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IN THE HIGH COURT OF SOUTH AFRICA
(TRANSVAAL PROVINCIAL DIVISION)

DATE: 12/05/2006
CASE NO: 33729/2004

In the matter between:

THE NATIONAL DIRECTOR OF
PUBLIC PROSECUTIONS APPLICANT

And

WILHELMINA JANETTE VERMAAK RESPONDENT

JUDGMENT

RANCHOD, AJ

[1] The respondent was convicted on 29 November 2004 in a district court on a charge of drunken driving as contemplated in section 65(1)(a) of the National Road Traffic Act 93 of 1996. The respondent was sentenced to a fine and an additional suspended sentence. She was also ordered to enter a rehabilitation centre for treatment for alcohol addiction.

[2] On 21 December 2004 the applicant brought an *ex parte* application for a preservation order, which was granted, in respect of the respondent's motor vehicle in terms of section 38(1) of the Prevention of

Organised Crime Act 121 of 1998 (“the Act”). The vehicle belongs to the respondent. The interim preservation order granted on 21 December 2004 was made final on 8 February 2005. On the same day an interim order of forfeiture of the motor vehicle was also granted. (These orders were granted by other Judges.) The matter then came before me in the motion court on 16 March 2005 when the applicant sought a final order of forfeiture of the motor vehicle. I was not convinced that the applicant had used the correct legislative provisions for seeking forfeiture of the respondent’s motor vehicle and I accordingly requested legal representatives of both the parties to argue the matter fully before me on a date to be arranged. My *prima facie* view was that the Act, when read together with its long title was not the correct Act under which the applicant could seek forfeiture of the motor vehicle of the respondent for the offence of drunken driving. The respondent applied for leave for late entry of appearance to defend in terms of section 49 of the Act and other ancillary relief. The order was granted. The matter was then argued before me on 19 September 2005 whereafter I reserved judgment. The applicant in its application for a preservation order relied on section 38(2)(a) of the Act in that it is contended that the vehicle which was driven by the respondent, at the time of the offence, is an "instrumentality of an offence" referred to in schedule 1 to the Act.

[3] Section 38(1) of the Act provides for a preservation order to be issued by the High Court on an ex-parte application by the National Director of Public Prosecutions. Sub-section (2) provides:

> "The High Court shall make an order referred to in subsection (1) if there are reasonable grounds to believe that the property concerned –
>
> (a) is an instrumentality of an offence referred to in Schdule 1;
>
> (b) is the proceeds of unlawful activities; or
>
> (c) is property associated with terrorist and related activities."

[4] The applicant relies on Item 33 of Schedule 1 to the Act. (The schedule provides a list of offences for which a forfeiture order may be sought.) Item 33 provides that forfeiture may be sought for

> "any offence the punishment wherefore may be a period of imprisonment exceeding one year without the option of a fine."

[5] Applicant's contention is that the offence of drunken driving or driving while the alcohol in the bloodstream of the driver exceeds the

legal limit (for the purposes of this judgment both categories are referred to as "drunken driving") falls within the ambit of item 33 because section 89(2) of the National Road Traffic Act provides for a sentence not exceeding six years imprisonment for a contravention of section 65 of that Act.

[6] Also in issue in the present application is whether there are reasonable grounds to believe that the motor vehicle was “an instrumentality of an offence” within the meaning of section 38 and section 50(1)(a) of the Act.

[7] The interpretation of section 38 and “an instrumentality of an offence” must, in my view, be determined in the light of the overall purpose of the Act. See *National Director of Public Prosecutions v R O Cook Properties (Pty) Ltd and Others* 2004 (2) SACR 208 (SCA) 221, para 6.

The purpose of the Act and certain of its relevant provisions

[8] Applicant in its answering affidavit (erroneously referred to as its "replying" affidavit to respondent's founding affidavit in support of her application for leave to enter an appearance to defend) says under the heading "The objective of the Act" at par 9 "The availability of other

measures to deal with the problem of drunken driving, such as arrest, imprisonment or the suspension of drivers licenses is ... not a reason not to implement the provisions of the Act which are aimed at the removal of the tainted property (the vehicle) from the hands of the offending driver".

[9] The Act's overall purpose can be gathered from its long title and preamble. The short title of the Act is "Prevention of Organised Crime Act No 121 of 1998".

[10] The long title reads:

> "To introduce measures to combat organised crime, money laundering and criminal gang activities; to prohibit certain activities relating to racketeering activities; to provide for the prohibition of money laundering and for an obligation to report certain information; to criminalise certain activities associated with gangs; to provide for the recovery of the proceeds of unlawful activity; for the civil forfeiture of criminal property that has been used to commit an offence; property that is the proceeds of unlawful activity or property that is owned or controlled by, or on behalf of, an entity involved in terrorist and related activities; to provide for the establishment of a criminal assets recovery account; to amend the Drugs and Drug Trafficking Act, 1992; to amend the

International Co-operation in Criminal Matters Act, 1996; to repeal the Proceeds of Crime Act, 1996; to incorporate the provisions contained in the Proceeds of Crime Act, 1996; and to provide for matters connected therewith." (The long title was substituted by section 27(1) of Act 33 of 2004.)

[11] The preamble, which is rather long but bears quoting in full, states:

"Whereas the Bill of Rights in the Constitution of the Republic of South Africa, 1996 (Act 108 of 1996), enshrines the rights of all people in the republic and affirms the democratic values of human dignity, equality and freedom;

And whereas the Constitution places a duty on the state to respect, protect, promote and fulfil the rights in the Bill of Rights;

And whereas there is a rapid growth of organised crime, money laundering and criminal gang activities nationally and internationally since organised crime has internationally been identified as an international security threat;

And whereas organised crime, money laundering and criminal gang activities infringe on the rights of the people as enshrined in the Bill of Rights;

And whereas it is the right of every person to be protected from fear, intimidation and physical harm caused by the criminal activities of violent gangs and individuals;

And whereas organised crime, money laundering and criminal gang activities, both individually and collectively, present a danger to public order and safety and economic stability, and have the potential to inflict social damage;

And whereas the South African common law and statutory law fails to deal effectively with organised crime, money laundering and criminal gang activities, and also fails to keep pace with international measures aimed at dealing effectively with organised crime, money laundering and criminal gang activities;

And bearing in mind that it is usually very difficult to prove the direct involvement of organised crime leaders in particular cases, because they do not perform the actual criminal activities themselves, it is necessary to criminalise the management of, and

related conduct in connection with enterprises which are involved in a pattern of racketeering activity;

And whereas no person convicted of an offence should benefit from the fruits of that or any related offence, whether such offence took place before or after the commencement of this act, legislation is necessary to provide for a civil remedy for the restraint and seizure, an confiscation of property which forms the benefits derived from such offence;

And whereas no person should benefit from the fruits of unlawful activities, nor is any person entitled to use property for the commission of an offence, whether such activities or offence took place before or after the commencement of this act, legislation is necessary to provide for a civil remedy for the preservation and seizure, and forfeiture of property which is derived from unlawful activities or is concerned in the commission or suspected commission of an offence;

And whereas effective legislative measures are necessary to prevent and combat the financing of terrorism and related activities and to effect the preservation, seizure and forfeiture of property

owned or controlled by, or on behalf of, an entity involved in terrorist and related activities;

And whereas there is a need to devote such forfeited assets and proceeds to the combating of organised crime, money laundering and the financing of terrorist and related activities;

And whereas the pervasive presence of criminal gangs in many communities is harmful to the wellbeing of these communities, it is necessary to criminalise participation in or promotion of criminal gang activities." (The preamble was also amended by section 13 of Act 38 of 1999 and section 21(1) of Act 33 of 2004, inter alia, to bring terrorism activities within the ambit of the Act.)

[12] The aim and purpose of the Act was considered in *National Director of Public Prosecutions v Mohammed* 2002 4 SA 843 (CC) 850 paragraph 15:

"It is common cause that conventional criminal penalties are inadequate as measures of deterrents when organised crime leaders are able to retain the considerable gains derived from organised crime, even on those occasions when they are brought to justice. The above problems make a severe impact on the young South

> African democracy, where resources are strained to meet urgent and extensive human needs. Various international instruments deal with the problem of international crime in this regard and it is now widely accepted in the international community that criminals should be stripped of the proceeds of their crimes, the purpose being to remove the incentive for crime, not to punish them. This approach has similarly being adopted by our legislature." (My emphasis.)

[13] The respondent opposes the application on the grounds that "section 38 of the Act must be interpreted with regard to the object and purpose of the Act, which implies the forfeiture of the property should have a rational relation to the purpose of the Act. If *in casu* it is found that such a rational relation does not exist, I am advised that then the forfeiture would possibly amount to a further penalty to my sentence in the magistrate's court, Grobblersdal. Since it is apparently the purpose of chapters 5 and 6 of the Act to deprive criminals from obtaining a benefit from crime, and not to punish them, it is respectfully submitted that there is no rational relation between the forfeiture of my property and the purpose of the Act." In an answering affidavit filed on the applicant's behalf by Mrs Julianah Rabaji a Special Director of Public Prosecutions, the applicant denies that there is "no rational relationship between the forfeiture of respondent's property and the purpose of the Act".

Reference is then made to the threat posed by drunken driving in South Africa and the magnitude of the problem.

[14] Annexed to the applicant's founding affidavit is a memorandum to the Minister of Transport prepared by Mr Gert Botha of the Transport Department which sets out detailed statistics of the various offences committed by motorists, including drunken driving to emphasize the seriousness of the problem. Mr Cassim for the applicant, similarly mentions the seriousness of the problem of drunken driving in motivating his argument that the seizure of vehicles belonging to drunk drivers is neither disproportionate nor irrational. I do not doubt the seriousness of the problem and drastic steps may be required to deal with it. As compelling as the argument may be for seizing the vehicles of drunken drivers, the issue here is whether the correct statutory authority to do so is being invoked.

[15] Applicant’s counsel, in his heads of argument deals with five issues, namely:

a. Whether civil forfeiture of the respondent’s vehicle constitutes further punishment.

b. Whether the offence of drunken driving is contemplated in item 33 of schedule 1 to the Act.

c. Whether the legislature contemplated that the Act could be used to seize vehicles belonging to drunk drivers.

d. Whether a vehicle driven by a drunk driver is an "instrumentality of an offence" as defined in section 1 of the Act; and

e. Whether the forfeiture of vehicles driven by drunk drivers is proportional to the harm posed to society by drunken driving.

[16] When considering an application for a forfeiture order applied for under section 48(1) of the Act the High Court is required by section 50(1) to make an order:

"If the court finds on balance of probabilities that the property concerned: –

(a) Is the instrumentality of an offence referred to in schedule 1; or

(b) Is the proceeds of unlawful activity; or

(c) Is property associated with terrorist and related activities".

[17] The act defines "instrumentality of an offence" as "any property which is concerned in the commission or suspected commission of an offence at any time before or after the commencement of this Act, whether committed within the Republic or elsewhere".

[18] It defines "proceeds of unlawful activities" as "any property or any service, advantage, benefit or reward which was derived, received or retained, directly or indirectly, in the republic or elsewhere, at any time before or after the commencement of this Act, in connection with or as a result of any unlawful activity carried on by any person, and includes any property representing property so derived".

[19] "(b)" and "(c)" of Section 50(1) of the Act are not applicable in this case.

[20] In view of the conclusion I have arrived at in this case, that the Act is not applicable, I need not consider whether "(a)" is applicable, i.e.

whether the motor vehicle is an “instrumentality of an offence”, nor do I deem it necessary to deal with the other issues raised on the papers.

Is drunken driving envisaged in the Act?

[21] The application is based on the assumption that drunken driving cases do fall within the ambit of the Act. Applicant’s counsel said as much at the hearing of the matter. He said the applicant’s starting point is that the Act in fact applies in this case in that the offence of drunken driving fell within the ambit of item 33 of schedule 1 to the Act. The applicant then proceeds to submit that “there is a rational relationship between the chosen legislative scheme of asset forfeiture, and the achievement of a legitimate governmental purpose, namely to reduce the incidents of and the threat associated with, drunken driving in South Africa” at paragraph 13 of the answering affidavit (erroneously referred to as the "replying affidavit"). The rest of the answering affidavit then deals with the forfeiture provisions of the Act.

[22] None of the numerous cases referred to by applicant's counsel deal pertinently with drunken driving cases except *Ex Parte National Director of Public Prosecutions* 2005 (2) SACR 198.

[23] Applicant's counsel argues that the application of the Act is not limited to organised crime, money laundering and criminal gang activities and refers to *NDPP v R O Cook and Others* in support of this view with specific reference to where tax evasion by a single individual is concerned. The *Cook* case was a consolidation of three appeals for hearing before the Supreme Court of Appeal. The third case, namely, *Seevnarayan* concerned the issued of tax evasion by an individual. The court found that the appellant had committed a fraud on both Sanlam and the South African Revenue Services. (My emphasis.) Fraud is explicitly covered by item 19 of schedule 1 whilst drunken driving is not. I respectfully agree with the view that the Act applies to cases of individual wrongdoing as stated in the *Seevnarayan* case. In my view, however, item 33 of the schedule must be read within the context of the purpose of the Act. *Ex parte National Director of Public Prosecutions* was the only reported case I could find dealing specifically with forfeiture of a motor vehicle in a drunken driving case. There JONES J dealt first with the issue whether the vehicle was an instrumentality of an offence. He held it was not. He then went on to say at 203 paragraph 9:

> "Other arguments can be advanced which may produce the same result. They include the argument that the general purposes of the Act as a whole, as revealed by its preamble, its structure, and the measures it introduces in order to achieve its purposes show that if

the Act is constitutionally and purposively interpreted it does not intend that a motor vehicle is an instrumentality in these circumstances. (*Mohammed's* case paras [14], [15] and [16].) The prevention of drunken driving is not related to any of the stated objectives of the Act. As I understand the *Mohammed* judgment and the way it is explained and applied in *Cook Properties*, the Act is a necessary measure because the existing machinery of our criminal procedure is inadequate when viewed against internationally accepted procedures for stripping criminals of 'the proceeds of their crimes, the purpose being to remove the incentive for crime and not to punish them'. (*Mohammed* para [15].) This must, of course, be done constitutionally, because the Bill of Rights precludes legislation which permits the arbitrary deprivation of property and it requires a strong rational basis, backed by sound reasons of policy, before deprivation of property can be regarded as permissible and not arbitrary (*Cook Properties* para [15].) I would have difficulty in finding for the *NDPP* in the light of these considerations. That result would permit the use of the Act to deal with the social problem of drinking and driving. This purpose does not in my view rest comfortably on the framework of legislation which is specially designed to bring our procedure into line with internationally accepted measures for combating organised crime, crime syndicates, gangsterism, money laundering and the like,

> which are the predominant purposes set out in the short title and preamble to the Act.... I would only comment that insofar as a rational policy basis is concerned, the *NDPP* puts up a case that drastic measures such as these are necessary and justified to prevent the carnage on South African roads which is one of the results of driving under influence of intoxicating liquor. This is a laudable motive. But it does not mean that that is what the Act intends. If parliament intended that the provisions of ch 6 were to apply to all cases of drunken driving or driving with an excessive amount of alcohol in the blood or breath, I believe that it would have said so specifically, either in the Act or in the National Road Traffic Act, and it would have legislated for safeguards, exceptions and other measures to make sure that the deprivation of property for this purpose was constitutionally acceptable. That it did not do so is in my opinion a further indication that that was not the intention of the Act."

I respectfully agree fully with the views of JONES J that the Act does not cover drunken driving cases. In *Dadoo Ltd and Others v Krugersdorp Municipal Council* 1920 AD 530 at 552 it is stated: "It is a wholesome rule of our law which requires a strict construction to be placed upon statutory provisions which interfere with elementary rights".

[24] As is apparent by now I have approached the matter firstly on the basis whether the Act applies. Since I conclude that the Act does not apply I need not consider whether the motor vehicle is the instrumentality of an offence, nor the remaining two of the five issues raised by applicant's counsel. However, I also agree with JONES J's view that a motor vehicle, for the reasons stated by him, is not the instrumentality of an offence and the application ought to fail on that ground also.

[25] Applicant's counsel submits that JONES J's view on the one hand that drunken driving falls within the ambit of item 33 of the schedule and his conclusion on the other hand that the Act could not be used to forfeit vehicles belonging to drunk drivers is mutually destructive. I do not agree. What JONES J says, in my view, is that the National Road Traffic Act provides for penalties for drunken driving in excess of the minimum referred to in Item 33 of the Schedule. This would, at first blush, seem to bring drunken driving within the ambit of the Act. However, the enquiry does not start there nor stop there. One must consider whether the Act applies and if so, whether a motor vehicle is the "instrumentality of an offence" in drunken driving cases. Either one of these approaches leads one to the conclusion that the Act does not cover drunken driving cases where forfeiture of the motor vehicle is sought.

[26] I make the following order:

1. In terms of section 47(1)(b) of Act 121 of 1998 the preservation order previously granted is hereby rescinded.

2. The interim order of forfeiture previously granted is hereby set aside.

3. The application for a final order of forfeiture is dismissed with costs.

N RANCHOD
ACTING JUDGE OF THE HIGH COURT

33729/2004

HEARD ON: 21/12/2004, 8/2/2005, 16/3/2005, 19/9/2005.
FOR THE APPLICANT: ADV N CASSIM SC; with him
ADV P VOLMINK
INSTRUCTED BY: THE STATE ATTORNEY, PRETORIA
FOR THE RESPONDENT: ADV F J LABUSCHAGNE
INSTRUCTED BY: MESSRS TIELMAN ROOS ATT C/O
MESSRS OLTTMAN ATT, PRETORIA
DATE OF JUDGMENT: 12/05/2006