IN THE HIGH COURT OF SOUTH AFRICA
(WITWATERSRAND LOCAL DIVISION)

REPORTABLE

CASE NO: 2001/20903
DATE: 11/08/2004

In the matter between:

THE NATIONAL DIRECTOR OF

PUBLIC PROSECUTIONS Applicant

and

COLE, PETER MICHAEL First Respondent

DAVIS, HILTON CHARLES Second Respondent

FIRST NATIONAL BANK Third Respondent

JUDGMENT

WILLIS J:

[1] What is commonly known as a "preservation order" was granted in respect of property at 31A Morgenster Crescent, Lonehill (to which I shall refer as "the property") in terms of section 38 of the Prevention of Organised Crime Act 121 of 1998 ("the Act") by my brother Ponnan J on 1 October 2001. He did so on the *ex parte* application of the National Director of Public Prosecutions (to whom I shall hereinafter, for the sake of convenience, refer as "the Director") in terms of section 38(1) of the Act. The order was published in the *Government Gazette* on 12 October 2001 and was served on the First Respondent, the Second Respondent and the Third Respondent in terms of section 39 of the Act. The First Respondent has alleged that the property is owned by him and the Second Respondent jointly. It is, however, registered in the Deeds Office as being owned by the First Respondent. The First and Second Respondent are what is generally known as a "gay couple". The First Respondent not only has the Human Immunodeficiency Virus (HIV) virus but full-blown Acquired Immunodeficiency Syndrome (AIDS). The case is tinged with sadness, not merely because of the First Respondent's disease but also because of the devastating consequences of drug addiction.

[2] The Director launched an application for the forfeiture of the property to the State in terms of section 50 (1) of the Act on 10 January 2002. The Director alleged that the property had been used in the commission of offences in terms of section 13 of the Drugs and Drug Trafficking Act 140 of 1992, ("the Drugs Act") and was accordingly an "instrumentality of an offence" within the meaning of the Act. The Director however agreed with the Third Respondent, which is a bank, that its interest in the property as mortgagee would be excluded from the operation of the forfeiture order. The Third Respondent is content that this should be so.

[3] After some preliminary skirmishes heard before another judge of this division, the issue which stands to be adjudicated by me relates to this application as well as a counter-application brought by the First Respondent. The First Respondent opposes forfeiture on the basis that the property is not an instrumentality of an offence. The First Respondent has abandoned most of the constitutional attacks he originally raised in the counter-application. The only constitutional attack with which he persists, is that section 50(1) of the Act is unconstitutional because it provides that the Court "shall" make a preservation order and accordingly obliges it to do so even where such an order would be wholly disproportionate. He contends that this defect should be cured by replacing the word "shall" with the word "may".

[4] The following facts relating to the First and Second Respondents are undisputed:

(i) They established a secret laboratory on the property. The photographs of the laboratory and the extensive list of equipment and materials found in it, make it clear that it was a substantial facility.

(ii) Apart from the equipment and materials found in the laboratory, a great deal of equipment, materials, drugs and related items were found on the remainder of the property.

(iii) They used the laboratory to manufacture 3-4 Methylenedioxymethamphetamine (widely known as "MDMA" or "Ecstacy"), Ketamine (widely known as "CAT") and Methamphetamine (widely known as "Meth") and to purify drugs purchased from others. At the time of the raid on their house on 13 September 1999, there were manufacturing processes in progress in the laboratory.

(iv) The drugs found on the property included Ecstacy with a street value of R13 000 and CAT with a street value of R63 000. The materials found on the property, were sufficient to produce additional quantities of 977 grams of Ecstacy, 238 grams of CAT and 238 grams of Meth.

(v) The items found on the property, included text books titled "Secrets of Methamphetamine Manufacture" and "Ecstacy – The MDMA Story". These were text books on the manufacture of drugs.

(vi) A computer kept at the house, included a document with detailed instructions on how to manufacture Ecstacy, a list of amounts owing to the respondents apparently for the sales of drugs and a spreadsheet of what appears to be income earned from drug sales.

(vii) The First Respondent's telephone calls were lawfully monitored by the police. It became apparent from those calls that he spoke freely to his friends of their manufacturing and distribution of Ecstacy and CAT.

(viii) Apart from the materials found on the premises at the time of their arrest on 13 September 1999, the police again found a drum of formic acid stored in the garage on the property during a search in February 2002. It was the same kind of chemical found in the laboratory during the search in 1999. The First Respondent indeed informed the police that the drum was part of the materials acquired and used prior to the earlier raid. Subsequent investigation however revealed that the packaging was of a kind only introduced after 1999. It must, in other words, have been subsequently acquired.

(ix) It is thus clear that the First Respondent and the Second Respondent not only established and operated a laboratory on the premises which they used to manufacture drugs, but that they also

- stored all the chemicals required for that purpose on the premises;
- stored drugs on the premises;
- consumed drugs on the premises;
- sold and supplied drugs on the premises;
- kept text books on the manufacture of drugs on the premises, and
- kept various records relating to their drug-related activities on their computer on the premises.

(x) Subsequent to his arrest in September 1999, the First Respondent pleaded guilty to manufacturing drugs which were scheduled substances in terms of sections 3, 13(b) and 17(d) of the Drugs Act and was fined R50 000.

[5] The First Respondent has sought to downplay the seriousness of these crimes by suggesting that they were only committed over a period of a few months and only on a very limited scale. He admits that he set up the secret laboratory but describes it as "a few pieces of equipment in the backyard toilet". He says that it was done primarily to experiment with the manufacture of cosmetics and to purify drugs for their own consumption. Although he admits that they used the laboratory to purify and manufacture Ecstacy, CAT and Meth, he says that it was done principally for their own use on a small scale and that they only supplied a very small quantity of drugs to "a close circle of friends who … use drugs" for which they received R9 500. He adds that they have "not used the premises for purposes of manufacturing drugs subsequent to our arrest".

[6] In response to these contentions, the Director put forward a substantial body of evidence from which a different picture emerges. The First Respondent has not made any effort to respond to it. The

main features of the picture as it emerges from the Director's evidence, are the following:

(i) The First Respondent suggests that the laboratory was set up to experiment with the manufacture of cosmetics. It is clear that these experiments never yielded anything. There is an unexplained gap of four years in The First Respondent's account and it is inconceivable that it was spent doing unsuccessful cosmetics experiments. At the time of the police raid on 13 September 1999, "no evidence whatsoever of cosmetic manufacturing was found at the premises … nor any documentation relating thereto".

(ii) Despite the First Respondent's coyness about the names of their "close circle of friends" to whom they supplied drugs, the police have however been able to identify them. All of them have been arrested on serious drug-related charges. The SMS messages that passed between them and a letter written by one of them, make it clear that they were members of a drug-ring heavily involved in drug trafficking. The Second Respondent apparently also provided a drug dealer who was one of the circle of friends, with a range of expensive assets including a Golf GTi, two Audi TT's, a Ducati motorcycle and a Rolex wristwatch (worth about R80 000). When the same drug dealer was arrested, the First Respondent and the Second Respondent took a particular interest in his case and apparently organised a collection to fund his bail to which they contributed R100 000.

(iii) Various documents found on the computer at the premises, indicate that the First Respondent and the

Second Respondent earned very substantial amounts from their drug sales.

(iv) There is also a substantial body of evidence that indicates that the First Respondent and the Second Respondent have continued their drug-related activities including their manufacture of drugs. They were found, *inter alia*, in possession of a drum of formic acid used in the production of Ecstacy in February 2002. When The First Respondent was asked about it, he gave a dishonest explanation for it.

[7] Even if one has regard only to the facts set out in paragraph [4] above, the First and Respondents manufactured, purchased, possessed, used and sold the drugs known as Ecstacy, CAT and Meth. These drugs are all "undesirable dependence-producing substances" as defined in section 1(1) of the Drugs Act because they are listed in Part III of schedule 2 thereof. It means that they are also "drugs" as defined in section 1(1) of the Drugs Act. It follows that, on the facts that are common cause, the First and the Second Respondents committed the following offences under the Drugs Act:

(i) The manufacture of scheduled substances. As noted above, the First Respondent pleaded guilty to the offence of manufacturing scheduled substances in terms of sections 3, 13(b) and 17(d) of the Drugs Act. The offence carried a maximum penalty of fifteen years' imprisonment plus a discretionary fine.

(ii) The possession and use of prohibited drugs. The First Respondent and the Second Respondents were both guilty of the possession and use of undesirable dependence-producing substances in terms of sections 4(b), 13(d) and

17(d). It carried a maximum penalty of fifteen years' imprisonment plus a discretionary fine.

(iii) Manufacturing and dealing in prohibited drugs. The First and the Second Respondents were both guilty of manufacturing and dealing in undesirable dependence-producing substances in terms of sections 5(d), 13(f) and 17(e). Section 5(d) provides that no person may "deal in" undesirable dependence-producing substances. The definition of "deal in" in section 1(1) makes it clear that it includes any act in relation to the "manufacture", "supply" and "sale" of drugs. It carried a maximum penalty of twenty-five years' imprisonment plus a discretionary fine.

All these offences in terms of section 13 of the Drugs Act, are listed in item 22 of schedule 1 of the Prevention of Organised Crime Act. It follows that the Director has established on the facts that are common cause, that the First and the Second Respondents have both committed offences referred to in schedule 1 of Prevention of Organised Crime Act. Their offences are moreover of a kind which the legislature clearly regards as being among the most serious.

[8] Section 1(1) of the Prevention of Organised Crime Act defines an "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 in the Republic or elsewhere". The Supreme Court of Appeal ("the SCA") recently considered this definition in the case of *NDPP v Cook Properties* 2004 (8) BCLR 844 (SCA). It held that it was clear that the legislature "sought to give the phrase a very wide meaning"[1] but that it would plainly not be appropriate to interpret it with "unbounded literalism".[2]

[1] para [12]

[2] para [13]

It considered all the factors bearing on its interpretation[3] and concluded that, for property to constitute an instrumentality of an offence, it is necessary that "the link between the crimes committed and the property is reasonably direct and that the employment of the property must be functional to the commission of the crimes."[4] and also that "in a real or substantial sense the property must facilitate or make possible the commission of the offences."[5] The property therefore must in "a real or substantial sense…facilitate or make possible the commission of the offence".[6] The SCA also considered the circumstances in which immovable property might constitute the instrumentality of an offence.[7] It held that the mere fact that an offence was committed at a particular place did not by itself make the premises concerned an instrumentality of the offence and that some closer connection than mere presence on the property would ordinarily be required.[8] Either in its nature or through the manner of its use, the property must in some way have been employed "to make possible or to facilitate" the commission of the offence.[9] The examples it mentioned included "the appointment, arrangement, organisation, construction or furnishing of premises to enable or facilitate the commission of a crime".[10] The SCA referred in the latter context to the "illuminating discussion" by the New South Wales Supreme Court in the case of *DPP (NSW) v King* [2000] NSWSC 394.[11] That court concluded its discussion of the issue by holding that

3 paras [14 to 30]

4 para [31]

5 ibid.

6 para [31]

7 paras [33] and [34]

8 paras [33] and [34]

9 para [34]

10 para [34]

11 para [34]

"(e)ither 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."[12] The SCA also considered the circumstances in which the premises on which drug-related offences are committed, may constitute instrumentalities of those offences.[13] It held that the mere fact that drug dealers may frequent an hotel did not make it "a drug shop" and consequently an instrumentality of the offence of dealing in drugs. It said that this was so in circumstances where *inter alia* where there was no evidence "that the premises themselves were used to manufacture, package or distribute drugs, or that any part of the premises was adapted or equipped to facilitate drug-dealing".[14] The clear implication is that where the premises are used to manufacture, package or distribute drugs or where they are adapted or equipped to facilitate drug dealing, then they do constitute instrumentalities of the offences committed on them. The latter inference is reinforced by the fact that the SCA added in a footnote that case of *NDPP v Prophet* 2003 (8) BCLR 906 (C) appeared to be an example where the property constituted an instrumentality of an offence for this reason.[15] The defendant in that case had manufactured drugs at his home on a very small scale. The High Court nonetheless concluded that his home constituted an instrumentality of an offence because,

> "It was a place to store the chemicals, rooms on the property were being used to process, refrigerate and 'synthesize' these chemicals, into what on a balance of probabilities was methamphetamine. The property cannot be divorced from these acts, it was an integral part, an instrumentality".[16]

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12 para [33]

13 para [49]

14 para [49]

15 para [34] footnote 41

16 para [28]

[9] Both the SCA in *Cook's* case[17] and the High Court in the case of *Prophet*[18] referred to the instrumentality test generally applied by the Courts in the United States of America. I shall dwell briefly upon the cases to which I was referred by *Mr Trengove*, who appears for the Director, because they provide some contextual colour to the issues with which the South African Courts are having to grapple in dealing with the interpretation and application of the Act. There are a number of other judgments of various Federal Circuit Courts of Appeals on the circumstances in which the property on which drug related offences are committed, render the property an instrumentality of the offence.

(i) The US Supreme Court held in *Austin v United States* 509 US 602 (1993) that civil forfeiture was subject to the prohibition of "excessive fines" in the Eighth Amendment to the Constitution. A civil forfeiture which constitutes an "excessive fine", is unconstitutional. The Supreme Court declined to lay down the test that had to be applied to determine when a forfeiture would be "excessive". Justice Scalia however suggested an instrumentality test for this purpose. Since Austin, the lower courts have developed various tests to determine when a civil forfeiture constitutes an "excessive" fine. Some of them have opted for the instrumentality test suggested by Justice Scalia while others have adopted a proportionality test or a combination of the two.[19]

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17 para [34] footnote 41 and para [49] footnote 43

18 para [25] footnotes 22 and 23

19 There is a useful discussion of the tests adopted by the various Federal Courts of Appeals in the judgment of the Court of Appeals for the Sixth Circuit in United States v Certain Real Property Located at 11869 Westshore Drive 1995 FED App. 0349P (6th CIR.)

(ii) In the case of *United States v Chandler* 36 F.3d 358 (1994) the defendant had for some years stored, used and distributed large quantities of marijuana and cocaine in and from the house on his farm. The court held that it constituted an instrumentality of the offence of trafficking in marijuana and was consequently liable to forfeiture. In coming to that conclusion, it held that, in measuring the strength and extent of the nexus between the property and the offence, the court may take into account,

> "(1) whether the use of the property in the offence was deliberate and planned or merely incidental and fortuitous;
> (2) whether the property was important to the success of the illegal activity;
> (3) the time during which the property was illegally used and the spatial extent of its use;
> (4) whether its illegal use was an isolated event or had been repeated; and
> (5) whether the purpose of acquiring, maintaining or using the property was to carry out the offence."[20]

(iii)In the case of *United States v One Parcel of Real Estate located at 7715 Betsy Bruce Lane* t906 F.2d 110 (1990) the defendant used his house to store, prepare, package and consume cocaine. He also kept drug paraphernalia at the house. He and friends from time to time met at the house to snort cocaine which he supplied to them. The Fourth Circuit Court of Appeals held that these facts established that the house was used to facilitate the crimes and that there was accordingly a "substantial connection" between the house and the crimes. The house was consequently declared forfeit.

(iv) In *United States v Bieri* 68 F.3d 232 (1995) a husband and wife stored 85 kilograms of marijuana on their family dairy farm from where they distributed it to others over a period of nearly two years.

[20] at 365

The Eighth Circuit Court of Appeals held that, although the farm was not used solely for illicit purposes, it was integral to the marijuana distribution conspiracy as it provided cover, storage and a centre of distribution for the illegal activity. The farm was declared forfeit.

(v) In the case of *United States v Cleckler* 270 F.3d 1331 (2001) the defendants owned a farm of twenty acres. Undercover agents purchased cocaine from them on two occasions. Despite the fact that only two transactions were involved, the Eleventh Circuit Court of Appeals held that there was a "substantial connection" between the property and the crime because one sale was negotiated on the farm (although consummated at another location) and another negotiated and completed on the farm.

(vi) In *United States v Real Property and Residents at 111th Avenue* 921 F.2d 1551 (1991) the defendant negotiated the purchase of ten kilograms of cocaine by telephone from his restaurant. He insisted however that the delivery take place in the driveway at his home. The Eleventh Circuit Court of Appeals held that it was sufficient to establish a "substantial connection" between the crime and his home. It declared his home forfeit. It explained this conclusion as follows:

> "Whether we apply a 'substantial connection' standard or a 'sufficient nexus' standard, the connection between the property in this case and the drug transaction is sufficient to support a forfeiture of the property… (The defendant) orchestrated a narcotics delivery which occurred on the driveway of his residence. His telephone conversations prior to the deal demonstrate his insistence that the deal take place on familiar territory. (He) later led the buyer to his residence. The government did not manoeuvre to have a narcotics deal occur at (his) house. The primary basis for forfeiture is that a portion of the defendant property, the driveway, served as the planned site of a ten kilogram cocaine delivery. The property played a central

> role in the transaction, facilitated the transaction, and was properly held forfeited to the United States".[21]

(vii) In *United States v Santoro* 866 F.2d 1538 (1989) the defendant's home was on a farm of 26 acres. She sold small quantities of cocaine to undercover officers on four occasions. There was no evidence that illegal drugs were ever stored or manufactured on the property. It was also apparent that the defendant was only acting as an intermediary in the transactions and received little or no reward for it. The Fourth Circuit Court of Appeals nonetheless held that there was a "substantial connection" between the property and the crimes and that it was accordingly liable to forfeiture. It said that,

> "While we conclude that there must be a substantial connection between this property and (the defendant's) actions, we find that her repeated use of the defendant property as a situs for conducting drug sales establishes this connection and thus, the property was used to facilitate her illegal conduct."[22]

(viii) In *United States v Sclafani* 900 F. 2d 470 (1990) police officers found a plastic bag with cocaine, a scale commonly used in association with cocaine trafficking, a bottle of Inositol commonly used to dilute cocaine powder and a number of firearms. The First Circuit Court of Appeals held that this evidence established a "substantial connection" between the defendant's home and her drug trafficking. Her home was declared forfeit.

(ix) In *United States v Premises known as 3639 - Second Street, Minneapolis* S829 F.2d 1093 (1989) undercover agents purchased two ounces of cocaine from the defendant at his house. When his house was searched, they found drugs, drug paraphernalia, a large amount of

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[21] 1556

[22] 1542

cash, guns and ammunition. The cash included government notes previously used by undercover agents to purchase illegal drugs. The Eighth Circuit Court of Appeals held that the evidence established a sufficient nexus between the house and the defendant's drug trafficking to render the house forfeit. It accepted that more was required than incidental or fortuitous contact between the property and the underlying illegal activity. It sufficed, however, if the property was used to facilitate the crime. It said in this context that "facilitate" encompassed any "activity making the prohibited conduct less difficult or more or less free from obstruction or hindrance".[23] It added that in this case,

> "the house was admittedly used in the sale of drugs; indeed, a triple beam scale, sifting device and covered bowl with cocaine residue, a baggy containing cocaine, and a balance pan, spoon, straw, a razor blade and drug notes were found in the house. In these circumstances, the mere use of the house for drug storage and consumant clearly made the sale of cocaine less difficult."

(x) In *United States v Certain Real Property located at 11869 Westshore Drive* 1995 FED App.0349P (6th Cir.) the defendants sold large quantities of marijuana kept at their residence and an adjacent barn. When they were raided, marijuana was found in the study, the master bedroom, the garage, the guest room, the kitchen and the living room. The Sixth Circuit Court of Appeals declared the property forfeit. In its application of the instrumentality test, it concluded that the house was used as a "sales office" and the barn as a "warehouse" for the storage and sale of the marijuana.

Mr Trengove very fairly submitted that these cases should be viewed with a measure of caution in South Africa because those of them that have employed an instrumentality test, have done so for reasons other

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[23] 1096

than those applicable in this case where instrumentality is a statutory requirement for forfeiture. It should not be supposed that I have referred to all of them with approval. I think it appropriate to record that, in my view, the result in some of these cases may have been too draconian for the stomach of a South African Court.

[10] *Mr Marais*, who appears for the First Respondent, attempted valiantly to persuade me that the position of his client was similar to that of the two fisherman who were guilty of fishing without a licence in the case of *S v Bissessue* 1980 (1) SA 228 (N). A magistrate had declared their motor car, together with two fishing rods and five fish, forfeit to the State. On appeal, the forfeiture order in respect of the motor car was set aside. In *Cook's* case the SCA had found this case of "practical assistance."[24] I regret to say that the First and the Second Respondent are in a different league from the two naughty fishermen. In this case, I am satisfied, in the words of the SCA in *Cook's* case, that "the link between the crimes committed and the property is reasonably direct and that the employment of the property (was) functional to the commission of the crimes."[25] and that "in a real or substantial sense the property (has) facilitated or made possible the commission of the offences."[26] The property therefore constituted an instrumentality of the drug offences committed by the First and the Second Respondent.

[11] The remaining issue is the contention of the First Respondent that section 50(1) of the Act is unconstitutional insofar as it obliges the court to make a forfeiture order instead of affording it a discretion to do so. He suggests that the defect be cured by replacing the word "shall" with the word "may". The First Respondent's contention proceeds from the premise that section 50(1) in particular and the Act in general do "not contain any mechanisms to ensure that there will be proportionality

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24 para [32]
25 para [31]
26 ibid.

between the gravity of the offence and the forfeiture of the property". That is why he contends that the Court should be vested with a discretion to enable it "to consider applications for forfeiture of instrumentalities of an offence on a proportional basis in accordance with the provisions of the Constitution".

[12] In *Cook's* case the SCA made that clear that, in an application for the forfeiture of an instrumentality of an offence in terms of section 50(1), "a proportionality analysis – in which the nature and value of the property subject to forfeiture is assessed in relation to the crime involved and the role played in its commission – may at the final stage in addition be appropriate".[27] It seems to have suggested that the Courts may indeed have a discretion.[28] It also seems to have suggested that, on a proper interpretation of section 50(1) read with section 48(1), the Court was not obliged under section 50(1) to order forfeiture of all the property sought to be forfeited under section 48(1).[29] It retained a discretion "to give the NDPP a lesser measure of forfeiture than he might choose to seek".[30] The SCA also explained that a proportionality analysis may be appropriate in an application for forfeiture under section 50(1) because the Constitutional Court had held in *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African revenue Service and Another* F2002 (4) SA 768 (CC)[31] that there was "broad support in other jurisdictions for an approach based on some concept of proportionality when dealing with deprivation of property". The SCA also referred in this regard to the US Supreme Court

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27 para [30]

28 para [74]

29 para [74]

30 para [74]

31 para [71]

judgments in *Austin* (*supra*) and *United States v Bajakajian* 524 US 321 (1998) which held that,

> "in post-conviction forfeitures, the touchstone of constitutional inquiry is the principle of proportionality: the amount forfeited must be compared to gravity of the offence; if the amount is grossly disproportional to the gravity of the offence, it is unconstitutional". [32]

The relevant part of the Constitutional Court's judgment in *First National Bank* case to which the SCA referred, concerned the prohibition of any "arbitrary deprivation of property" in section 25(1) of the Constitution. The Constitutional Court referred to the foreign jurisprudence[33] and concluded that it demonstrated at least two important principles: the first is that "there are appropriate circumstances where it is permissible for legislation, in the broader public interest, to deprive persons of property without payment of compensation",[34] and the second is that, for the validity of such deprivation, there must be an "appropriate relationship between means and ends, between the sacrifice the individual is asked to make and the public purpose this is intended to serve." It is one that is not limited to an inquiry into mere rationality, but is less strict than a full and exacting proportionality examination.[35] Pursuant to this analysis, the Constitutional Court concluded that a deprivation of property was "arbitrary" within the meaning of section 25 of our Constitution, if the law did not provide "sufficient reason" for the particular deprivation or

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32 para 30 footnote 35

33 paras [72] to [96]

34 para [97]

35 para [98]

was "procedurally unfair".[36] It went on to say[37] that "sufficient reason" had to be established as follows:

> "(a) It is to be determined by evaluating the relationship between means employed, namely the deprivation in question and ends sought to be achieved, namely the purpose of the law in question.
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> (b) A complexity of relationships has to be considered.
>
> (c) In evaluating the deprivation in question, regard must be had to the relationship between the purpose for the deprivation and the person whose property is affected.
>
> (d) In addition, regard must be had to the relationship between the purpose of the deprivation and the nature of the property as well as the extent of the deprivation in respect of such property.
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> (e) Generally speaking, where the property in question is ownership of land or a corporeal movable, a more compelling purpose will have to be established in order for the depriving law to constitute sufficient reason for the deprivation than in the case when the property is something different and the property right something less extensive. This judgment is not concerned at all with incorporeal property.
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> (f) Generally speaking, when the deprivation in question embraces all the incidents of ownership, the purpose for the deprivation will have to be more compelling than when the deprivation embraces only some incidents of ownership and those incidents only partially.
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> (g) Depending on such interplay between variable means and ends, the nature of the property in question and the extent of its deprivation, there may be circumstances when sufficient reason is established by, in effect, no more than a mere rational relationship between means and ends; in others this might only be established by a proportionality evaluation closer to that required by s 36(1) of the Constitution.
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> (h) Whether there is sufficient reason to warrant the deprivation is a matter to be decided on all the relevant facts of each particular

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[36] para [100]

[37] para [100]

> case, always bearing in mind that the inquiry is concerned with 'arbitrary' in relation to the deprivation of property under s 25."

The *First National Bank* case dealt with deprivations of property generally and not with deprivations designed to prevent or punish crime. As noted earlier, in *Cook's* case the SCA however also referred to the judgments of the US Supreme Court in *Austin*[38] and *Bajakajian*[39] which dealt more particularly with the application of a proportionality analysis to deprivations of property designed to punish crime. *Bajakajian* is the later and consequently also the more useful of the two judgments. Its notable features relevant to the present inquiry, include the following:

(i) The defendant attempted to board an international flight with $357 144 concealed in his luggage. It was not unlawful to export the money provided that he reported it before he did so. He was charged and convicted of attempting to export the money without making such a report. The government sought forfeiture of the whole amount under a statutory provision which provided that someone convicted of wilfully committing the offence, shall forfeit "any property … involved in such an offence". The trial court however refused to declare the full amount forfeit because it held that to do so would violate the Eighth Amendment's prohibition of "excessive" fines.

(ii) The Supreme Court upheld the trial court by a margin of five to four. Justice Thomas delivered the opinion of the majority and Justice Kennedy delivered the opinion of the dissenting minority. As appears from their opinions, the court was sharply divided *inter alia* on the application of the proportionality standard to the facts of the case. The

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38 Austin v United States 509 US 602 (1993)

39 United States v Bajakajian 524 US 321 (1998)

majority held that forfeiture of the full amount would be grossly disproportionate and thus "excessive" within the meaning of the Eighth Amendment. The minority on the other hand held that the full amount ought to be forfeited because it was not disproportionate to the severity of the crime.

(iii) The court was however unanimous on the appropriate proportionality standard. The majority held and the minority agreed, that a punitive forfeiture was "excessive" for purposes of the Eighth Amendment, only if the defendant proved that it was "grossly disproportional" to the severity of his offence.

[13] In *Cook's* case the SCA said that the interrelated purposes of forfeiture under chapter 6 of the Act included the following:[40]

- Removing the incentives for crime.
- Deterring persons from using or allowing their property to be used in crime.
- Eliminating or incapacitating some of the means by which crime may be committed.
- Advancing the ends of justice by depriving those involved in crime of the property concerned.

It made the point that, although certain of the purposes of forfeiture under chapter 6 had a penal element,[41] the objectives of the chapter "transcend the merely penal".[42] The Constitutional Court held in *NDPP v Mohamed* 2002 (4) SA 843 (CC)[43] and the SCA affirmed in *Cook's* case,[44] that "the primary objective of provisions of this sort is to remove

40 para [18]

41 para [17]

42 para [18]

43 para [15]

44 para [17]

the incentive for crime, not to punish criminals". It seems, therefore, that any proportionality analysis would have to weigh the impact of the forfeiture on a respondent, not only against the severity of his crime but also against the public interest in the prevention of crime. The public interest is considered to be a legitimate objective that forfeiture is designed to serve.

[14] It is not difficult to detect in various cases, reported and unreported, both in South Africa and elsewhere, a certain wariness about making forfeiture orders. This should hardly be surprising: respect for the ownership of the property of another is a principle of cardinal importance in all common law systems. A reflective Court, respectful of the rule of law, is bound to ask: "But where will it all end? Where does one legitimately draw the line?" Forfeiture orders can so easily become not a weapon of justice but a weapon of terror; so easily can they erode the values which have served us well for thousands of years. In a country with a history such as ours, a Court is likely to be vigilant in guarding against moral and intellectual flabbiness when it comes to basic issues of principle. Nevertheless, it would seem that forfeiture may play an important role in the prevention and punishment of drug offences. Indeed, the contemporary mechanisms of forfeiture had their origins in attempts to combat drug offences both internationally and locally. The first major international instrument to deal with the problem of international crime, was the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988. The preamble records that the parties to the convention are:

> "Deeply concerned by the magnitude of and rising trend in the illicit production of, demand for and traffic in narcotic drugs and psychotropic substances, which pose a serious threat to the health and

> welfare of human beings and adversely affect the economic, cultural and political foundations of society" and
>
> "Deeply concerned also by the steadily increasing inroads into various social groups made by illicit traffic in narcotic drugs and psychotropic substances, and particularly by the fact that children are used in many parts of the world as an illicit drug consumers market and for purposes of illicit production, distribution and trade in narcotic drugs and psychotropic substances, which entails a danger of incalculable gravity".

Article 3 obliges the parties to criminalise every activity along the chain of the production, distribution, possession and use of illegal drugs including the possession of equipment, materials and substances used for their production. They must also provide for those offences to be punished by "sanctions which take into account the grave nature of these offences" such as "imprisonment or other forms of deprivation of liberty, pecuniary sanctions and *confiscation*". (my emphasis). Article 5 requires the parties to adopt such measures as may be necessary for the confiscation of various things including "materials and equipment or other instrumentalities used in or intended for use in any manner" in drug offences of the kind described in article 3. They are not only required to establish the legislative framework for this to be done but are also required to ensure that their executive authorities give effect to it. The enactment of the Drugs Act in 1992 included the first general South African legislation for the confiscation of the proceeds of crime. It provided, *inter alia*, for someone convicted of a drug-related offence, to be deprived of the benefits derived from it. These provisions were repealed and replaced by the Proceeds of Crime Act 76 of 1996 which was, in turn repealed and replaced by Prevention of Organised Crime Act. The latter two statutes extended the mechanism of confiscation from drug-related offences to crime generally. This broadening of confiscation as a means for the prevention and punishment of crime

accorded with similar developments at international level.[45] This history clearly demonstrates that the forfeiture measure invoked by the Director in this case is designed, both here and abroad, to combat precisely the kind of crimes which the First and Second Respondents committed. The rampant nature of these crimes and the widespread personal and social devastation which they cause, have resulted in an international consensus that the device of forfeiture is a useful, and perhaps even a necessary, tool in fighting a seriously harmful evil.

[15] It seems clear that proportionality in cases such as this cannot be measured with fine legal callipers. Nevertheless, using the imagery of *Mr Trengove*, I am satisfied that forfeiture in this case will not result in "a sledgehammer being used to swat a gnat." Moreover, judicial discomfort with a consequence is insufficient to render it disproportional to the extent that the relief sought may be refused. Undoubtedly, a forfeiture order will have tragic consequences for the First and Second Respondents: they will lose their home. In view of the First Respondent's state of health, this will be particularly sad. In this regard, two points need to be made. The first is that forfeiture orders will almost always visit real hardship upon those against whom they are made: this is among the very purposes for which they were devised. The second is that the visiting of hardship upon a person is not in itself unconstitutional. In view of the weight of authority to which I have referred, I cannot see that any constitutional right of the First and Second Respondent would be infringed by making a forfeiture order. Section 165 (2) of our Constitution affirms the independence of the judiciary. It would seem section 50 (1) of the Act does not compromise this independence. In *Cook's* case, Griesel J's criticism in *NDPP v*

[45] For instance by the Recommendations of the Financial Action Task Force on Money Laundering of the Group of Seven Countries, the Model Regulations Concerning Money Laundering Offences adopted by the Organisation of American States, the Commonwealth Model Law for the Prohibition of Money Laundering and ultimately by the United Nations Convention against Transnational Organised Crime of 2000.

Seevnarayan 2003 (2) SA 178 (C) of the failure of the legislature to confer a broad equitable discretion on the Courts was clearly diapproved.[46] I have given consideration to whether I could order a partial forfeiture instead of a full forfeiture as seems to have been suggested by the SCA in *Cook's* case as a method of dealing with the question of proportionality.[47] The intractable difficulty is that immovable property, unlike various other kinds of assets of which money is perhaps the best example, is usually indivisible. Sub-division of this immovable property would, in any event, require the approval of the local municipality which is not a party to these proceedings. Besides, nothing was put before me to suggest that this solution would be desirable, and, if so, possible. On the issue of forfeiture, I cannot come to the assistance of the First and Second Respondents on any discretionary basis. The constitutional point, for the reasons given, fails.

[16] In view of the novelty, complexity and importance of the issues involved in this case, the employment by the Director of two counsel has been justified. I shall, however, make a costs order which I believe will be appropriate to this case in order to mitigate the hardship which the First and Second Respondents will experience. Section 50 (2) of the Act would seem to permit an order of this kind. It reads as follows: "The High Court may, when it makes a forfeiture order or at any time thereafter, make any ancillary orders that it considers appropriate, including orders for and with respect to facilitating the transfer to the State of property forfeited to the State under such an order."

[17] The following order is made:

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46 See *Cook's* case para [74]; *Seevnarayan* paras [42], [49], [54], [65-66].

47 para [74]

(1) The immovable property together with the buildings and structures erected thereon as well as the fixtures and fittings situate at erf 174, 31A Morgenster Crescent, Lonehill, Johannesburg, Gauteng Province ("the property") is hereby declared forfeit to the State in terms of section 50 of the Prevention of Organised Crime Act, 121 of 1998 ("the Act");

(2) The *curator bonis* appointed in terms of the preservation order made by the Honourable Mr Justice Ponnan on 1 October 2001 will continue to act in such capacity and the *curator's* expenditure will be paid from the proceeds of the forfeited property on fulfilment of the forfeiture order;

(3) In terms of section 56 (2) of the Act, the property shall vest in the *curator bonis* on behalf of the State on the date on which the forfeiture order takes effect;

(4) The interests of the Third Respondent are hereby excluded from the operation of this order and the *curator bonis* shall forthwith after disposal of the property in terms of paragraph 5.1 below, settle the outstanding balance on the home loan bond account number 300002858449 held

at the Randburg branch of the Third Respondent.

(5) The *curator bonis*, as of the date which the forfeiture order takes effect, shall be empowered to perform the following:

5.1 subject to consultation with the Third Respondent, to dispose of the property by sale or other means;

5.2 to deduct the fees and expenditure associated with his function as a *curator bonis*;

5.3 to deposit, in terms of section 57(1) of the Act, the balance of the proceeds into the Criminal assets recovery Account established under section 63 of the Act;

5.4 to perform any ancillary acts which, in the opinion of the *curator bonis*, but subject to any directions of the Criminal Assets Recovery Committee established under section 65 of the Act, are necessary.

(6) In terms of section 50 (5) of the Act, the Registrar of this Honourable Court is directed to publish a notice of this order in the *Government Gazette* as soon as is practical after the making of this order;

(7) Any person affected by this forfeiture order, and who was entitled to receive notice of

the application under section 48(2) of the Act but who did not receive such notice, may within 45 days after publication of the notice of the forfeiture order in the *Gazette*, apply for an order under section 54 of the Act, excluding his or her interest in the property, or varying the operation of the order in respect of the property;

(8) All the paragraphs of this order shall operate with immediate effect, except paragraphs 3,4 and 5, which will only take effect on the day that a possible appeal is disposed of in terms of section 55 of the Act, or on the day that an application for the exclusion of interests in forfeited property in terms of section 54 of the Act is disposed of, or after expiry of the period in which an appeal may be lodged or application made in terms of section 54 of the Act;

(9) The counter-application is dismissed;

(10) The taxed costs of the applicant, including the costs consequent upon the employment of two counsel, are to be paid from the proceeds of the sale of the property.

DATED AT JOHANNESBURG THIS 11th DAY OF AUGUST, 2004.

N.P. WILLIS
JUDGE OF THE HIGH COURT

Counsel for the Applicant: *W.H. Trengove SC* and, with him, *A. Cockerell*

Counsel for the First Respondent: *D. Marais*

Counsel for the Second Respondent: None

Counsel for the Third Respondent: *N. Constantinides*

Attorney for the Applicant: State Attorney

Attorney for the First Respondent: Ramsurjoo & Du Plessis Inc.

Attorney for the Second Respondent: None

Attorney for the Third Respondent: Van Hulsteyns

Date of Hearing: 4th August, 2004.

Date of Judgment: 11th August, 2004