IN THE HIGH COURT OF SOUTH AFRICA

(WITWATERSRAND LOCAL DIVISION)

CASE NUMBER: 04/15615

In the matter between:

THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS **Applicant**

and

ANDRE GERBER **First Respondent**

LEIGH DORIS WHYTE **Second Respondent**

JUDGMENT

SCHWARTZMAN J:

1. This is an application for a forfeiture order in terms of Section 50 of the Prevention of Organised Crime Act 121 of 1998 (POCA). What the Applicant seeks to have forfeited to the State is the Second Respondent's residential property at 56 Le Grey Street, Bramley North, Johannesburg (the property). The Second Respondent, her partner the First Respondent, their foster child and the Second Respondent's mother live on the property.

A. THE BACKGROUND FACTS

2. The Second Respondent purchased the property on 27 August 2001 for R320 000. It was transferred into her name on 2 February 2002. The purchase price was paid by way of a R54 000 deposit that came from the proceeds of an insurance claim. The balance of the purchase price – R270 000 – was paid out of the proceeds of an ABSA bond registered over the property.

3. The First Respondent was born on 28 February 1961. The Second Respondent was born on 3 October 1962. According to the Second Respondent they were childhood sweethearts whose parents opposed their being together. They separated sometime after she had an abortion that resulted in her being unable to have children. She then married, emigrated to Australia, divorced and returned to South Africa where the Second Respondent says she and the First Respondent reunited and "*I was with my one and only soul mate*". The period of time covered by these events is not known. What is known is that in 2000 the First and Second Respondent were living together in Norwood, Johannesburg. They then moved into the property. I will deal more fully hereafter with the relationship between the Respondents.

4. On 5 December 2003 the police raided the property. In the back garden they found a well established dagga plantation and a number

of plastic containers in which dagga seedlings were being grown. They also found bags containing harvested dagga. On opening the locked double garage the police found that it had been turned into a well-equipped greenhouse for the organic cultivation of dagga. The equipment included powerful overhead lights to provide light and warmth, fans to circulate warm air and a temperature gauge. Inside the garage dagga plants were growing in tubs. Harvested dagga plants were hanging out to dry from roof beams. In the house the police found a scale, glass bottles containing dagga specimens, small packets of dried dagga, dagga cigarettes and magazines dealing with the cultivation of dagga. The police, who seized what they found, counted about 295 dagga plants. The street value of the dagga, which weighed 10 kilograms was approximately R100 000. The First Respondent was arrested. He was charged with dealing in dagga. This was in terms of Section 5 of the Drug and Drug Trafficking Act 140 of 1992.

5. The First Respondent, who admitted possession of what was found on the property, said that he was an habitual dagga user and that he only smoked the seeds or flowers of the dagga plants that he cultivated for his own use. Be this as it may, and on 21 April 2004, the First Respondent entered into a plea agreement with the State in terms of Section 105 A (1) of the Criminal Procedure Act, in which he

pleaded guilty to wrongfully and unlawfully cultivating dagga plants on the property. The definition of "*dealing*" in the Drugs Act includes "*cultivation*". Following his conviction, the First Respondent was sentenced to 18 months imprisonment or a R6 000 fine all of which was suspended for five years on the usual conditions.

6. The Second Respondent was not charged with any offence.

7. Ordinarily, and when the Applicant decides to seek a forfeiture order, it commences proceedings by way of applying, *ex parte*, for an order in terms of Section 38 (1) of POCA, in which it obtains a preservation order. The papers that are then served on the Respondents draw attention to the fact that the Applicant will, within 90 days, apply in terms of Section 48 of POCA for an order declaring the property forfeited to the State. The Respondents are also informed of their right to oppose the forfeiture application.

81 In this matter, the Applicant decided to seek the forfeiture of the Second Respondent's property by invoking the provisions of POCA. Before proceeding with a preservation application, its representatives met with the Respondents' Counsel. This resulted in the Second Respondent signing an undertaking, on 17 May 2004, that recorded the Applicant's intention to apply for a preservation order in respect of

the property. The Second Respondent then undertook not to dispose of or alienate the property. She also undertook to maintain the property and pay the bond. In these circumstances, an *ex parte* order was not sought. What happened instead was that on 16 July 2004, the Applicant gave the Respondents notice of its intention to bring a preservation application. Attached to this application is the founding affidavit and the draft of a court order to be sought in a preservation application. Attached to the draft order is the Applicant's notice of intention to apply for a forfeiture order within 90 days of the grant of the preservation order and the Respondents right to file answering affidavits.

82 On 19 May 2004 the Respondents filed their answering affidavits. The reply was served on 23 September 2004. On 4 November 2004 the Respondents filed a further affidavit attaching documents and evidence that the Second Respondent said were not available when the answering affidavit was filed. This affidavit also dealt with new matters raised by the Applicant in its reply. The Applicant did not object to the filing of this affidavit or any part of its content. It did not seek to file a further reply.

83 In an attempt to bring the procedure agreed by the parties into line with the provisions of POCA, the Applicant sought and was granted

an *ex parte* preservation order that *inter alia* and formally gave notice of its intention to apply, within 90 days of service of the order, for a forfeiture order. This happened on 30 November 2004. On 28 February 2005 the Respondents gave notice of their intention to oppose the forfeiture order. Attached to this notice is an affidavit recording an agreement that it would not be necessary to file further affidavits and that the affidavits already filed would be regarded as the parties affidavits in the forfeiture application. On 1 April 2005 the Applicant gave notice of its intention to apply for a forfeiture order. In an affidavit in support of this application reference is made to the affidavits already filed by the parties. No new facts are relied on by the Applicant in support of the forfeiture application. The Respondents did not file a further affidavit.

9. In their answering affidavit the Respondents said that the First Respondent started cultivating dagga some six months before 6 December 2003, the date on which the police raided the property. This was not disputed by the Applicant. The Second Respondent's mother, who lives on the property, appears to be a wealthy woman, who has made substantial payments to the Second Respondent, who has in turn used the funds to *inter alia* maintain and pay costs involved in owning the property. There is also evidence that over the years the First Respondent has conducted an income producing

leather manufacturing business. The Second Respondent assists the First Respondent in this business. When the Respondents moved into the property this business was run from the property. Although there are assertions by the Applicant, there are no facts from which it can be inferred that the property, which was transferred to the First Respondent on 2 February 2002, is the proceeds of any unlawful activity. Such facts, as they are, negative the Applicant's assertions.

10. In her answering affidavit, the Second Respondent described herself as a shy, quiet, introvert, who is dependent on the First Respondent. She described her relationship with the Second Respondent as unusual in that he is a domineering "*alpha male who has forced me to submit to his whims and not to question him in any way.*"

11. The Second Respondent knew of the First Respondent's dagga habit. When he started growing dagga on the property she tried to get him to stop. This led to numerous arguments, a refusal on his part to stop and threats by him to leave her should she stop him from doing what he wanted. She says she did not want to lose his companionship and love, and feared that if she pushed him too hard he would leave her. In essence, she says that she found herself trapped in a situation from which she could not escape in which, contrary to her wishes, she had to acquiesce in the First Respondent's unlawful conduct.

12. The Second Respondent submits that if a forfeiture of her property is ordered she, her foster child and her mother will be punished for acts to which she was not a willing party.

13. In reply, the Applicant stated that it had no knowledge "*of the details of the personal relationship between the First and Second Respondent. In so far as Second Respondent seeks to describe the First Respondent as domineering and herself as submissive, this is denied by the Applicant. The Second Respondent furnished no proof in this regard. The Second Respondent annexes no proof except a vague allegation that she will sometime in the future seek counselling.*"

14. In her further answering affidavit, the Second Respondent said the affidavit was required so that she could annex documents "*not readily available to attach to the opposing affidavit due to the fact that I was unable to properly apply my mind to the matter as detailed hereunder.*" The further affidavit also dealt with the "*numerous new issues*" raised in the reply.

15. In this affidavit, and with reference to paragraph 13 hereof, the Second Respondent attached the report of Steven Kaplan, a clinical

psychologist, dated 1 October 2004 in which he said:

"***RE: MS. LEIGH WHYTE***

The following report is written at the request of Ms Whyte and her partner Andre Gerber. Written permission has been received by both in terms of waiving confidentiality.

BACKGROUND AND REASON FOR THIS REPORT

Ms Whyte has seen me for three sessions, her partner for only one as corroboration. She first saw me on the 14th of September 2004 with anxiety disorder related complaints. It soon became clear that she was suffering from post-traumatic stress disorder as a result of the consequences of the legal action pending against her.

During the course of 2003, Mr Gerber had grown a quantity of marijuana plants on the premises of their home and had subsequently been arrested and charged for this. Thereafter, the Assets Forfeiture Unit of the South African Police Services made application to attach Ms Whyte's house on the suspicion that the house had been paid for by the proceeds of marijuana sales. Ms Whyte and her partner strongly deny any such wrongdoing and claim that all their assets are legitimately purchased.

Ms Whyte's innocence notwithstanding, it has therefore become necessary to explain why Ms Whyte did not take stronger action against Mr Gerber immediately upon discovering his cache of plants; and why she did not herself remove the plants and dispose of them after requesting he do so. To understand this, it is necessary to disclose aspects of both individuals and the dynamics of their relationship.

CLIENT HISTORY

Ms Whyte and Mr Gerber have known each other for most of their lives. They both originate from Durban where, until Ms Whyte was 19 years old, they were romantically involved with each other. After a traumatic parting, they both moved on to different relationships, Ms Whyte eventually marrying, moving overseas and subsequently divorcing her husband. Upon her return to South Africa, Mr Gerber immediately terminated the relationship he was in and re-united with Ms Whyte. They have been together ever since.

The relationship itself is not particularly healthy for either and clearly contains aspects of desperation and fear of rejection from both sides. Both parties display an exceptionally strong external locus of control, relying very much on outside sources for personal validation, particularly from each other. In Ms Whyte's case, this manifests as a passive personality style, to the point of Dependent Personality

Disorder; in Mr Gerber's case this manifests in a passive-aggressive personality style, almost to the point of Anti-Social Personality Disorder.

The combination of these two personality types, essentially coupled with their history of being parted and re-united, results in a very common relationship dynamic more commonly associated with battered spouse syndrome. Both personalities display exceptionally strong fears of rejection, particularly with regard to one another, but in general as well. It is highly likely that this aspect has been a defining one of their relationship from the beginning. Although it seems clear that there is little evidence of Mr Gerber ever physically abusing Ms Whyte, it is amply evident that both parties contributed to a situation of emotional abuse. Mr Gerber presents as an exceptionally strong, anxious, dominant personality; but lacking in self-esteem. He would have to rely on Ms Whyte for much of his emotional needs. Ms Whyte presents as an extremely passive, people pleasing but equally anxious. As this dynamic has been in existence for quite some time, it is practically impossible that Ms Whyte would have realistically considered the possibility of confronting or opposing Mr Gerber. Her fear of rejection, however misplaced, would have been far, far stronger than any fear of the consequences of his behaviour. By failing to confront him, she facilitates her own co-dependency in the relationship; but guarantees his emotional loyalty. Research and case history for precedents in this regard are legion.

RECOMMENDATIONS AND CONCLUSION

As in all cases of this nature, events must inevitably reach a point, typically through some traumatic event, where both parties are forced to choose different paths for the future. If they do not, they are more or less condemned to repeat history. It is therefore unsurprising that events reached the juncture that they did, forcing both parties to confront their behaviour. Both Ms Whyte and Mr Gerber have reached a point where they acknowledge the need to confront their own choices and their relationship. For this reason it is strongly recommended that they begin the process of couples therapy, either with myself or another therapist. Both are in full agreement and will be doing this regardless of the legal matter to hand."

As already indicated, the Applicant did not oppose the filing of this affidavit, nor did it seek to file a further reply. In argument it did not object to any part of it. In particular the Applicant did not object to the fact that Kaplan's report was not confirmed in an affidavit. It

furthermore did not seek to have the Second Respondent's or Kaplan's account of her mental state and state of mind tested by way of a reference to oral evidence.

B. THE LAW

16. Section 50 (1) (a) of POCA, that must be read subject to Section 52, obliges a High Court to make a forfeiture order if it finds, on a balance of probabilities, that the property concerned "*is an instrumentality of an offence referred to in Schedule 1*". Dealing in dagga is an offence referred to in Schedule 1 of POCA. Section 52 (1) empowers a Court making a forfeiture order to exclude from its operation certain interests in the property. Section 52 (2A) requires an owner opposing forfeiture to state that he or she acquired the property legally and

"*(a) neither knew nor had reasonable grounds to suspect that the property … is an instrumentality of an offence referred to in Schedule 1*.

(b)… "

17. In **National Director of Public Prosecutions v RO Cook (Pty) Ltd & others appeals 2004 (8) BCLR 844 (SCA)**, the Court said, in paragraphs 21 and 22 of its judgment, that when a forfeiture order is sought, the Court undertakes a two-stage enquiry. The first is to decide whether the property is an instrumentality of an offence. The owner's guilt or wrongdoing, knowledge or lack of it, are not the

Court's focus. "*The question is whether a functional relationship between property and crime has been established. Only at the second stage, when (after finding that the property was an instrumentality) the Court considers whether certain interests should be excluded from forfeiture, does the owner's state of mind come into play.*"

18. In *Cook* that dealt with a number of appeals, the Court was only required to deal with the first stage of the enquiry. After referring to Section 52 (2A) (a) it said:

"*[24] This section burdens the owner with an onus to prove certain facts on balance of probabilities before the court can make an exclusionary order. Although the Constitutional Court referred to this loosely as creating an 'innocent owner' defence, a literal reading of s 52(2A)(a) would suggest that innocence is not enough… (If) the owner fails to prove absence of knowledge or absence of reasonable grounds for suspicion, on such a reading the property stands to be forfeited even if he or she was unable to do anything about the scheduled offence or its continuation.*

[25] Again, examples of the untoward results a literal reading could produce proliferated in argument. If, for example, an owner knows or

reasonably suspects that his property is an instrumentality, and for this reason report the matter to the police, seeking their intervention against the criminals, this on a literal reading will not avail against forfeiture. Once the owner knows or reasonably suspects, liability to forfeiture follows, despite innocence of involvement, implication or even acquiescence. The 'reasonable steps to prevent' defence (s 52(2A)(b)) avails only for pre-statute offences. On such a reading the statute does not provide an 'innocent owner defence' but only … an 'ignorant owner defence'. (My emphasis)

[26] We emphasise that none of the owners in the appeals before us invoked the second stage of the chapter's procedures: In the course each case took, they staked their fortunes rather on a narrow reading of 'instrumentality of an offence'. As a result these cases do not require us to give a determinate reading of the second stage provision. Nor is the constitutionality of the reverse onus resting upon owners facing forfeiture before us. It may be that s 52 (2A)(a) should be read, applying the common law maxim that the law does not demand the impossible, so as to avoid forfeiture when the owner has done 'all that reasonably could be expected' to prevent the unlawful use of the property, and that this can properly be done despite the contrasting proximity of sub-paragraph (b). We need not decide that now. Nor do the appeals require us to confront the serious constitutional question whether forfeiture is permissible when the owner has committed no wrong of any sort, whether intentional or negligent, active or acquiescent. (My underlining)

[27] We therefore express no final views on the interpretation of s 52. The present relevance of the second stage is to emphasise that, even on any likely constitutional interpretation, the forfeiture provisions place substantial burdens on owners and that these likewise point to a narrow reading of 'instrumentality of an offence'"

19. "*[T]o constitute an instrumentality of an offence the property sought to be forfeited must in a 'real or substantial sense … facilitate or make possible the commission of the offence' and that it 'must be instrumental in, and not merely incidental to, the commission of the offence'. As to immovable property, the Court 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. Further, 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'. Where premises are used to manufacture, package or distribute drugs, or where any part of the premises has been adapted or equipped to facilitate drug-dealing (which in terms of s 1(1) of the Drugs Act includes 'manufacturing') they will in all probability constitute an instrumentality of an offence on them.*" – see **Simon Prophet v National Director of Public Prosecutions 2006 (1) SA 38 (SCA)** at paragraph 26 (cited with approval by the Constitutional Court in Simon Prophet v National Director of Public Prosecutions (unreported decision handed down on 29 September 2006), paragraph 22 read with footnote 11).

20. The "*innocent owner*" defence referred to in paragraph 24 of the Cook

decision comes from **National Director of Public Prosecutions V Mohammed N.O. 2002 (4) SA 843 (CC)** at page 851, where the following is said:

"*There is, however, a defence at the second stage of the proceedings when forfeiture is being sought by the State. An owner can at that stage claim that he or she obtained the property legally and for value, and that he or she neither knew nor had reasonable grounds to suspect that the property constituted the proceeds of crime or had been an instrumentality in an offence (the 'innocent owner' defence).*"

21. In a footnote to paragraph 26 of *Cook*, the Court referred to **Austin v United States (509 US 602 (1993) 629** where Kennedy J said "*At some point, we may have to confront the constitutional question whether forfeiture is permitted when the owner has committed no wrong of any sort, intentional or negligent. That for me would raise a serious question. Though the history of forfeiture laws might not be determinative of that issue, it would have an important bearing on the outcome. I would reserve for that or some other necessary occasion the inquiry the Court undertakes here. Unlike Justice Scalia, see ante, at 625, 125 L Ed 2d at 507, I would also reserve the question whether in rem forfeitures always amount to an intended punishment of the owner of the forfeited property.*"

22. The underlined sentence of paragraph 26 of *Cook* (paragraph 18 *supra*) is based on the general principle of *lex non cogit ad imposibilia*. "*This principle, which is really one of the law of contract, has general application.*" – see **Pharmaceutical Society of South Africa v Minister of Health 2005 (3) SA 238 (SCA)** at paragraph 32.

C. COUNSEL'S ARGUMENT AND THE COURT'S DECISION

23. In argument the Respondent's Counsel correctly conceded that the property was an instrumentality of the offence committed by the First Respondent. Accordingly, the next question to be considered relates to proportionality. In this context the Constitutional Court, in the *Simon Prophet* judgment (*supra*), said "*[58] Civil forfeiture provides a unique remedy used as a measure to combat organised crime. It rests on the legal fiction that the property and not the owner has contravened the law. It does not require a conviction or even a criminal charge against the owner. This kind of forfeiture is in theory seen as remedial and not punitive. The general approach to forfeiture once the threshold of establishing that the property is an instrumentality of an offence has been met is to embark upon a proportionality enquiry – weighing the severity of the interference with individual rights to property against the extent to which the property was used for the purposes of the commission of the offence, bearing*

in mind the nature of the offence." In paragraph 60 of its judgment the Court went on to distinguish Chapter 5 and Chapter 6 forfeitures in terms of POCA. Chapter 5 provides for the forfeiture of benefits derived from the commission of an offence once a defendant has been convicted. It is then said that Chapter 6 (sections 37 to 62) provides for forfeiture of an instrument of a crime that are not dependant on a conviction. The application before me has to do with Chapter 6 forfeiture.

24. In paragraph 61 of its judgment, the Constitutional Court expressed a note of caution by saying that an "*unrestrained application of Chapter 6 may violate constitutional rights, in particular the protection against arbitrary deprivation of property particularly within the meaning of section 25 (1) of the Constitution, which requires that 'no law may permit arbitrary deprivation of property.'*" Here the Court referred to its decision in **First National Bank v SARS 2002 (4) SA 768(CC)**, where it said "*[98]… [F]or 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 enquiry into mere rationality, but is less strict than a full and exacting proportionality examination.*" At paragraph 100 of this judgment, the Constitutional Court concluded that a deprivation of property is

arbitrary within the meaning of Section 25 of the Constitution when the law referred does not provide sufficient reason for the particular deprivation in question or is procedurally unfair. The court went on to set out factors to be taken into account. In *Prophet* the Constitutional Court, at paragraph 63, set out what, on the facts of that case, it considered to be some of the relevant facts. They were "*whether the property is integral to the commission of the crime; whether the forfeiture would prevent the further commission of the offence and its social consequences; whether the 'innocent owner' defence would be available to the applicant; the nature and use of the property and the effect on the applicant of the forfeiture of the property.*"

25. What did not arise in *Simon Prophet*, and what has not arisen in any of the other decisions to which I was referred by Mr Pillay (who appeared for the Applicant) in the course of his helpful argument, is whether "*forfeiture is permissible when the owner has committed no wrong of any sort, whether intentional or negligent, active or acquiescent*" (see paragraph 26 of Cook (*supra*) and paragraph 21 (*supra*)).

26. The Second Respondent's version that the Applicant was unable to refute, and which it did not seek to test by way of a reference to oral evidence, was that she found herself in a position where she was

powerless to prevent the First Respondent from pursuing his unlawful conduct by using her property as an instrumentality for his unlawful conduct. This assertion is supported by Kaplan's report.

27. To avoid a forfeiture, the Second Respondent cannot, on the facts, rely on either the innocent or ignorant owner defence. On the facts, the Second Respondent has, in the words of Kennedy J in the *Austin* decision, "*committed no wrong of any sort, intentional or negligent*". In its *obiter dictum* on this issue, the Supreme Court of Appeal, in paragraph 26 of it judgment in *Cook*, suggested that a Defendant should also be required to prove that his or her conduct was not "*acquiescent*". I do not, with the greatest respect, agree with the need to add this requirement. On the facts of the application, I find that an unrestricted application of Chapter 6 of POCA and, in particular, Section 52 (2A) (a) would result in the Second Respondent, who committed no wrong of any sort, intentional or negligent, being arbitrarily deprived of her property.

28. If I am wrong in coming to the above conclusion and that it could reasonably be expected of the Second Respondent that she report the First Respondent's conduct to the police, I am satisfied, on the basis of paragraph 9 of the Constitutional Court's judgment in **First National Bank v SARS** (*supra* paragraph 24) that having regard to all

the facts of the matter it would not be appropriate to make a forfeiture order that would leave the Second Respondent, her foster child and her elderly mother homeless.

29. In the result the following order is made:

1. The forfeiture application is dismissed.

2. The preservation order granted on 30 November 2004 is set aside.

3. The Applicant is ordered to pay the costs of this application.

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I W SCHWARTZMAN

JUDGE OF THE HIGH COURT

Counsel for the Applicant: **Adv H D Baer**

Instructed by: **Louis Weinstein**

Louis Weinstein & Associates

Counsel for the Respondent: **C Pillay**
Instructed by: **F Latif**
State Attorney's Office

REPORTABLE AND 'OF INTEREST' TO OTHER JUDGES

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS
v GERBER & ANOTHER: 04/15615

To require a Respondent, who has committed no wrong, intentional or negligent, to forfeit his or her residential property in terms of the Prevention of Organised Crime Act (POCA) would constitute an arbitrary deprivation of property within the meaning of Section 25 (1) of the Constitution. Application for a forfeiture order refused. Preservation order set aside. Applicant ordered to pay the costs.

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Schwartzman J