Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

Coram: TRAVERSO, DJP, LE GRANGE et FORTUIN, JJ

Case No: A236/10

In the matter between:

HILDA VAN DER BURG — **First Appellant**
EDWARD VAN DER BURG — **Second Appellant**

And

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS — **Respondent**

JUDGMENT DELIVERED ON 16 MARCH 2011

LE GRANGE, J:-

[1] This is an appeal against an order granted by Gassner AJ, for the forfeiture of an immovable property owned by the Appellants. The order includes a refrigerator and a large quantity of liquor which was seized from the immovable property.

[2] Mr. Derris, an attorney with rights of appearance in this Court, appeared for the Appellants. Mr. G M Budlender, SC appeared for the Respondent.

[3] The undisputed factual matrix underpinning this matter can be summarised as follows: The First and Second Appellants are married in community of property. They are the registered owners of erf 161658, Athlone, an immovable property which is situated at 25 A Birdwood Street, Athlone ("*the property*"). This property was bought by the Appellants in November 2000 for an amount of R169 000.00. A mortgage bond for R135 000.00 was registered against the property in favour of Standard Bank of South Africa. The market value of the property at the time of the forfeiture application during 2006 was approximately R350 000.00.

[4] In the same year (2006) Standard Bank of South Africa obtained judgment against the Appellants for payment of the amount of R139 538.43 plus interest, and an order declaring the property executable for the capital and interest.

[5] It is not in dispute that the property is situated in a dense residential area. The building on the property, a semi-detached house, consists of an open plan kitchen and living area, three bedrooms, a bathroom and passage. There is also a wooden and galvanised structure attached to the right side of the house. It is also not in dispute that liquor is usually ordered from and

served in the main house and the wooden structure is used as a service, sale and consumption area in the shebeen operation. Various police investigative operations concluded at the property revealed that the main house is used extensively to store liquor. Crates of liquor are also stored in the passage of the main house. Liquor is also refrigerated and stored in various different fridges in the house. One of the bedrooms is used as a stockroom for storing liquor. The Appellants live on the property together with their four minor children of various ages.

[6] The nearest school, St Raphaels Primary School, is approximately 30 meters away from the property. The entrance to the school is directly in line of sight of the property. Next to the school is St Mary's Roman Catholic Church which is approximately 100 metres away. Other places of worship and educational institutions within a 500 metre radius of the premises are the Pinkster Protestante Church, the New Apostolic Church, the Congregational Church and the Grassroots Education Centre. Approximately 900 metres away in Birdwood Street is the Star High School whose learners use Birdwood Street as a means to get to the railway station. These learners have to pass the Appellants' property in order to get to the railway station.

[7] Four licenced outlets exist within a radius of four hundred metres of the Appellant's property, namely The Crowded House, Liberty Liquors, Club Lenin and the Joy Restaurant and Sports bar. Liberty liquors have a bottle

store licence and the other three mentioned premises have special liquor licences in terms of which liquor can be consumed on the premises.

[8] It is common cause that the Appellants bought the property in November 2000 and from the very outset unlawfully used the property as a shebeen. It is not in dispute that the First Appellant applied in February 2002 for a liquor licence. In this application the First Appellant stated she had conducted the business of a "*tavern*" for the past two years. The First Appellant also mentioned in this application that she invested R 50 000.00 in the business and intends to invest a further R 20 000.00 in developing the property and furnishing the premises. The Appellants also earned an income from their fruit and vegetable stalls that amounts to approximately R 6000 per month.

[9] The public living in the area has repeatedly complained about the property being used as a shebeen. Mrs K Essa, an immediate neighbour, has written over 50 letters to various government departments in an attempt to bring an end to the unlawful selling of liquor from the property.

[10] Mrs Essa, in her complaints, described the conduct of the shebeen as follows:-

10.1 People enter the premises and leave with liquor that was purchased there. This occurs throughout the day and night.

10.2 Patrons sit and drink liquor in the carport on the premises and in the backyard of the premises. There are benches specifically put up for these patrons to consume their liquor.

10.3 On many occasions minors purchase liquor from the premises and consume liquor on the premises.

10.4 The shebeen generates an unendurable noise.

10.5 There are regular physical fights between the patrons and the Respondents often join the fracas.

10.6 Extremely vulgar and abusive language is commonplace on the premises.

10.7 Some of the patrons become so drunk that they collapse on the road on either Carrington or Birdwood Streets.

10.8 Patrons hurl bottles at each other, and also throw bottles against the walls surrounding Mrs Essa's property. They often fling empty liquor bottles into her yard.

10.9 Patrons urinate in full view of the public, in the yard of the premises, on the streets, and against the boundary wall.

10.10 Patrons trespass on Mrs Essa's property in order to gain access to the shebeen.

[11] It is common cause that the South African Police Services made numerous attempts to persuade or compel the Appellants to cease their unlawful activity. The police undertook at least 52 actions at the property in an attempt to stop the unlawful sale of liquor. These included, *inter alia* the searches, seizures and arrests that took place on the following dates:

111 2 November 2001;

11.2 3 May 2002;

11.3 9 August 2002;

11.4 24 August 2002;

11.5 6 September 2002;

11.6 9 October 2002;

11.7 18 December 2002;

11.8 15 March 2003;

11.9 12 August 2003;

11.10 9 January 2004;

11.11 13 August 2004

11.12 11 September 2004;

11.13 10 June 2005; and

11.14 16 June 2005.

[12] Some of these interventions resulted in convictions, and others did not. In each instance there is no dispute that liquor was being unlawfully sold on the premises.

[13] It needs to be mentioned that the police gave verbal and written warnings to the Appellants to cease the unlawful selling of liquor at the property. A verbal warning was given on 18 April 2002. Written warnings were given on the following dates:

13.1 23 April 2002;

13.2 1 May 2002;

13.3 22 October 2002;

13.4 10 January 2003;

13.5 2 September 2003;

13.6 11 November 2003;

13.7 18 November 2003;

13.8 21 November 2003;

13.9 17 December 2003;

13.10 6 January 2004;

13.11 23 January 2004;

13.12 21 April 2004;

13.13 28 June 2004;

13.14 8 June 2005;

13.15 28 June 2005;

13.16 8 November 2005; and

13.17 1 February 2006.

[14] The police in Athlone decided, due to lack of resources, to stop with further search and seizure operations at the property as conventional law enforcement strategies failed to have any effect on the Appellants.

[15] It was then that the National Directorate of Public Prosecutions (NDPP) decided to step in and launch an application for a preservation order in respect of the property. The NDPP obtained a provisional preservation order in June 2006. This order was made final in October 2006. The Appellants continued unabated with their unlawful activities despite the preservation order and further arrests, searches, and seizures were carried out in the months of August, September and November 2006 by the police.

[16] Against this factual background, the Court *a quo* decided in favour of the Respondent. In paragraphs [36] – [38] of the judgment the following is recorded:-

> *"[36] I am of the view that the respondents' undeterred contravention of s 154(1)(a) of the Liquor Act over many years falls firmly within the first extreme of offences categorised in National Director of Public Prosecutions v Vermaak (supra) in which the Supreme Court of Appeal emphasised that the primary purpose of a forfeiture order is remedial to cripple or inhibit criminal activity.*

[37] The remedial effect of a forfeiture order in the present matter would be that it would not only stop the respondents' contravention of s 154(1)(a) of the Liquor Act but it would also arrest the continuance of that activity by others in the ongoing enterprise. A forfeiture order would not only close down the illegal shebeen but would also convey the firm message to the respondents, to other owners of illegal shebeens and to the public at large, 'that the law does not turn a blind eye to the persistent and obdurate pursuit of criminal business and will act to demonstrate that [this] does not pay'.

[38] In my view the Mohunram case, on which the respondents relied, is distinguishable. Unlike, as in the Mohunram matter, there is no clear demarcation in this case between areas in the main house used for legitimate purposes and areas used to conduct the shebeen business. Although the added structure was exclusively used for shebeen purposes, major areas of the main house were integral to the shebeen business. It is so that the property also serves as the respondents' home. However, I have already dealt with the fact that they will not be rendered homeless by the forfeiture."

[17] In this appeal, Mr. Derris essentially advanced three main arguments. Firstly, the Court *a quo* erred in finding that a forfeiture order in terms of the immovable property was warranted as the offence of illegal sale of liquor is not an offence as contemplated in terms of Chapter 6 of the Prevention of Organised Crime Act 121 of 1998 ("POCA"). According to Mr. Derris, POCA only relates to *"organised crime offences"*, or similar gang-related criminal activity, and not to criminal activity conducted by individuals. Secondly, the Court *a quo* misdirected itself in finding that the property constituted an instrumentality of an offence as envisaged by POCA. Lastly, the forfeiture of

the property is manifestly disproportionate to the offence(s) that the Applicants committed.

[18] Mr. Budlender contended that on the undisputed body of evidence in this case it is overwhelmingly clear that the property of the Appellants is an instrumentality of the offence. Moreover, the Courts have repeatedly held that forfeiture is competent in matters unrelated to gang or similar activities. He also argued that conventional law enforcement strategies have failed to have any effect on the Appellants who continued unabated with their illegal activities. He argued that the forfeiture of their property is not disproportionate to the offences committed by the Appellants.

[19] It is now well accepted in our law that when a forfeiture order is sought a two-stage inquiry is undertaken. Firstly, it must be determined whether the relevant property constitutes an instrumentality of an offence. At this stage the focus is not on the owner's guilt or wrongdoing, knowledge or lack thereof, but on the role the property plays in the commission of the crime and whether a functional relationship between the property and crime has been established. At the second stage, it must be decided whether certain interests in the property should be excluded from the operation of the forfeiture order. It is at this stage of the inquiry that the proportionality requirement becomes appropriate. At the first stage the onus rests on the Applicant to prove on a balance of probabilities that the property constitutes the instrumentality of an offence or the proceeds of unlawful activities. Once

the onus is discharged, the onus shifts to the Respondents to prove why the property ought to be excluded from a forfeiture order. See National Director of Public Prosecutions v R Cook Properties (Pty) Ltd 2004 (8) BCLR 844 (SCA) at page 853 para [21] and National Director of Public Prosecutions v Parker 2006 (3) 198 (SCA).

[20] In *casu*, it is common cause that the Appellants have repeatedly contravened section 154(1) of the Liquor Act, no 27 of 1989 ("the Act"). In terms of section 163(1) of the said Act, any person who is guilty of an offence in terms of section 154(1)(a) shall on conviction be liable to a fine or to imprisonment for a period of not more than five years. Moreover, in terms of section 163(2) of the Act, any person who is convicted of an offence contemplated in section 163(1) within a period of five years after conviction of any offence contemplated in that subsection, shall be liable to double the fine or imprisonment which may be imposed for that offence, or to both that fine and that imprisonment.

[21] In terms of Schedule 1, item 33 of POCA, the following offences are included:-

> "...
>
> *33. Any offence the punishment wherefore may be a period of imprisonment exceeding 1 year without the option of a fine;*
>
> ..."

[22] The contention by Mr. Derris that the crimes committed by the Appellants are not offences referred to in Schedule 1 of POCA, as the Appellants never received a sentence of imprisonment of more than one year without the option of a fine, is in my view contrived. The wording in item 33 is clear and unambiguous. It refers to *"any offence the punishment whereof may be* (my underlining) *a period of imprisonment exceeding one year without the option of a fine"*. A period of direct imprisonment for at least one year is therefore not peremptory and simply inconsistent with the plain meaning of the wording of item 33. The offences the Appellants committed in terms of the Liquor Act do therefore fall squarely within the ambit of POCA.

[23] The further submission by Mr. Derris that "offences" in terms of Chapter 6 of POCA only relate to *"gang activity"* and not individual wrongdoing is also without merit. Our law is replete with authority that a forfeiture order is competent in matters where individual criminal conduct is involved by persons acting on their own or with a number of others. The *dictum* in the matter of National Director of Public Prosecutions v Van Staden and Others 2007(1) SACR 338 (SCA) is in my view apposite in this instance. At page 340 paragraph [1] the following was held:-

> *"It has been said, at times, that the purpose of the Prevention of Organised Crime Act 121 of 1998 is to combat the special evils that are associated with organised crime, but that is not entirely correct. That is certainly one of its purposes, and perhaps even its principal purpose, but as pointed out by this Court in National Director of Public Prosecutions v R O Cook Properties (Pty) Ltd; National Director of Public*

Prosecutions v 37 Gillespie Street Durban (Pty) Ltd and Another; National Director of Public Prosecutions v Seevnarayan, its provisions are designed to reach far beyond organised crime and apply also to cases of individual wrongdoing."

[24] In Mohunram and Another v NDPP (Law Review Project as *Amicus Curiae*) 2007 (4) SA 222 (CC), the majority judgment by Van Heerden AJ, again restated the position that chapter 6 of POCA is not only limited to gang-related crimes. At page 239 E - Van Heerden AJ, held the following: "*..I remain unconvinced by the LRP's contention that chapter 6 of POCA can reasonably be interpreted so as to apply only to so called 'organised crime offences'".* The Court *a quo's* approach in finding that the Appellant's criminal conduct falls within the ambit of POCA is therefore unassailable.

[25] The argument advanced by Mr. Derris that the Court *a quo* erred in finding the property of the Appellants was an instrumentality of the offences they committed needs closer scrutiny.

[26] Section 1 of POCA defines "*instrumentality of an offence*" as "*any property which is concerned in the commission or suspected commission of an offence.*" In Prophet v National Director of Public Prosecutions 2006 (2) SACR 525 (CC) at page 547 para [55] the correct interpretation and application of the *'instrumentality of an offence'* concept was fully considered and is it unnecessary to restate it. The determining question is:-

> *"....whether there is a sufficiently close link between the property and its criminal use, and whether the property has a close enough relationship to the actual commission of the offence to render it an instrumentality."*
> (See Cook's case *supra* at para [32])

[27] On the Appellants' own version the property was bought in November 2000 and from the very outset, it was unlawfully used by them as a shebeen. An illegal wooden structure was also added to the property to specifically facilitate the illegal sale and consumption of alcohol on the premises. The business of the shebeen is conducted from the house where liquor is sold and stored. A significant amount of Liquor is stored in one of the bedrooms and in the kitchen from where it is sold. The Liquor is usually ordered from the main house and sales are conducted from both the main house and the illegal erected wooden structure. The empty crates and bottles are stored in the illegal structure. The consumption of liquor also occurs there too.

[28] On a conspectus of the evidence *in casu* I am satisfied that it is established beyond doubt that the property was deliberately arranged, organised, furnished, adapted and equipped to enable or facilitate the Appellants' illegal activities. The property is also central to the success of the Appellants' illegal activity. The illegal use of the property occurred continuously for a period of more than six years. The Appellants persisted with their illegal activities even when a preservation order was obtained by the NDPP against the property. The spatial extent to which the property was

utilised for the illegal activity was considerable, as many parts of the house were used for the storing and selling of liquor. In my view, the conclusion is unavoidable that the property was a direct instrumentality to the offences the Appellants were committing and the Court *a quo* was correct in its finding in this regard.

[29] The final consideration in this matter is whether it would be disproportionate to forfeit the property of the Appellants worth approximately R 355 350 to the State. Our Higher Courts have consistently accepted that proportionality is a governing principle which imposes limits on how the powers granted under POCA may be exercised. In this regard see Mohunram *supra* at page 246 para [56] and the authority referred to therein.

[30] There is no doubt that civil forfeiture of property is a controversial mechanism. However, this law enforcement tool has been accepted by many countries all over the world as a legitimate mechanism to combat serious crime.

[31] The primary purpose and feature of forfeiture is to prevent further illicit use of property and by imposing an economic penalty, thereby rendering illegal behaviour unprofitable and to cripple criminal activity.

[32] I am in agreement with the comments of the author AJ Van der Walt that it is clearly essential that at no stage should the effects of civil forfeiture

be treated in *a 'predetermined, mechanistic manner – the rationality, fairness and justifiability of each case should be judged on its own merits and treated accordingly'."* See Civil Forfeiture of Instrumentalities and Proceeds of Crime and the Constitutional Property Clause (2000) 16 SAJHR 1 at page 45. It becomes therefore critical that a balance be struck "*between the public interest in effective crime fighting and the interest of private property owners affected by forfeiture laws.*" See Mohammed NO and Others v National Director of Public Prosecutions 2003 (1) SACR 286 (W) at page 306, para 57*d-e*.

[33] The proportionality assessment is a legal one, based on an evaluation of al the relevant factors in the full factual matrix of the particular case. The onus of establishing that all the requirements for a forfeiture order in terms of section 50 of POCA, including that of proportionality, have been met rests on the NDPP throughout. However, as some of the factual material relevant to the proportionality analysis will often be peculiarly within the knowledge of the owner of the property concerned, once a *prima facie* case has been established by the NDPP, such owner would in the usual course be well-advised to place this material before the court. This does not, however, shift the onus of proof to the owner in question; it merely places on the owner an evidential burden or, as it is sometimes called, a burden of adducing evidence in rebuttal. The ultimate task of the Court is to ensure that the deprivation of property that will result from a forfeiture order is not arbitrary.

[34] The facts in this matter are of a rather peculiar nature. Mr. Derris, in advancing his argument that a forfeiture is disproportionate in this instance, contended that the offence of unlawfully selling liquor, is not one of the extreme offences and the maximum penalties in terms of the Liquor Act were never imposed upon the Appellants.

[35] Mr. Derris may be correct that the offence of selling unlawful liquor may be an ordinary crime, but the facts in this matter firmly demonstrate that this is no ordinary matter. The conventional penalties imposed and police operations proved wholly inadequate to prevent or inhibit the Appellants from continuing to run their shebeen at the property in contravention of the Liquor Act. Notwithstanding the almost 52 police operations during November 2001 to June 2005 and further police operations after the granting of the preservation order, the Appellants continued undeterred with their criminal enterprise. The allegations by the NDPP that "*conventional law enforcement strategies have failed to have any effect on the Respondents, who continue regardless in unashamed contempt for the law*" were also not disputed by the Appellants. There is also no indication in their answering affidavits that they have any intention to close the shebeen. In light of all of this, the Appellants made crime their business and will continue do so.

[36] The further suggestion by Mr. Derris, that the maximum penalty in terms of the Liquor Act may have been sufficient to stop the Appellant's from their illegal activities and that a forfeiture order is in fact a "topping up" of the

penalties provided for by the Liquor Act, is with all respect contrived. The numerous police actions over a period of six years and the different court sanctions, including a preservation order from this Court did not stop the Appellants from continuing with their illegal shebeen enterprise. Moreover, nowhere in the provisions of POCA is it a prerequisite that the maximum penalty of direct imprisonment of persons must first be sought before a forfeiture order can be obtained against them. The primary purpose and feature of forfeiture remains the imposition of an economic penalty, thereby rendering illegal behaviour unprofitable and crippling or inhibiting criminal activity.

[37] The Court *a quo* was mindful of the impact the order for forfeiture may have on the Appellants minor children. In para [31] of the judgement, Gassner AJ, in my view, properly considered the minors' position. The Appellants in their answering affidavits never raised the issue that they will be unable to provide alternative accommodation for their children. Their major concern was that their children may be deprived of their inheritance. At page 420 of the record the following is recorded "15...*A forfeiture order will have the effect of depriving our children of their inheritance".* In terms of the provisions of s 28(1)(c) of our Constitution, every child has a right, *inter alia,* to "*basic shelter."* The Appellants earns approximately R 6000 per month from their fruit and vegetable stalls. They are clearly business orientated persons. I am satisfied they will not be rendered destitute and should be in a position to find alternative accommodation for themselves and their children.

[38] The evidence in this case overwhelmingly proves that the offence the Appellants committed was in the course of an ongoing criminal enterprise. It is also not in dispute that an employee of the Appellants was brutally murdered in the house and both Appellants were arrested for this crime. The ongoing criminal enterprise of the Appellants has a severe impact on their neigbours who have repeatedly complained about the social deterioration of their neighbourhood as a result of the illegal shebeen. The neighbours' complaints are not frivolous. It appears minors have repeatedly frequented the property to purchase liquor. A primary school is situated 30 metres away and in direct line of sight of the Appellants' property. Other places of worship are also in close proximity, including a high school. The complaints also relate to severe anti-social behaviour when patrons are drunk. The growing concern about the way major substance abuse related crimes continues to threaten and affect the everyday lives of ordinary members of the community, is a factor that cannot be ignored by this Court. There is a duty upon all, within the framework of our constitutional democracy, to deter the persistent and continuous illegal enterprises of criminals who have little respect for the rule of law and contribute to society's ills and ultimate deterioration of our neighbourhoods.

[39] On a conspectus of all the evidence, this is no ordinary matter and must rank as one of the extreme cases where crime has become the Appellants business. The forfeiture of the property and movables is therefore

not disproportionate to the purposes which POCA aims to achieve. It follows, for the reasons stated herein, the appeal cannot succeed.

[40] In the result the following order is proposed.

The appeal is dismissed with costs.

LE GRANGE, J

I agree and it is so ordered.

TRAVERSO, DJP

I agree.

FORTUIN, J