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**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

Reportable/Not Reportable

Case no: AR 330/2024

In the matter between:

VUYISWA VENERY NGCOBO

APPELLANT

and

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

Coram: ME Nkosi, Mathenjwa JJ and Ploos van Amstel AJ

Heard: 11 September 2026

Delivered: 09 October 2026

ORDER

On appeal from: the KwaZulu-Natal Division of the High Court, Pietermaritzburg
(Voormolen AJ, sitting as court of first instance):

1. The appellant's appeal is dismissed.
 2. The appellant is ordered to pay the costs of the appeal.
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This judgment was handed down electronically by circulation to the parties' legal representatives by email. The date for the handing down of the judgment is deemed to be 09 October 2026 at 10:00

JUDGMENT

ME Nkosi J (Mathenjwa J and Ploos van Amstel AJ concurring)

Introduction

[1] This is an appeal by Vuyiswa Venery Ngcobo ('the appellant') against the judgment and order of the court *a quo* (per Voormolen AJ). In terms of the order appealed against the court *a quo* declared the sum of R450 000, being the replacement value of the Jaguar F-Pace SUV ('the motor vehicle'), an instrumentality of an offence and ordered that it be forfeited to the State in terms of s 50(l)(a) of the Prevention of Organised Crime Act 121 of 1998 ('POCA').

[2] The appeal is with leave of the court *a quo* and is opposed by the respondent, the National Director of Public Prosecution; ('the NDPP').

The grounds of appeal

[3] The appeal is based primarily on the following grounds:

- (a) That the court *a quo* erred and/or misdirected itself when it found that the NDPP proved on a balance of probabilities that the property was an instrumentality of an offence, to wit, corruption;
- (b) In relation to the stationary contract, that the court *a quo* overlooked or ignored material evidence which proves that the property was not an

instrumentality of corruption and that there was in fact no corruption in relation to the award of the stationary contract;

(c) In relation to the Durban Solid Waste ('the DSW') tender, that the court *a quo* erred, similarly ignored or overlooked vital evidence which detracts materially from the allegation of corruption;

(d) That the court *a quo* erred and/or misdirected itself by placing an onus on the appellant in relation to the first leg of the enquiry which was aimed at establishing the existence of corruption;

(e) In relation to the second leg of the enquiry, that the court *a quo* misdirected itself in rejecting the appellant's version regarding the circumstances in which the motor vehicle was purchased; and

(f) That the court *a quo* erred and/or misdirected itself in finding that the restraint of property order issued in terms of s 26 of POCA did not prohibit the making of the forfeiture order.

The issues

[4] The issues for determination by this court are essentially the following:

(a) Whether the NDPP has proven on a balance of probabilities that the motor vehicle was an instrumentality of an offence¹ referred to in Schedule 1 of POCA, that is, bearing in mind that this is irrespective of whether or not there are criminal proceedings pending arising from the alleged offence;² and

(b) If the response to the question posed in paragraph (a) above is in the affirmative, whether there is any basis for this court to find on a balance of probabilities that:

¹ Section 1 of POCA defines the term '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 the Republic or elsewhere.'

² *National Director of Public Prosecutions v RO Cook Properties (Pty) Ltd; National Director of Public Prosecutions v 37 Gillespie Street Durban (Pty) Ltd and Another; National Director of Public Prosecutions v Seevnarayan* 2004 (2) SACR 208 (SCA) para 10; *National Director of Public Prosecutions v Gallant* [2021] ZAECPHC 51 paras 10-11; *National Director of Public Prosecutions v Biru* [2024] ZAEQBHC 30 para 28.

- (i) the appellant had acquired the motor vehicle legally and for a consideration, the value of which is not significantly less than its value; and
- (ii) the appellant neither knew nor had reasonable grounds to suspect that the motor vehicle was an instrumentality of an offence.

Determination of the issues

[5] The issues set out in the preceding paragraph are premised on the appellant's grounds of appeal *mutatis mutandis* set out above. It is within that context that the issues must be determined by this court.

Issue 1: Whether the NDPP has proven on a balance of probabilities that the motor vehicle was an instrumentality of an offence referred to in Schedule 1 of POCA?

[6] In addressing the question posed in the heading to this paragraph, I think it will be appropriate to adopt as a starting point the relevant provisions of POCA, starting with 50(1) thereof, the relevant provisions of which read as follows:

'Making of forfeiture order

(1) The High Court shall, subject to section 52, make an order applied for under section 48(1)³ if the Court finds on a balance of probabilities that the property concerned-

- (a) is an instrumentality of an offence referred to in Schedule I;
- (b) is the proceeds of unlawful activities; or
- (c) is property associated with terrorist and related activities.'

³ Section 48(1) provides that 'If a preservation of property order is in force the National Director, may apply to a High Court for an order forfeiting to the State all or any of the property that is subject to the preservation of property order.'

[7] By way of background, there are two tenders that formed the basis of the NDPP's application for forfeiture of the motor vehicle. They are commonly referred to by the parties as 'the DSW tender' and 'the stationary tender', respectively.

The DSW tender

[8] Starting with the DSW tender, the circumstances which led to the NDPP lodging an application for the forfeiture of the motor vehicle date back to 2 November 2017. That was when Mr Sandile Ngcobo ('Ngcobo'), who is the appellant's husband, approached the Jaguar dealership in uMhlanga ('Jaguar') to purchase a new motor vehicle for the appellant. He informed the salesman at Jaguar, a certain Mr Sulaiman Kajee ('Kajee'), that he wanted the deal to be concluded in the name of Mr Mzwandile Dludla ('Dludla').

[9] The purchase price of the vehicle was R990 539, and was paid for on 3 November 2017 as follows:

- (a) R400 000 by way of electronic funds transfer made by Dludla, who is the sole director of Isibaya General Business Traders ('Isibaya');
- (b) R200 000 cash deposited by Mr Hlenga Sibisi ('Sibisi') into the bank account of Jaguar; and
- (c) R400 000 trade in value for a BMW 3 series vehicle owned by Jobe & Sons Holdings ('Jobe'). A letter from the sole director of Jobe, namely, Mr Nkululeko Sithole ('Sithole'), dated 3 November 2017 gave permission to Jaguar to accept the aforesaid BMW as a trade in for the new motor vehicle.

[10] By way of explanation, in addition to Isibaya, Dludla is also the sole director of Ilanga Lamahlase Projects (Pty) Ltd ('Ilanga'). Sibisi, who is Dludla's uncle, controls the financial and administrative affairs of both entities, that is, Isibaya and Ilanga. At the time of the purchase of the motor vehicle both the appellant and Ngcobo were employed by the eThekweni Municipality ('the Municipality'). The position held by

Ngcobo was that of Deputy Head of the Supply Chain Management (SCM) unit of the Municipality. The appellant left her erstwhile employment with the Municipality during or about February 2018.

[11] On 3 November 2017, late in the afternoon, Kajee contacted Ngcobo and informed him that all monies paid in respect of the motor vehicle had been received by Jaguar in the dealership's account, and that the vehicle was ready to be collected. Shortly thereafter, Ngcobo arrived at the dealership accompanied by the appellant and Dlodla. As previously indicated by Ngcobo to Kajee, Dlodla was the one who signed all the necessary documents for the purchase of the motor vehicle.

[12] After the deal was concluded, the elated appellant left the dealership driving the motor vehicle. However, its certificate of registration reflects that it was registered in the name of Dlodla until 25 March 2019 when it was finally registered in the maiden name of the appellant, which is Cembi. From the date of its purchase, the motor vehicle was driven by the appellant and, occasionally, by Ngcobo while he was still employed by the Municipality.

[13] On 14 December 2017, Ngcobo chaired a meeting of the Bid Adjudication Committee ('BAC') of the Municipality. At that meeting, the BAC granted approval of the request made by the Head of Special Projects, Mr AR Abbu ('Abbu'), for authority to use 36 of the Municipal Supply Chain Management Regulations⁴ ('the Regulations') to source quotations from service providers for the provision of refuse collection, street cleaning and illegal dumping management services in the townships which fall within the jurisdiction of the Municipality. s 36 allows the accounting officer to deviate from procurement processes and dispense with the official procurement processes and to procure any required goods or services through any convenient

[14] On 18 December 2017, emails were sent out by Thando Mkhize from the DSW to, *inter alia*, Sibisi at 'h[...]. In the email, Sibisi was requested to: '*complete the attached*

⁴ Municipal Supply Chain Management Regulations, Gen 868, GG 27636, 30 May 2005.

form urgently' and 'hand deliver with Tax Clearance Certificate, BBEE Certificate and proof of ownership of necessary equipment/vehicles'. It was further stated in the same email that due to time constraints, the completed Tender Form was to be returned to the Municipality by no later than 12h00 on J1 December 2017.

[15] The completed Tender Form (that was backdated to 15 December 2017) was submitted by Dludla on behalf of Ilanga for the advertised services in respect of three areas, namely, South Region Areas, North Region Areas (KwaMashu Areas) and North Region Areas (Hostels). Notably, Dludla ticked 'NO' next to the following question appearing at the bottom of the Tender Form that was submitted by him on behalf of Ilanga:

'Do you or any other directors, managers, principal shareholder or stakeholder of your entity have any relationship (spouse, family friend, associate) with persons in the service of the State and/or who may be involved with the evaluation of this quotation? If yes, please, furnish particulars below.'

[16] On the same date, 18 December 2017, Abbu submitted a report to the BAC seeking its approval of his recommendation to appoint four service providers, including Ilanga. Each one of the four service providers concerned was to provide the refuse collection, street cleaning and refuse disposal services in the area/s for which it was recommended. Abbu's report was considered by the BAC at its special meeting held on 19 December 2017, which was chaired by Ngcobo.

[17] It is stated in item 3 of the said meeting under the heading '*DECLARATION OF INTEREST*' that: '*It was noted that none of the members (of the BAC) had declared interest on the matters appearing on the Agenda.*' This was notwithstanding the fact that less than two months before the date of that meeting Ngcobo and the appellant had taken delivery of a new motor vehicle that was paid for by, *inter alia*, Dludla, who is the sole director of Ilanga, together with his uncle, Sibisi.

[18] The BAC resolved that the quotation received from Ilanga for the interim provision of refuse collection, street cleaning and illegal dumping management in respect of the North Region Areas (KwaMashu Areas) be accepted for the price of R4 603 203 per month and R850 per cubic metre, exclusive of VAT, subject to compliance checks.⁵ It was noted that this was intended to be an interim solution to ensure that the refuse collection service in the townships continued after the previous contracts ended on 31 December 2017.

The preservation and forfeiture orders

[19] The award of the DSW tenders to the four service providers concerned had subsequently become the subject of investigation by the Municipality. On 28 October 2020, the NDPP obtained a preservation order in terms of s 38 of POCA in respect of the motor vehicle on the basis that it was an instrumentality of an offence, to wit, corruption.

[20] Following the granting of the preservation order, the NDPP proceeded to lodge an application for the forfeiture of the motor vehicle in terms of s 48 of POCA. Amongst the allegations made by the NDPP in the forfeiture application was that an investigation conducted by the Municipality had revealed that Dludla and Sibisi had provided the funds for the purchase of the motor vehicle. It was subsequently established that Ngcobo had chaired the BAC meeting where part of the DSW tender was awarded to Ilanga without declaring an interest in the tender that was submitted by Dludla on behalf of Ilanga.

[21] In support of its allegation that a relationship existed between Ngcobo and Sibisi, the NDPP averred that the cellular telephone records obtained by the Municipality revealed that Ngcobo communicated with Sibisi an estimated 1965 times between 30 January 2017 and 13 March 2019, and on numerous occasions between 1 November

⁵ This refers to a review or an inspection to ensure that a tenderer is in full compliance with the law and the specifications of the contract awarded to it as determined by the Municipality.

2017 and 31 December 2017. The latter period coincided with the period when the motor vehicle was bought for the appellant, and the DSW tender in respect of the North Region Areas (KwaMashu Areas) was awarded to Ilanga.

[22] It was further averred by the NDPP that the same telephone records revealed that the appellant and Sibisi communicated with each other on 249 occasions between 21 January 2017 and 17 March 2019. They further communicated with each other on several occasions between 1 November 2017 and 31 December 2017. The latter period coincided with the period when the motor vehicle was bought for the appellant and the DSW tender in respect of the North Region Areas (KwaMashu Areas) was awarded to Ilanga.

[23] Notably, neither the appellant nor Ngcobo proffered any explanation for the aforesaid telephone calls between them and Sibisi. In the circumstances, the only reasonable inference to be drawn from this is that there appears to have been a longstanding relationship between Dludla and both the appellant and Ngcobo. If that is the case, it is highly unlikely that the appellant and Ngcobo would be unaware of Sibisi's role in Isibaya and Ilanga, as well as his relationship with Dludla, who is the sole director of both entities.

[24] It was argued by Mr *Howse* SC, who appeared for the appellant, that Ngcobo was not aware of Dludla's directorship of Ilanga, and that this explains his failure to declare an interest in Ilanga's tender prior to chairing the BAC meeting on 19 December 2017. With due respect to Mr *Howse*, such argument is untenable. I find it hard to believe that Ngcobo was not aware of Dludla's directorship of Ilanga, particularly, in the light of his apparent relationship with Sibisi, who is Dludla's uncle. Besides, the members of the BAC must have been provided with Ilanga's tender document, in which Dludla is reflected as the sole director, to ensure that it was in compliance before the BAC could grant its approval thereof.

[25] In the circumstances, it accordingly follows that Dlodla's failure to disclose his relationship with the appellant and Ngcobo in the tender documents of Ilanga, coupled with Ngcobo's failure to declare an interest in the said tender, are indicative of an apparent attempt to conceal the corrupt relationship that existed between them. For all intents and purposes, the appellant was the *de facto* beneficiary of such relationship by virtue of having a new motor vehicle purchased for her.

The stationary tender

[26] Regarding the stationary tender, its relevance to the NDPP's application for the forfeiture of the motor vehicle dates back to January 2017. That is when Sithole submitted Jobe's tender to the Municipality in response to an invitation for tenders for the supply of stationary to the Municipality for a period of 24 months. The tender document of Jobe was completed and signed by Sithole in his capacity as its sole director. A portion of the stationary tender was awarded to Style Craft Office Design ('Style Craft').

[27] According to the cellular telephone records obtained by the Municipality, Ngcobo and Sithole communicated with each other on 242 occasions between 2 January 2017 and 28 October 2018. They further communicated with each other on several occasions between 1 November 2017 and 31 December 2017. The latter communications coincided with the period when Ngcobo called at Jaguar to purchase a new motor vehicle for the appellant, using Sithole's BMW 3 series as part payment of the purchase price.

[28] On 27 September 2017 a recommendation was made to the BAC that, *inter alia*, the portion of the tender that was initially awarded to Style Craft be rescinded and awarded to Jobe. This was pursuant to a report that was co-signed by the Senior Manager of Corporate Procurement and a certain NS Mkhize (whose capacity is not specified) that Style Craft had indicated that it wanted to withdraw its tender for the stationary contract. The basis of the recommendation to award the relevant contract to

Jobe was supposedly that its tender was the next most responsive received by the Municipality.

[29] The recommendation was considered by the BAC at its meeting held on 16 October 2017, which was chaired by Ngcobo. One of the items provided for in the agenda of the said meeting (item 3) was the declaration of interests by members of the BAC. According to the minutes of that meeting Ngcobo did not disclose his relationship with Sithole, notwithstanding the extraordinary large number of telephone calls between them over the period 2 January 2017 to 28 October 2018.

[30] Instead, on 3 November 2017, which was barely three weeks after the aforesaid BAC meeting held on 16 October 2017, Sithole is said to have given up his BMW 3 series to Jaguar as a trade in for the purchase of a new motor vehicle for the appellant. Notably, no explanation was provided by either Ngcobo or the appellant to justify the unusually high volume of telephone phone calls between Sithole and Ngcobo during the period preceding the award of the relevant tender to Jobe and beyond.

[31] Consequently, as was the case in respect of the DSW tender, the inescapable conclusion is that Ngcobo's failure to declare an interest in Jobe's stationary tender was intended to conceal a corrupt relationship between him and Sithole. This culminated in Sithole giving up his BMW 3 series towards the purchase of a new motor vehicle for the appellant. Ngcobo's acceptance of Sithole's vehicle towards the purchase of a new motor vehicle for his wife, the appellant, was probably intended to serve as gratification for Ngcobo to influence the BAC to award the stationary contract to Jobe.

[32] In the circumstances, I find that the NDPP succeeded to prove on a balance of probabilities that the motor vehicle was an instrumentality of, at least, two offences referred to in Schedule 1 of POCA, namely, corruption and money laundering.⁶ Insofar as the offence of money laundering is concerned, the payments made by Dlodla, Sibisi

⁶ The crimes of corruption and money laundering are amongst the crimes with which the appellant, Ngcobo, Dlodla, Sibisi and Sithole were charged with in the Commercial Crimes Court in Durban.

and Sithole to Jaguar were, in my view, intended to conceal or disguise the act of corruption as the source of funds used to purchase the motor vehicle for the appellant.

[33] In the light of the finding made by this court in the preceding paragraph, it accordingly follows the appellant's grounds of appeal in relation to the first leg of the enquiry are without substance and, therefore, must be rejected on that basis. In particular, I find that the court *a quo* was correct in its finding that the NDPP had adduced sufficient evidence to prove on a balance of probabilities that the motor vehicle was an instrumentality of an offence.

[34] In my view, there is no basis for the appellant's contention that the court *a quo* ignored or overlooked vital evidence which disproves corruption, or that it placed an onus on the appellant to disprove the crime of corruption. Assuming that the 'vital' evidence alluded to by the appellant is the evidence she put up in her opposition of the forfeiture application, such evidence must properly be dealt with by the court in the second leg of the enquiry⁷ which is dealt with in the next part of this judgment.

[35] Regarding the reliance by Mr Howse on *S v Golding and Others*⁸ on the basis that the members of the BAC acted as a collective in awarding part of the DSW tender to Ilanga, I am inclined to agree with Ms *Moithilall*, who appeared for the NDPP, that his reliance on that case is misplaced for the following reasons:

- (a) firstly, Ngcobo was the chairperson of the BAC and, as such, had a lot of influence on the decisions taken by that Committee, and;
- (b) secondly, the fact that the members of the BAC acted as a collective does not, in my view, absolve Ngcobo from his apparent failure to declare his interest in the tender of Ilanga, even if it can be shown that he exercised no influence whatsoever on the other members of the BAC to award the relevant tender to Ilanga.

⁷ Section 52(2) of POCA allows any person who is aggrieved by the forfeiture order sought by the NDPP to adduce evidence on a balance of probabilities in defence of the forfeiture order sought by the NDPP.

⁸ *S v Golding and Others* (CCC63/2019 KZD).

Issue 2: Whether there is any basis for this court to find on a balance of probabilities that:

- (a) the appellant had acquired the motor vehicle legally and/or a consideration, the value of which is not significantly less than its value; and***
- (b) the appellant neither knew nor had reasonable grounds to suspect that the motor vehicle was an instrumentality of an offence.***

[36] This is the second leg of the enquiry, the basis of which is s 52 of POCA, the relevant provisions of which read as follows:

'Exclusion of interests in property

(1) The High Court may, on application -

- (a) under section 48 (3);⁹ or
- (b) by a person referred to in section 49 (1),¹⁰

and when it makes a forfeiture order, make an order excluding certain interests in property which is subject to the order, from the operation thereof. ...

(2A) The High Court may make an order under subsection (1), in relation to the forfeiture of an instrumentality of an offence referred to in Schedule I or property associated with terrorist and related activities, if it finds on a balance of probabilities that the applicant for the order had acquired the interest concerned legally, and-

- (a) neither knew nor had reasonable grounds to suspect that the property in which the interest is held is an instrumentality of an offence referred to in Schedule I or property associated with terrorist and related activities; or
- (b) where the offence concerned had occurred before the commencement of this Act, the applicant has since the commencement of

⁹ An application under s 48(3) is brought by any person who has an interest in the property that is the subject of a forfeiture application.

¹⁰ Section 49(1) refers to a person who, for any reason, did not enter an appearance to oppose the NDPP's application for preservation of property in which such person has an interest.

this Act taken all reasonable steps to prevent the use of the property concerned as an instrumentality of an offence referred to in Schedule 1 or property associated with terrorist and related activities.'

The appellant's defence

[37] In the present case, the appellant's defence to the *prima facie* case of corruption established by the NDPP is that the motor vehicle was an early wedding gift from her mother, who is now deceased. Her explanation, briefly stated, is that she and Ngcobo intended to get married in 2018, but her ailing mother wished her to have the motor vehicle as an early wedding gift. Consequently, due to her mother's ailing health, she acquired the vehicle on 3 November 2017.

[38] Regarding the payments made by Dladla, Sibisi and Sithole towards the purchase of the motor vehicle, the appellant's explanation is that her mother, who was a single parent, was the sole director and shareholder of a company called Zithivum Trading Enterprise (Pty) Ltd ('Zithivum '). Through Zithivum, she conducted a general business which included construction, renovations, interior decoration, office supplies, events and catering.

[39] Owing to the longstanding friendship and business association between the appellant's mother and Sibisi, Zithivum had provided the following services to Isibaya between 13 February 2017 and 29 June 2017:

- (a) 13 February 2017 - supplied catering, transport, goodie bags and security for a one-day event hosted by Isibaya and rendered an invoice dated 13 February 2017 for the total sum of R276 000;
- (b) 31 March 2017 - for food parcel distribution, transport, tent hiring and chairs and mobile toilets and rendered an invoice dated 31 March 2017 for the total sum of R290 000;

(c) 31 March 2017 - for interior design consulting and the supply of office furniture and rendered an invoice dated 31 March 2017 for the total sum of R172 653.56; and

(d) 29 June 2017 - for the completion of renovations at 2[...] B[...] Rd and rendered an invoice dated 29 June 2017 for the total sum of R443 346.94.

[40] During or about October 2017, when her health took a turn for the worse and she became bedridden, the appellant's mother requested Sibisi to arrange for payment of the abovementioned invoices so that she could purchase a motor vehicle for the appellant as an early wedding gift. Isibaya was unable to make payment immediately and, instead, prepared a one-page 'acknowledgement of debt' dated 23 October 2017, the relevant portions of which read as follows:

'Isibaya do (sic) hereby acknowledge that we are truly and lawfully indebted to Zivithum in the sum of R1 182 000.50 (One million One Hundred and Eighty-Two Thousand (Rand) and Fifty cents (inclusive of interest) being for various services rendered. Isibaya hereby binds itself to pay the full amount of the said capital by no later than 30th December 2017.'

The NDPP's response to the appellant's defence

[41] The issues raised by the appellant to justify her acquisition of the motor vehicle are disputed by the NDPP and, in my view, with good reason. However, the view held by the court *a quo* was that the defence raised by the appellant created a dispute of fact which, based on the principles set out in *Plascon-Evans*,¹¹ as qualified in *Wightman t/a JW Construction v Headfour (Pty) Ltd and Another*,¹² precluded the court *a quo* from making a finding on such issues. In essence, the NDPP's contention is that the invoices

¹¹ *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634-635.

¹² *Wightman t/a JW Construction v Headfour (Pty) Ltd and Another* [2008] LASCA 6; 2006 (3) SA 371 (SCA) (*Wightman*) para 13.

put up by the appellant, as well as the acknowledgement of debt in favour of Zithivum, are fictitious and, therefore, do not give rise to a genuine dispute of fact.¹³

[42] The qualification of *Plascon-Evans* in *Wightman* that is alluded to by the court a quo was articulated by the Supreme Court of Appeal ('SCA') in *Wightman* as follows:¹⁴

'Recognising that the truth almost always lies beyond mere linguistic determination the courts have said that an applicant who seeks final relief on motion must, in the event of conflict, accept the version set up by his opponent unless the latter's allegations are, in the opinion of the court, not such as to raise a real, genuine or bona fide dispute of fact or are so far-fetched or clearly untenable that the court is justified in rejecting them merely on the papers: ... '

[43] The *Plascon-Evans* rule was further clarified by the SCA in *National Director of Public Prosecutions v Zuma*¹⁵ as follows:

'Motion proceedings, unless concerned with interim relief, are all about the resolution of legal issues based on common cause facts. Unless the circumstances are special they cannot be used to resolve factual issues because they are not designed to determine probabilities. It is well established under the *Plascon-Evans* rule that where in motion proceedings disputes of fact arise on the affidavits, a final order can be granted only if the facts averred in the applicant's (Mr Zuma's) affidavits, which have been admitted by the respondent (the NDPP), together with the facts alleged by the latter, justify such order. It may be different if the respondent's version consists of bald or uncreditworthy denials, raises fictitious disputes of fact, is palpably implausible, far-fetched or so clearly untenable that the court is justified in rejecting them merely on the papers papers ' (Footnote omitted.)

¹³ The effect of the *Plascon-Evans* rule is that where in motion proceedings disputes of fact arise on the affidavits, a final order can be granted only if the facts averred in the applicant's affidavits, which have been admitted by the respondent, together with the facts alleged by the respondent, justify such order.

¹⁴ *Wightman* para 12.

¹⁵ *National Director of Public Prosecutions v Zuma* [2009] ZASCA 1; 2009 (1) SACR 361 (SCA) para 26.

[44] The above passage in *Zuma* was quoted with approval by the SCA in *National Director of Public Prosecutions v Moyane*,¹⁶ the facts of which are almost identical to the facts of this case. As in this case, the appeal in *Moyane* concerned the question as to whether a motor vehicle was 'the proceeds of unlawful activities' and/or was 'an instrumentality of an offence' within the meaning of POCA, and so liable to forfeiture under s 50(1)(a) of the same Act.

[45] Although *Moyane* was finally decided on the basis of whether the NDPP had established that the motor vehicle was the proceeds of unlawful activities, namely, money laundering, the common denominator between the two cases is that a substantial amount of the purchase price was paid by various third parties who are claimed by each appellant to be business associates and/or friends. The SCA in *Moyane* found that the appellant's averments regarding the source of funds used to purchase the motor vehicle fell short of creating a real, genuine and *bona fide* dispute of fact.

[46] In the present case, the court *a quo*'s application of the *Plascon-Evans* rule was, in my view, flawed. Based on the *Plascon-Evans* rule as clarified by the SCA in *Wightman*, *Zuma* and *Moyane*, the court *a quo* ought to have applied its mind to the issues raised by the appellant in defence of the NDPP's forfeiture application to determine whether they raise a real, genuine or *bona fide* dispute of fact. If not, then the court would be justified in rejecting the appellant's version merely on the papers.

[47] Starting with the invoices put up by the appellant, I find merit in the NDPP's contention that the said invoices were fabricated to give legitimacy to the appellant's version for the following reasons:

- (a) According to the appellant, Zithivum was essentially a small business enterprise which had the appellant's late mother as its sole director and

¹⁶ *National Director of Public Prosecutions v Moyane* [2022] ZASCA 79 para 8.

shareholder. If that is the case, I find it highly unlikely and far-fetched that Zithivum had sufficient financial resources to provide goods and/or services to Isibaya from February to October 2017 without requiring any deposits and/or prompt payments within 30 days of rendering each invoice;

(b) It is the appellant's own version that Zithivum's turnover was well over R1 million per annum, which is the threshold for compulsory registration for VAT. However, while provision is made for VAT on the invoices put up by the appellant, there is no VAT amount charged in any one of the said invoices; and

(c) In addition to the above, no supporting documentation was put up by the appellant to show that the alleged goods and/or services were, indeed, solicited by Isibaya and provided by Zithivum.

[48] Similarly, there appears to be merit in the NDPP's contention that the purported acknowledgement of debt was also fabricated for the following reasons:

(a) It is contained in a mere one-page document, the relevant contents of which read as follows:

‘ACKNOWLEDGEMENT OF DEBT

Isibaya ... do (sic) hereby acknowledge that we are truly and lawfully indebted to Zithivum ... in the sum of R1 182 000.00 (One Million One Hundred and Eighty-Two Thousand and Fifty Cents (inclusive of interest) being for various services rendered. Isibaya hereby bind itself to pay the full amount of the said capital by not later than 30th December 2017.'

(b) It makes no provision for payment of interest, and the stipulation that the sum of R1 182 000 is inclusive of interest is obviously incorrect as such amount is the capital sum of the four invoices added together;

(c) It is silent on the remedies available to Zithivum in the event of default in payment by Isibaya; and

(d) It is not signed by a representative of either the alleged debtor (Isibaya) or the alleged creditor (Zithivum). Instead, the company stamps of both entities appear at the bottom of the document.

[49] In view of the foregoing, I am not satisfied that the issues raised by the appellant in her defence raise a real, genuine and *bona fide* dispute of fact warranting the matter being referred for the hearing of oral evidence. Instead, my view is that there is no basis for this court to find on a balance of probabilities that: (a) the appellant acquired the motor vehicle legally and for a consideration, the value of which is not significantly less than its value, and; (b) the appellant neither knew nor had reasonable grounds to suspect that the motor vehicle was an instrumentality of an offence.

[50] This brings me to the remaining grounds of appeal that are relied upon by the appellant in respect of the second leg of the enquiry. Firstly, it is not correct that the court *a quo* overlooked or ignored material evidence adduced by the appellant to show that the motor vehicle was not an instrumentality of corruption. It is equally not correct that the court *a quo* rejected the appellant's version regarding the circumstances in which the motor vehicle was purchased.

[51] As stated in the preceding paragraphs of this judgment, the court *a quo* was mindful of the evidence adduced by the appellant, but declined to make a finding in relation thereto on the basis that it was precluded by the *Plascon-Evans* rule from doing so. Instead, the finding of the court *a quo* was based on the first leg of the enquiry in terms of which the NDPP was required to prove on a balance of probabilities that the motor vehicle was the instrumentality of an offence of corruption.

[52] Regarding the last ground of appeal relied upon the appellant, I do not understand the basis of the appellant's contention that the court *a quo* erred and/or misdirected itself in finding that the restraint of property order in terms of s 26 of POCA did not prohibit the making of the forfeiture order in terms of s50 of that Act. Regrettably, we did not get the benefit of hearing legal argument by Mr *Howse* regarding this ground of appeal.

[53] For what it is worth, I am inclined to agree with the view expressed by the court a quo that the restraint order in terms of s 26 of POCA and the preservation order in terms of s 38 of the same Act are both interim measures aimed at prohibiting any person from dealing in any manner with the property the subject thereof. I am not aware of anything in POCA which prevents the court from granting a forfeiture order in respect of a property that is the subject of a restraint order.

[54] In other words, a restraint order does not necessarily need to remain in place until the criminal proceedings to which it relates have been concluded, which could take years as it turned out in respect of this case. The one process is not dependent on the existence or the outcome of the other process. Each lies in the inherent discretion of the court.

[55] For instance, the court may grant a forfeiture order in respect of a property that is the subject of a restraint order if there is a strong likelihood of such property being destroyed or devalued before the criminal proceedings to which it relates have been concluded. In other instances, the storage and/or preservation costs of the property may increase exponentially to an extent that the court may deem it appropriate to grant a forfeiture order in respect thereof even if it is still subject to a restraint order, provided that the NDPP has succeeded to prove on a balance of probabilities the first leg of the enquiry.

[56] Consequently, like the other grounds of appeal relied upon by the appellant, I find the last ground to be without merit. Besides, the issue is of mere academic importance in any event as the motor vehicle that was the subject of the restraint order was damaged beyond repair before the date on which the forfeiture order was granted by the court a quo. Thereafter, all that remained to be forfeited to the State was the sum of R450 000 that was paid by the erstwhile insurer of the motor vehicle.

Order

[57] In the result, the following order is made:

1. The appellant's appeal is dismissed.
2. The appellant is ordered to pay the costs

ME NKOSI J

I agree.

MATHENJWA J

I agree.

PLOOS VAN AMSTEL AJ

Appearances

For the appellant: Mr J E Howse SC

Briefed by: Austen Smith inc, Pietermaritzburg

For the respondent: Ms B L Mothilall

Briefed by: Department of Public Prosecution, Durban

Date of judgment: 09 October 2026