



**IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE HIGH COURT, CAPE TOWN**

Case No: 13008/2007

In the matter between:

THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS Applicant

and

RICHARD MARTIN STEMMET

1st Respondent

BERENICE ANN FLATWELL

2nd Respondent

JUDGMENT DELIVERED ON 30 APRIL 2009

YEKISO, J

[1] This is an application for an order in terms of section 50 of the Prevention of Organized Crime Act, 121 of 1998 declaring forfeited to the State an amount of R70,508-55, seized by the police, together with a large quantity of drugs, from certain premises situate at and commonly known as 24 Clifton Road, Muizenberg. The aforesaid amount of money, together with a large quantity of drugs involved, was seized from the said premises on 16 August 2006.

[2] On 19 September 2007 Traverso DJP granted an order in terms of section 38 of the Prevention of Organized Crime Act in terms whereof the aforementioned amount of R70,508-55 was preserved. On 9 October 2009 the first respondent, through his attorneys of record, filed a notice in terms of sections 39(3), 48, 49(1) and 52 of the Prevention of Organized Crime Act in which notice the first respondent gave notice of its intention to oppose the granting of a forfeiture order contemplated in section 50 of the Prevention of Organized Crime Act. Thus, the first respondent opposes the forfeiture order sought.

THE FACTS

[3] The factual background to the relief sought is set out in the affidavit of Thandeka Tryphinia Dzingwa, a superintendent in the SA Police Service stationed at the Western Cape Asset Investigation Task Team, deposed to on 30 August 2007. In this affidavit, Dzingwa states that on 15 August 2006 constable Xolisa Qetuka, a member of the Metropolitan Police stationed at the Reaction Unit of the City Police, obtained a search warrant issued by one Captain Sandra Jonathan, a police captain stationed at the SA Police Service, Wynberg authorising the police to conduct a search at the premises situate at 24 Clifton Road, Muizenberg. The search warrant was issued in the name of constable Qethuka, incorrectly spelt in the warrant as "Katuku". Once constable Qethuka had obtained the search warrant he, together with constables Claude Josias, Henry Jacobs, Veranice Martha Kock, all from the Metro Police Services, as well as John Jacobus Nieuwoudt, Faheem Jacobs and Reginald Mtshali, from the SA Police Service, proceeded to the premises situate at 24 Clifton Road, Muizenberg with a view to executing the search warrant. The premises are

fenced with a high boundary wall. The entrance into the property is through a full metal gate.

[4] At the gate the police called out to the occupants of the property to open up. Qethuka looked through the metal gate hole and observed that the lights were on. There were shadows of people running inside the house. Qethuka subsequently forced the metal gate open as well as the two metal burglar doors. Josias forced open the locked front door. Once inside the house, constables Qethuka, Jacobs and Josias saw the first respondent emerge from a toilet where mandrax tablets were later found scattered on the floor and some floating in the toilet bowl. At the same time they saw an adult female running out of one room to another room. Constable Josias pursued her and found her sitting in the corner of the room. According to him (Josias) she was wearing only a check blue pyjama top. Veronica Kock, a female constable from the Metro Police, asked her to put on her pyjama pants. She went with her to the bedroom where she and the first respondent slept. Kock stripped the bed and found a pistol wrapped in a grey cloth. It was a black pistol with serial number 314539 with no magazine.

[5] Kock proceeded with the search. She searched the en suite bathroom. She found four clear bank bags containing about 30 small clear plastic bags with a substance suspected to be methalone, more commonly known as "tik crystal meth", in the toilet pot. On conducting a further search Kock found money wrapped in elastic bands inside a "Game" plastic bag. Kock counted the money in the presence of second respondent and it amounted to R70,290-00 in notes and R218-55 in coins. Kock then sealed

the money in a forensic seal bag. Josias, who it appears was with Kock when the search was conducted, asked Kock to search a black handbag which second respondent claimed was hers. In the handbag there was a wallet and a hand towel. Kock asked the second respondent to open the wallet. Kock unwrapped the hand towel and found a clear plastic bag with ±50 tablets suspected to be mandrax.

[6] Qethuka dealt with the first respondent in the course of the search. Whilst the search was being carried out, Qethuka ordered the first respondent to stand still. He thereafter took him (the first respondent) back to a room, which he ultimately discovered was a toilet. Constable Jacobs, who was with Qethuka at the time, searched the toilet and found what he suspected to be mandrax pills lying on the floor of the toilet. There were some pills that were floating inside the toilet pot and some that were wrapped in a newspaper. Jacobs seized the pills and placed them in a forensic seal bag. Jacobs, Josias and first respondent went to first respondent's vehicle which was parked in the garage. Jacobs and Josias searched the vehicle in the presence of first respondent. They found a pistol in the cubbyhole together with an unknown amount of money.

[7] Josias, Jacobs and first respondent went back to the main dwelling. They searched the sitting room and found one plastic bag in a CD rack which contained 20 small sachets of what was suspected to be "tik" crystals. Jacobs placed the bag in a forensic seal bag. When, in the course of the search, the first respondent was confronted with the amount of R70,508-55 found in the premises, the first respondent admitted ownership thereof. When the first respondent was asked by Insp John

Nieuwoudt about the source of the money, he claimed that the money were proceeds of his liquor business. The first respondent, on the other hand, states in his answering affidavit that the explanation he furnished to the police was that the money was earned from his “besigheid”.

[8] Qethuka arrested both respondents on charges of possession of drugs in contravention of the Drug & Drug Trafficking Act, 140 of 1992. The respondents, together with the drugs and the cash seized, were taken to Muizenberg Police Station where a police docket with Muizenberg CAS 208/08/2006 was opened. The cash, together with the drugs seized, were sent to the forensic laboratory for forensic analysis. The affidavit of Dzingwa is confirmed, by way of confirmatory affidavits, by all the police officers who conducted the search operation. This then constitutes the factual background towards the launch of the proceedings for the preservation order and, ultimately, the order to have the property seized forfeited to the state.

THE LEGAL FRAMEWORK

[9] The requirements for a forfeiture order sought by the applicant are contained in section 50(1) of the Prevention of Organized Crime Act which provides as follows:

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

- (a) is an instrumentality of an offence referred to in schedule 1;
- (b) is the proceeds of unlawful activities; or
- (c) is property associated with terrorist and related activities.”

In addition to the requirements set out in section 50(1) of the Prevention of Organized Crime Act, the applicant must show that the forfeiture of the property is a proportionate measure.

[10] In order to succeed to obtain the relief sought, the applicant has to establish the following, namely:

[10.1.] that the offence of drug dealing took place;

[10.2.] that the applicant has succeeded to establish a link between the drug dealing and the property seized. Once the applicant has established these elements, it further has to be shown:

[10.3.] that the respondent has failed to establish that he is an innocent owner; and

[10.4.] that the seizure of the property would not be proportionate in the circumstances. I shall, in turn, determine if the applicant has succeeded to show, on a balance of probabilities, that the elements set out above have been established.

HAS THE OFFENCE OF DRUG DEALING BEEN ESTABLISHED

[11] As pointed out in the preceding paragraph, for the applicant to succeed to obtain the relief sought, the applicant has to establish that the offence of drug dealing has been committed. The evidence shows that seven (7) law enforcement officers were involved in the search operation. All the law enforcement officers claim that a large quantity of drugs was seized from the premises, ostensibly in the presence of both the first and the second respondent. The respondents do not deny that 140 units of solid material individually sealed in plastic weighing 134.96g contained methamphetamine

("tik") and that 50 tablets in a plastic bag together with 760g of solid material containing methaqualone (mandrax) wrapped in plastic bags, were found and seized by the police at the premises.

[12] The applicant contends that the substances referred to in the preceding paragraph and seized from the premises during the search operation are prohibited substances listed in Part II and III of Schedule 2 to the Drugs & Drug Trafficking Act. Section 4 of the Drugs & Drug Trafficking Act prohibits use and possession of any dependence-producing substance by any person except in circumstances set out in paragraph (b)(i) – (vi) of the section. Section 5 of the Drugs & Drug Trafficking Act, in turn, prohibits dealing in any dependence-producing substance except in circumstances set out in paragraph (b)(i) – (iv) of the section.

[13] Section 5 of the Drug & Drug Trafficking Act provides:

"No person shall deal in –

(a) any dependence-producing substance; or

(b) any dangerous dependence-producing substance or any undesirable dependence-producing substance."

In turn, section 1 of the Drugs & Drug Trafficking Act defines dealing, in relation to a drug, to include "performing any act in connection with the trans-shipment, importation, cultivation, collection, manufacture, supply, prescription, administration, sale, transmission or exportation of the drug".

[14] Constables Qethuka, Jacobs and Josias state in their evidence, in the form of affidavits, that once they were inside the premises, they saw the

first respondent emerge from a toilet where mandrax tablets were later found scattered on the floor and some floating in the toilet bowl. The first respondent denies this. He denies having emerged from the toilet whilst the police were at the premises. In as far as this aspect is concerned, the first respondent states that after he had been awoken by a loud noise, he jumped out of bed in the room in which he and the second respondent were sleeping, and ran into the passage towards the front door, dressed in sleep shorts and a T-shirt. In the passage he was confronted by armed police officers; that a shot gun was pointed at him and was, ultimately, ordered to lie down on the floor. He further denies that he had accompanied constables Qethuka and Jacobs to the backroom, which later turned out to be a toilet, where mandrax tablets were found lying on the floor and some floating inside the toilet pot. The first respondent thus does not dispute the presence of the drugs in the premises except that he, as a person, was not aware of the presence thereof when he came to the premises.

[15] In amplification of lack of knowledge of the presence of the drugs found at the premises the first respondent states in his answering affidavit that he arrived at the premises in point at about 22h30 during the night of 15 August 2006. He had about 18h00 earlier in the day been invited by the second respondent, who happens to be his girlfriend, to spend the night with her. The property is owned by the second respondent and is resident thereat. When he entered the premises on arrival there were no drugs displayed anywhere on the property. He went to the bedroom and put his clothes over the side of the wardrobe. He put the money, which was later seized by the police, on the middle section of the wardrobe where the mirror is and got into bed. He goes on to say that at no stage did he see any

drugs displayed in any of the bedrooms or in the lounge. In due course he fell asleep and was, in the course of the night, awoken by a loud noise caused by the police.

[16] In an attempt to distance himself from the drugs found in the premises, the first respondent comes up with a curious assertion that the drugs could possibly have been placed in the premises by dirty police officers involved in the search operation. This assertion is made against the background of overwhelming evidence by seven police officers of the circumstances under which the drugs were found in the premises. The first respondent denies having been observed emerging from the toilet; he denies having accompanied constables Jacobs and Qethuka to the toilet and further denies having accompanied constables Jacobs and Josias when they searched the sitting room. He denies that the search was done in his presence and alleges, instead, that the drugs were shown to him after the drugs had already been discovered by the police.

[17] The first respondent's response to the allegations levelled against him consists of a bare denial coupled with a claim that the drugs found in the premises could possibly have been placed in the premises by dirty police officers involved in the search operation. He does not state in his affidavit whether, after the drugs were found, he attempted to ascertain from the second respondent if she had any knowledge of drugs found in the premises and, if so, what the second respondent's explanation is about the presence thereof in the premises. For the first respondent's version of the evidence to be accepted one would have to reject the version, not only of Jacobs and Qethuka who state in their evidence/affidavits that the first

respondent was with them in the course of the search operation, but indeed the evidence of all the seven (7) police officers who were involved in the search operation.

[18] As far as the second respondent is concerned, the evidence shows that four plastic bags containing approximately 30 smaller plastic bags containing “tik” crystal meth were found in the en-suite adjacent to the bedroom she shared with the first respondent. These substances were found not only in her immediate vicinity but also in her presence; fifty mandrax tablets wrapped in paper towel in a wallet in her handbag were found in the bedroom she shared with the first respondent; an amount of R70,508-55 found in a “Game” plastic bag on the dressing table in the same bedroom she shared with the first respondent. The second respondent does not dispute these facts. All the second respondent does in her affidavit is merely to confirm the contents of first respondent’s affidavit that he arrived at the premises late at night; that no drugs were displayed in the premises on his arrival and that, therefore, the first respondent could not have been aware of the presence of the drugs in the premises. On the other hand, all that the first respondent states in his affidavit is that he cannot comment on the drugs found in the second respondent’s handbag and in the en-suite adjacent to the bedroom they shared. As regards the drugs found elsewhere in the premises all that the first respondent cares to say is his suspicion that he may have been set up by the police officers involved in the execution of the warrant.

[19] The first respondent’s claim of a set-up is difficult to understand. He claims not to be residing at the premises where the drugs were found. He

happened to have been at the premises where the drugs were found on an earlier invitation by the second respondent so that if the first respondent's version of his presence at the premises were to be accepted, a matter of the search warrant would be a sheer coincidence with the first respondent's presence at the premises when, in itself flies in the face of the very setup the first respondent claims.

[20] The drugs referred to in paragraph [18] were found in the premises situate at 24 Clifton Road, Muizenberg and in the presence of and in the immediate vicinity of both the first and second respondent. None of the respondent genuinely and unambiguously dispute that the drugs were found in the premises. All that the first respondent does is to deny that he had accompanied the police to the toilet where some of the drugs were found. Thus, the first respondent contends, against the overwhelming evidence of two police officials in the persons of constables Jacobs and Qethuka, that he was not present when the substances were found and that these were shown to him only after the police had discovered same. Thus, respondents provide no satisfactory explanation as regards the presence of the drugs in the premises. The absence of any satisfactory explanation on the part of the respondents as regards the presence of the drugs in the premises leads to one and the only inescapable inference: and that is both the first and the second respondents kept the drugs in the premises in point; that the drugs were kept in the premises under their control and, therefore, both the respondents were in possession thereof in contravention of section 4 of the Drugs & Drug Trafficking Act.

[21] These drugs were properly packaged in clear plastic bags; some were scattered on the floor and some were floating in the toilet bowl. Based on this evidence, it is reasonable to infer that the drugs were not intended for personal use but that the respondents were in possession thereof for purposes of dealing therein.

WAS CASH FOUND THE PROCEEDS OF UNLAWFUL ACTIVITY ?

[22] "Proceeds of unlawful activity" is defined as follows in section 1 of the Prevention of Organised Crime Act:

"any property or any service advantage, benefit or reward which was derived 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."

[23] In *National Director of Public Prosecutions v RO Cook Properties (Pty) Ltd* 2004(8) BCLR 844 (SCA) the Supreme Court of Appeal disagreed with the approach adopted by Griesel J in *National Director of Public Prosecutions v Seevnarayan* 2003(2) SA 178 (C) who considered that a literal approach of the definition of "proceeds of unlawful activity" would lead to absurd and grossly inequitable results and that a restrictive interpretation was imperative and ought to be preferred. In adopting this approach Griesel J relied on the short title of the Prevention of Organised Crime Act and noted that its long title suggested that the Act was intended to combat organised crime, money laundering and criminal gang activity. Instead, the Supreme Court of Appeal held that the approach suggested by Griesel J "radically truncates the scope of the Act", suggesting that portions of the long title of the Act left out by Griesel J, as well as the ninth paragraph of

the preamble, clearly show that the statute is designed to reach far beyond “organised crime, money laundering and criminal gang activities”. The Supreme Court of Appeal finally held that the statute clearly applies to cases of individual wrong-doing thus suggesting a wider interpretation to the one proposed by Griesel J.

SOURCE OF PROPERTY FOUND

[24] As has already been pointed out in paragraph [7] of this judgment, when the first respondent was asked about the source of the money found in the premises, he claimed that the money found were proceeds of his liquor business. This explanation prompted Thandeka Tryphinia Dzingwa, who, as has already been pointed out, is a superintendent in the SA Police Service stationed at the Western Cape Asset Investigation Task Team, to conduct an investigation as regards whether the first respondent was issued with a licence to operate a liquor business. However, per a statement, in the form of an affidavit, by Emerentia Fredrika Donaldson, an Inspector in the SA Police Service stationed at Muizenberg, it appeared that the first respondent was never issued with a licence to operate a liquor business at 24 Clifton Road, Muizenberg. This investigation thus excluded a lawful liquor business conducted at 24 Clifton Road, Muizenberg being a source of the amount of R70,508-55 found at the premises.

[25] However, in his answering affidavit, the first respondent adopts a complete change of front. In his answering affidavit, the first respondent disputes that he told the police that the cash found were proceeds of his liquor business and states that the cash seized was “earned from my ‘besigheid’”. The first respondent goes on to claim in his answering

affidavit that he is a 50% member in a Close Corporation TAKE NOTE Trading 219 CC, trading as Tiffany's Jazz Club and that the cash seized was given to him by his partner, Trevor Bosman, to make further purchase of stock; that the cash seized was advanced to him by his partner to purchase further stock, particularly hard liquor, and that, therefore, it was cash legitimately earned and not the proceeds of unlawful activity and/or instrumentality of an offence contemplated in Schedule 1 of the Prevention of Organised Crime Act.

[26] It should always be borne in mind that the cash seized was found in the same premises and, in particular, the same bedroom where part of the large quantity of drugs was found. This is the same amount of money which the first respondent claims was advanced to him by his business partner, Trevor Bosman, to purchase further stock. The first respondent does not explain in his answering affidavit whether the amount so advanced was drawn from the bank and, if so, to provide a withdrawal slip verifying specifically when such withdrawal was made. If not drawn from the bank, the first respondent does not explain if the amount so advanced was drawn from the till and, if so, how was it accounted for in the books of the Close Corporation together with evidence of such accounting. The first respondent does not explain if the amount so advanced resulted in a shortfall from the cash takings and, if it did, how such shortfall was accounted for; the first respondent does not explain what the total value of stock to be purchased was, specifically what brand of liquor was to be purchased and how the total amount to be used to purchase further stock is arrived at; and lastly no explanation as regards how it came about that the amount so advanced was put in a "Game" plastic bag.

[27] In matters such as the one before me, apart from dealing with the applicant's allegations to the full extent, it is incumbent on the respondents to advance credible evidence of the source of the cash seized. In the instance of this matter, a large sum of money such as the one seized from the premises was found at the same premises where a large quantity of drugs was seized. The first respondent advances no credible evidence as regards how the amount allegedly advanced to him by his partner was accounted for in the books of Close Corporation; whether the amount so advanced was withdrawn from the bank and, whether such withdrawal was by way of a cheque and, if withdrawn by way of a cheque, provide verification for such a withdrawal; the total amount of stock to be purchased and how the total amount of stock to be purchased is arrived at. Arising from all these unanswered questions, the only reasonable inference to be drawn on the facts of this matter is that the cash seized by the police, by virtue of its proximity to the drugs found and later seized, is an integral part of drug dealing.

[28] In his answering affidavit, the first respondent raises a number of issues which, in my view, are not substantiated by evidence, such issues ranging from a claim that he was set up by the police and that the law enforcement officials had conspired to trap him; failure by the applicant to file a statement by Mtshali despite the first respondent having had access to a sworn statement by Mtshali made to the police about the alleged drug dealing at the premises; and about the use of junior police officials and members of the Metro Police in applying for and executing a search warrant. None of the issues raised by the first respondent, either

individually or cumulatively, constitute an irregularity on the part of the police in executing the warrant and in no way support the first respondent's claim of innocent ownership of cash seized.

[29] In launching the application in the manner it did, the applicant relies on the offence of drug dealing in contravention of section 5 of the Drugs & Drug Trafficking Act, the latter being an offence referred to in Schedule 1 of the Prevention of Organised Crime Act; that the money sought forfeited to the State is the proceeds of unlawful activity contemplated in section 1 of the Prevention of Organised Crime Act. Based on the evidence before me, the first respondent has failed to establish innocent ownership of the money sought to be forfeited. The applicant, based on evidence before me, has succeeded to prove that the offence of drug dealing was committed. The applicant is thus entitled to the relief sought in terms of the Notice of Motion.

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

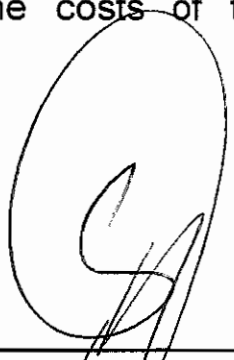
[30.1.] It is declared that the amount of R70,508-55, which is the subject of the Preservation Order granted on 19 September 2007, is forfeited to the State.

[30.2.] Upon this order becoming effective, the property shall vest in the State and *curator bonis* Lungelo Matiwane, is directed to realise the amount so forfeited. The *curator bonis* is further directed to submit his account to the Master of the High Court for his approval; thereafter to deduct his fees and disbursements as approved by the Master in respect of

the curatorship and to pay the balance into the Criminal Assets Recovery Account established in terms of section 63 of the Act.

[30.3.] The Registrar of this Court is directed to publish a notice in the Government Gazette as soon as practicable after the order is made.

[30.4.] The first respondent is ordered to pay the costs of this application.


A handwritten signature in black ink, consisting of a large, stylized 'N' and 'J' followed by 'Yekiso, J'. The signature is written over a horizontal line.

N J Yekiso, J