutor-General has to prove on the balance of probabilities that the property may be seized and forfeited to the State.⁴ The test has been explained by Parker AJ in the matter of *The Prosecutor-General v Hategekimana*⁵ in the following words:

'[5] The following is important: In the determination of a forfeiture application under POCA the following constituent elements in the interpretation and application of S 61(1) of POCA are crucial:

- (a) If the court finds that the property in question was an instrumentality of any of the offences referred to in Schedule 1 to POCA or was born out of proceeds of unlawful activities, the court has a duty, not a discretion, to make a forfeiture order.*
- (b) Proof that the property was an instrumentality of such offence or was born out of unlawful activities is established on the standard of proof in civil cases.*

¹ National Director of Public Prosecutions v RO Cook Properties (Pty) Ltd [2004] 2 All SA 491 (SCA).

² The Prosecutor –General v New Africa Dimension CC and Two Others POCA 10/2012 NAHCMD 123 (20 April 2016).

³ RO Cook Properties (Pty) [2004] 2 All SA 491 (SCA).

⁴ Muhnam and Another v NDPP and Two Others (CCT 19/06) [2007] ZACC 4 par 82.

⁵ POCA 5/2014 [2015]NAHCMD 238 (8 October 2015).

- (c) *The offence involved need not have been committed by the respondent.*
- (d) *The unlawful activities complained of need not be exclusively the activities of the respondent.*

Conflicting versions

[41] As has been observed from the summaries of the versions of the applicant and the respondent, the two versions are mutually destructive. It is therefore necessary to deal with this aspect before proceeding to apply the law to the facts. The approach by the court in motion proceedings to resolve conflicting versions of the parties is well settled. Damaseb AJA writing for the court in the matter of *M Pupkewitz & Sons (Pty) Ltd t/a Pupkewitz Megabuild v Kurz*⁶ cited with approval the following principle as outlined by the South African Appellate Court in the matter of *Goran v Skidmore* 1952 (1) SA 732:

'Now it is trite law that, in general, in finding facts and making inferences in a civil case, the Court may go upon a mere preponderance of probability, even although its so doing does not exclude every reasonable doubt for, in finding facts or making inferences in a civil case, it seems to me that one may by balancing probabilities select a conclusion which seems to be more natural, or plausible, conclusion from amongst several conceivable ones, even though that conclusion be not the only reasonable one.'

Similarly,

*'Where the onus rests on the plaintiff as in the present case, and where there are two mutually destructive stories, he can only succeed if he satisfies the Court on a preponderance of probability that his version is true and accurate and therefore acceptable, and that the other version advanced by the defendant is therefore false or mistaken and falls to be rejected.'*⁷

Application of the law to the facts

⁶ 2008 NASC 9 9 (14 July 2008).

⁷ (National Employers' General Insurance v Jagers 1984 (4) SA 437 at 440E-F) cited with approval in the matter of *The Prosecutor –General v Hategekimana supra*."

[42] I consider it necessary to separately consider whether the property was an instrumentality of the two alleged offences of kidnapping and rape respectively. I will first consider whether the property was an instrumentality in the commission of the offence of kidnapping and thereafter whether the property was instrumentality in the commission of the offence of rape.

Property being instrumentality concerning the commission of the offence of kidnaping

[43] The offence of kidnapping is said to consist in unlawfully and intentionally depriving a person of liberty of movement and/or her custodians of control.⁸ Corbett CJ in the matter of *S v Morgan*⁹ has the following to say regarding the offence of kidnapping:

'Kidnapping is always a serious offence since it involves deprivation of liberty particularly freedom of movement, freedom to be where one wants to be, freedom to do as one wishes'

[44] Furthermore, the offence of kidnapping is committed not only where there is forcible deprivation of freedom of movement, but also where the victim is enticed by craft or cunning.¹⁰

[45] Ms Kazondunge on behalf of the applicant submits that the facts before court have proved on the balance of probabilities that the respondent used the property to kidnap the complainant. On the other hand Mr Isaacks for the respondent submits that that the only link between the property and the alleged offence of kidnapping is that the complainant was being driven in the property prior to the alleged offence of rape having been committed. This, according to Mr Isaacks, makes the property merely incidental to the alleged commission of the offence.

⁸ CR Snyman *Criminal Law* 3rd ed, p 437.

⁹ 1993(2) SACR (A) at 177G.

¹⁰ *S v Wellem* 1993 (2) SACR 18 (E) at p 31 and Law of South Africa vol. 6, para 299.

[46] There is a slight dispute between the complainant and the respondent as to whether it was the respondent who offered the complainant a lift to town or whether it was the complainant who asked the respondent for the lift to town. The dispute would perhaps have been relevant if Ms Kazondunge had maintained her argument that the respondent picked up the complainant under false premises that he would give her a lift to town. In my view, this point lost its relevance once Ms Kazondunge in her heads of argument stated that the complainant got into the property voluntarily. It is incorrectly submitted on behalf of the applicant that the respondent picked up the complainant under a false pretext that he would give her a lift to town, as he was heading in the same direction as well. The complainant's own version on this point is that the respondent told her that he was going to Khomasdal, and that he would drop her later in town. The respondent's version on other hand on this point is that he told the complainant that he would not mind dropping her off somewhere in town.

[47] From the admitted facts between the complainant and the respondent there is nothing to suggest that the complainant was enticed through craft or cunning to get into the car. Mr Isaacks, correctly in my view, points out that the complainant herself does not allege in her statement that she was kidnapped by the respondent. In my view it is clear from the facts that the complainant voluntarily got into the car on the understanding that the respondent was first heading to Khomasdal but later would drop her in town.

[48] It is submitted on behalf of the applicant that the respondent changed direction and headed in a different direction from the one he and the complainant had initially agreed upon. There is no evidence that the complainant and the respondent had agreed on a specific direction. As pointed out earlier, on the complainant's own version, the respondent told her that he was going to Khomasdal. On his own admission the respondent was so intoxicated that he is not in position to recall the route they took from 7de Laan in the area of Otjomuise where the complainant got onto the car to Khomasdal. The available and reliable version on this point is that of the complainant. On the complainant's version the respondent drove to or, so it appears, through Khomasdal. According to the complainant, somewhere along the way, the respondent told her that he

was going to drop off Cloete at the Nurses' Home at Central Hospital, which requires somebody to drive in the direction of town. They drove along Florence Nightingale Street from the direction of Khomasdal. I think it would be fair to say in normal parlance 'town' means the Central District Area of Windhoek. It is further the complainant's version that the respondent did indeed drive into the Central Hospital's ground where the Nurses' Home is situated. He did however not drop off Cloete at the Nurses' Home, but proceeded to drive through the hospital ground past the outpatient area and then in front of the maternity ward, following the tarred road between Central Hospital and Katutura Hospital.

[49] Ms Kazondunge submits that the complainant got into the property voluntarily, but this was only until such a time that it became evident to her that the respondent had no intention of taking her to town and this was when her occupation of the property was no longer voluntary. She submits therefore that the respondent's change of course of his direction without the complainant's consent had the effect of unlawfully depriving the complainant of her right to movement as she was no longer heading into the direction she intended to go, nor did the respondent have the intention to take her to town as he had made her believe he would.

[50] Before proceeding to consider Ms Kazondunge, together with the question whether the facts proved that the property was as an instrumentality in the commission of the alleged offence of kidnapping I think it would be apposite to first consider the facts and what was said by the court in the matter of *Cook Properties* referred to earlier in this judgement and which I consider to be instructive.

[51] The *Cook Properties* case concerns a suburban house in Randburg, Gauteng. The owner (a private family company) let a house under a written lease as 'a guest house'. The National Director of Public Prosecutions ('NDPP') alleged that the lessees used it as a brothel 'in contravention of S 20(1) of the Sexual Offences Act 31 of 1957'; and that persons kidnapped by one Michael Zinqi and his cohorts were assaulted and held hostage in the house. The NDPP sought an order for the house to be declared an

instrumentality of an offence. The owner opposed the application. The court found that it had not been proved that the property was an instrumentality of an offence and dismissed the NDPP's application.¹¹ In interpreting what 'instrumentality of an offence' means, the court started off by looking at the definition contained in POCA and expressed itself as follows at Paragraph 31 of the judgment:

[31] For now it is enough to say that the words 'concerned in the commission of an offence' must in our view 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. By this we mean that the property must play a reasonably direct role in the commission of the offence. In a real or substantial sense the property must facilitate or (make possible the commission of the offence). As the term 'instrumentality' itself suggests (albeit that it is defined to extend beyond its ordinary meaning), the property must be "instrumental in", and not merely incidental to, the commission of the offence. For otherwise there is no rational connection between the deprivation of property and the objective of the Act: the deprivation will constitute merely an additional penalty in relation to the crime, but without the constitutional safeguards that are a prerequisite for the imposition of criminal penalties.' (the underlining is mine for emphasis)

[52] Having said this, the court arrived at the following conclusion at Paragraph 33 of the judgment:

'The fact that kidnapped persons were held hostage and assaulted at the house does not make the property an 'instrumentality of an offence'. The property was the place where the crimes were committed. But the location was purely incidental to their commission. We agree with the approach Stegmann J adopted in National Director of Public Prosecutions re Application for Forfeiture of Property in terms of ss 48 and 53 of the Prevention of Organised Crime Act, 1998:

"The mere fact that a particular offence was committed on a particular property would not necessarily entail the consequence that the property was "concerned in the commission" of the offence or that the property had become an "instrumentality of an offence". It seems

¹¹ P. 9 of the judgment.

to me that evidence of some closer connection than mere presence on the property would ordinarily be required in order to establish that the property had been "concerned in the commission" of an offence.

He added:

"Every [scheduled] offence must be committed on some piece of property. But it would be absurd to infer that the legislature had intended every property on which such an offence had been committed to be liable to forfeiture to the State. A closer connection must be shown than mere presence. It must be established that the property was 'concerned' in the commission of the offence, and not merely that the offence was committed on the property." (the underlining is mine for emphasis)

[53] The court went on to say that for a property to be liable to forfeiture it required that:

'Either in its nature or through the manner of its utilisation, the property must have been employed in some way to make possible or to facilitate the commission of the offence. Examples include the cultivation of land for the production of drug crops; the appointment, arrangement, organisation, construction or furnishing of premises to enable or facilitate the commission of a crime; or the fact that the particular attributes of the location are used as a lure or enticement to the victims upon whom the crime is perpetrated (such as a houseboat whose particular attractions were used to lure minors into falling prey to sexual offences).'¹²

[54] Against the background of the court's pronouncement in the *Cook Properties* matter, which I fully embrace, I will now proceed to consider what transpired in the present matter.

[55] Apart from narrating where the respondent drove to after he had entered the Central Hospital's ground up to the point where the respondent stopped the car, the

¹² Para 34 of the judgment. Citing an unreported case from the Victorian County Court cited in *DPP (NSW) v King* [2000] NSWSC 394 para 22.

complainant does not indicate her attitude after the respondent changed the course of direction. It is incorrectly submitted on behalf of the applicant that when the respondent drove past the Nurses' Home she asked him again where he was going. On careful reading of the complainant's affidavit, nowhere is it stated that she had asked the respondent where he was going. She did not protest nor asked the respondent to drop her off, say, in front of the outpatient area where one would expect to see a guard or people lingering in front of the outpatient entrance. If she had realised that she had been kidnapped, I would have expected her to make a fuss or scream or ask to be dropped when they drove in front of the outpatient entrance. In other words, she did not indicate absence of her consent or disapproval over the change of course.

[56] The respondent's version as to why he changed the course of his direction, he says that he did so because he was asked by the complainant to rather drop her at the Okahandja hiking spot to meet someone there. He says further that he agreed to drop her there because after he had dropped her at that spot he would simply have proceeded with the highway to town. The respondent's version is improbable. It is to be remembered that the respondent originally when he and the complainant met, he told her that he was not going to town, but that he would not mind dropping her somewhere near town. There was therefore no need for the respondent to proceed to town after he had dropped off the complainant at the hiking spot. In any event, as things turned out, he did not drop the complaint at the hiking spot. The respondent version is further improbable for the reason that the complainant would not have asked to be dropped at the Okahandja hiking spot while she had already agreed with her husband to meet at the park in town. The respondent's version on this point is rejected as false.

[57] The question is then: why did the respondent change the direction? According to Ms Kazondunge's argument, the respondent changed the direction in order to kidnap the complainant. I do not agree with that conclusion. It is not the only reasonable inference to be drawn from the proved facts. In my view, the reasonable inference to be drawn, and which is consistent with proved facts, is that at that juncture the respondent had decided to have sexual intercourse with the complainant. This inference is not only

supported by what happened later when the alleged offence of rape took place but also by what happened when the complainant initially entered the car. On the respondent's version, when he testified during his bail application, after the complainant had entered the car, he had a discussion of 'sexual nature' with the complainant. Based on the facts before me it does not appear to me that the respondent had the necessary intention to kidnap the complainant. In my view the changing of the direction was a mere preparatory step towards the commission of the alleged offence of rape.

[58] Taking all the relevant facts into account I am not persuaded that the applicant has succeeded in proving on the balance of probabilities that the property was an instrumentality concerning the commission of the alleged offence of kidnap.

The property being an instrumentality concerning the commission of the alleged of the offence of Rape

[59] Section 2 of the *Combating of Rape Act 8 of 2000* stipulates the following regarding the offence of rape.

(1) Any person (in this Act referred to as a perpetrator) who intentionally under coercive circumstances - (a) commits or continues to commit a sexual act with another person; or (b) causes another person to commit a sexual act with the perpetrator or with a third person, shall be guilty of the offence of rape.

(2) For the purposes of subsection (1) "coercive circumstances" includes, but is not limited to - (a) the application of physical force to the complainant or to a person other than the complainant; (b) threats (whether verbally or through conduct) of the application of physical force to the complainant or to a person other than the complainant; (c) threats (whether verbally or through conduct) to cause harm (other than bodily harm) to the complainant or to a person other than the complainant under circumstances where it is not reasonable for the complainant to disregard the threats; (d)...; (e) circumstances where the complainant is unlawfully detained; (f) ...; (g) ...; (h) ...; (i) circumstances where the presence of more than one person is used to intimidate the complainant.'

[60] Ms Kazondunge submits that the applicant has proved on the balance of probabilities, that the property played a direct role in the respondent raping the complainant as the complainant was '*trapped inside the property and could not escape*'. On the other hand Mr Isaacks, relying on several case law, including the *Cook Properties* matter (*supra*), submits that the applicant has failed to make out a case that there exists a close relationship between the property and the alleged commission of the offence of rape. He further submits that there is nothing on the applicant's papers which demonstrates that the nature or manner of the utilization of the property showed that it was employed in some way probable to facilitate the alleged commission of the offence of rape.

[61] It is not clear to me what Ms Kazondunge wishes to convey when she submits that the complainant was 'trapped inside the property'. The evidence by the complainant is that the respondent pressed down both complaints legs on the [back] seat with his legs. The complainant did not also say that she could not escape. In my view the offence of rape could have taken place without the property. In other words the property is not a means without which the offence of rape could have been committed. In my considered view the property was not instrumental to the commission of the offence; it was merely incidental thereto. The fact that the alleged offence of rape took place in the property does not make the property an instrumentality of the offence. It has not been shown that there is any reasonable direct link between the offence and the property. In my view the property was not in any way functional to the commission of the offence of rape.

[62] It would appear from the evidence that the offence took place not because the complainant was trapped in the property but because she was subdued through punching, beating with the knife and throttling, being knocked in her ribs with a knee and punched with fists on her head and eye. She lost consciousness because of those acts. In my view, all those acts have nothing to do with the property. They could have taken place without the property.

[63] It has been held that the fact that a crime is committed at a certain location does not by itself entail that the '*venue is concerned in the commission of the offence*'; that it provides only the venue for the crime; and that it is not enough to trigger the forfeiture provisions.¹³ I fully agree with this view. In my considered view these principles are applicable to the present matter.

[64] Taking everything into account, I have arrived at the conclusion that the applicant has failed to discharge the onus of proving on a balance of probabilities that the property was an instrumentality in the commission of the alleged offence of rape.

Whether sanctions should be imposed

[65] It is common cause that Mr Isaacks for the respondent failed to attend the case Management Conference proceedings on Wednesday, 29 June 2016 at 08:30. Prior to that date the legal practitioners for the parties had filed a joint case management report which was duly accepted by the court and the matter was postponed to 7 July 2016 for status hearing. In the Report, Mr Isaacks had indicated that the respondent intended to file an interlocutory application. By 6 July 2016 the interlocutory application had not been filed. The applicant's legal practitioner then filed a one-sided status report. When the matter was called on 7 July 2016, Mr Cupido appeared on behalf of Mr Isaacks. The matter was allocated a date for hearing, being 13 September 2016, and also for considering sanctions against Mr Isaacks, on the date of the hearing. The legal practitioners were ordered to file heads of argument in the meantime.

[66] In the one-sided status report filed by Ms Kazondunge for the applicant pointed out that by the time she had drafted the single status report, Mr Isaacks had not yet communicated with her. She pointed out that the applicant was being prejudiced in the conduct of the matter and thus requested the court to impose the necessary sanction on Mr Isaacks.

¹³ RO Cook Properties and the authorities cited therein.

[67] On 6 July 2016, the day before the hearing, Mr Isaacks filed an affidavit in which he sought to explain his failure to appear before court on 29 June 2016. In his affidavit Mr Isaacks explained that on 28 June 2016 he was informed by his secretary that he needed to attend before the magistrate court of Gobabis for continuation of a bail application. According to him his secretary confirmed to him that “*one of the other lawyers*” would stand in for him in this matter. He then drove to Gobabis on 29 June 2016, for continuation of the bail application hearing. Mr Isaacks says that on 7 July 2016 when Mr Cupido returned from court, he informed him that the managing judge would require him to explain why he had not appeared on 29 June 2016. According to him, it was only then that he realised that nobody had appeared on his behalf on 29 June 2016. He says further that upon inquiry his secretary could not remember what happened on that day. He therefore asks for condonation. Mr Isaacks’ secretary filed a confirmatory affidavit.

[68] Rule 53 (1)(a) of this Court provides that if a party or his legal practitioner, without reasonable explanation fails to attend a case planning conference, case management conference, a status hearing, an additional case management conference or a pre-trial conference, the managing judge may enter an order that is just and fair in the matter. The Judge President of this Court has had an opportunity to emphasise the consequence of non-appearance in the matter of *Hubner v Krieger*¹⁴ that the statutory rationale behind the new case management system is to ensure that the court’s time and resources are deployed more productively.

[69] I have a problem with Mr Isaacks’s explanation; it is not a reasonable explanation. He does not take personal responsibility for his failure to attend the Case Management Conference. He indirectly puts the blame on his secretary. What is clear is that he had double-booked himself in respect of this matter and the bail application in Gobabis. Even after he had been alerted about the double booking by his secretary, he did not take it upon himself to make an arrangement with a specific lawyer to stand in for him, but left it to his secretary. It is Mr Isaacks who is the officer of this court: not his secretary. It was incumbent upon him to make sure that a lawyer would stand in for him. He failed to do

¹⁴ *Hubner v Krieger* 2012 (1) NR 191 (HC) at 192 C.

so. Furthermore after he had returned from Gobabis it would appear that he did not bother to enquire as to what had transpired at the Case Management Conference. Mr Isaacks also failed to explain why he did not file the interlocutory application which he had indicated to the court in the Case Management report he would file. He further failed to participate in compiling a status report, with the result that instead of a joint status report, only a one-sided status report was filed by the legal practitioners for the applicant.

[70] Ms Kazondunge in her heads of argument referred the court to the judgement of this court by Cheda J in the matter of *Malezky v Minister of Justice*¹⁵ where the learned judge pointed out that parties and their legal practitioners should not be slack in the observance of the Rules, which are an important element in the machinery for the administration of justice. Furthermore, that all litigants are obliged to comply with the rules and practice directives of the court. In addition, a party who has been aggrieved by non-compliance with the Rules by the other party is entitled to certain remedies which the court can impose in its discretion.

[71] This Court feels that the time has come for it to strictly impose sanctions for non-compliance with its Rules. It is hoped that appropriate sanctions would serve as a deterrent to legal practitioners' failing to comply with the Rules and orders of the court. The sanction imposed in this matter is embodied in the costs order.

[72] In the result, I make the following order:

1. The application is dismissed.
2. The applicant is ordered to pay two-thirds (2/3) of the respondent's taxed costs. The reduction of one-third (1/3) of the costs serves as a sanction against the legal practitioners for the respondent for the flagrant non-compliance with the Rules of this Court.

¹⁵ A9/2013 [2013] NAHCND 316.

H Angula

Deputy Judge President

APPEARANCES:

APPLICANT:

Ms Kazondunge

Office of the Government Attorney

RESPONDENT:

Mr Isaacks

Of Isaacks & Associates Inc.