REPORTABLE

Republic of South Africa

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

CASE NO: A338/2010

In the matter between:

THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	**Appellant**
and	
EDWARD JOHN VAN DER MERWE	**1st Respondent**
RUGAYA SOLOMONS	**2nd Respondent**

JUDGMENT DELIVERED: 24 FEBRUARY 2011

BINNS-WARD J:

1]The National Director of Public Prosecutions ('the NDPP'), who is the appellant before us, applied at first instance, in terms of s 48(1) of the Prevention of Organised Crime Act 121 of 1998 ('the Act'), for an order declaring forfeit to the State certain property which had been earlier made subject to a preservation order in terms of s 38 of the Act. The property concerned comprised of (i) an immovable property registered in the name of the second respondent, and (ii) the

sum of R115 862, 35, being the total of various amounts of cash which had been seized by the police during raids made at the address of the immovable property in the course of anti-narcotic operations. The first respondent, who is alleged to be the lessee of the fixed property, claimed that the cash represented the takings of a taxi business that he said he operated from the premises. The second respondent is the first respondent's former wife. She and the first respondent had lived together at the immovable property for some years, but had moved to another address a year or two before their separation.

2]The NDPP alleged that the immovable property was susceptible to forfeiture because it was an '*instrumentality of an offence*'[1] as defined in s 1 of the Act. It was alleged that the property was used for the purposes of the unlawful dealing in drugs, which is one of the types of offence listed in Schedule 1 of the Act. He sought a forfeiture order in respect of the cash on the basis that the money comprised the '*proceeds of unlawful activities*'.[2] The court of first instance granted a forfeiture order in respect of the cash, but refused the application in respect of the immovable property. With the leave of the court *a quo*, the NDPP appeals against the refusal of the application for the forfeiture of the fixed property; and the first respondent cross-appeals against the order declaring the cash forfeit and the attendant adverse costs order. In the court *a quo* the second

1 The term '*instrumentality of an offence*' is defined in s 1 of the Act to mean '*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*'.
2 '*Proceeds of unlawful activities*' is defined in s 1 of the Act to mean '*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*'.

respondent had been represented by the same counsel who appeared there on behalf of the first respondent.[3] There was, however, no appearance on behalf of the second respondent before us to oppose the NDPP's appeal.

3]Proceedings in the court *a quo* took place in two stages. At the first stage, in a judgment given on 31 December 2007 ('the first judgment'), the court determined that the immovable property was an instrumentality, as defined, but having been requested by the respondents' counsel to make an order of the nature made by the Supreme Court of Appeal ('the SCA') in paragraph 2 of the order made in *National Director of Public Prosecutions v Parker* 2006 (3) SA 198 (SCA),[4] the court, following the wording of the order made in *Parker*, ordered that '*the respondents' knowledge insofar as the defences provided for in s 52(2A)(a) and (b)*, *the so-called 'innocent owner defences', are concerned*' be referred for the hearing of oral evidence. The learned judge also referred what he considered to be relevant disputes of fact in respect of the characterisation of the cash as '*proceeds of unlawful activities*' to oral evidence.

4]Before turning to deal in turn, first with the appeal and then with the cross-appeal, it will be useful - particularly in view of what I consider to have been the misdirected grant of an order referring issues that would arise for consideration in terms of s 52 of the Act for oral evidence when there had been no application by the respondents in terms of s 48(4)(b) for an order in terms of that provision - to

3 Both the appellant and the first respondent were represented on appeal by different counsel from those by whom they had been represented in the court *a quo*.
4 See para 25 of the judgment in *Parker*.

contextualise the nature of the proceedings at first instance within the framework of the Act. The exercise is also useful to assist an understanding of the basis of the criticism later in this judgment of the court *a quo*'s treatment of the evidence concerning the second respondent's alleged ignorance that her property was being used for the purposes of drug dealing, and the apparent effect of that treatment on the court *a quo*'s approach to determining whether or not the NDPP had discharged the *onus* in respect of showing that a forfeiture order was a proportionately appropriate means of achieving the objects of the Act.

5]The proceedings in the court *a quo* occurred in terms of the provisions of chap 6, which is comprised of ss 37 - 62 of the Act. The purpose of the Act and the role within it of chap 6 were explained by Ackermann J in *National Director of Public Prosecutions and Another v Mohamed NO and Others* 2002 (4) SA 843 (CC) at para 14-22. At para 16-18 of the Constitutional Court's judgment the learned judge made the following observations of particular relevance in the current matter:

> [16] The present Act (and particularly chaps 5 and 6 thereof) represents the culmination of a protracted process of law reform which has sought to give effect to South Africa's international obligation to ensure that criminals do not benefit from their crimes. The Act uses two mechanisms to ensure that property derived from crime or used in the commission of crime is forfeited to the State. These mechanisms are set forth in chap 5 (comprising ss 12 to 36) and chap 6 (comprising ss 37 to 62). Chapter 5 provides for the forfeiture of the benefits derived from crime but its confiscation machinery may only be invoked when the 'defendant' is convicted of an offence. Chapter 6 provides for forfeiture of the proceeds of and instrumentalities used in crime, but is not conviction-based; it may be invoked even when there is no prosecution.

> [17] …… Chapter 6 provides for forfeiture in circumstances where it is established, on a balance of probabilities, that property has been used to commit an offence, or constitutes the proceeds of unlawful activities, even where no criminal proceedings in respect of the relevant crimes have been instituted. In this respect, chap 6 needs to be understood in contradistinction to chap 5 of the Act. Chapter 6 is therefore focused, not on wrongdoers, but on property that has been used to commit an offence or which constitutes the proceeds of crime. The guilt or wrongdoing of the owners or possessors of property is, therefore, not primarily relevant to the proceedings.
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> [18] 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).

Proceedings in an application for forfeiture of property in terms of chap 6 of the Act are civil in nature and subject to the rules of evidence applicable in civil proceedings.[5]

6]As observed in *National Director of Public Prosecutions v RO 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* [2004] 2 All SA 491 (SCA) at para 14, '*The purpose of Chapter 6's forfeiture provisions is signalled in the part of the Act's Preamble that states that "no person should benefit from the fruits of unlawful activities, nor is any person entitled to use property for the commission of an offence". The "use" of property "for" the commission of crime denotes a relationship of direct functionality*

5 See s 37 of the Act.

between what is used and what is achieved.' Regard to the relevant purpose of the Act impels a relatively restricted construction of the term '*instrumentality of an offence*'.[6] Property only incidentally connected with the commission of an offence is thus not subject to forfeiture in terms of the provision.[7] The implications of the property clause in the Bill of Rights, which proscribes any law that purports to permit the arbitrary deprivation of property, also impel a rationally purposive rather than a strictly literal application of the relevant provisions of the Act.[8] By construing the applicable provisions in a manner that implies the requirement of a proportionality enquiry, the operation of the forfeiture provisions in a manner that could offend against s 25 of the Constitution is avoided.

7]Forfeiture in terms of chap 6 of the Act, while it inevitably bears with it a measure of penal effect, is primarily intended to achieve socially remedial objectives[9]. A non-exhaustive list of such objectives was identified at para 18 of *Cook Properties* : *'(a) removing incentives for crime; (b) deterring persons from using or allowing their property to be used in crime, (c) eliminating or incapacitating some of the means by which crime may be committed ("neutralising"…property that has been used and may again be used in crime); and… (d) advancing the ends of justice by depriving those involved in crime of the property concerned*'. That is why, notwithstanding its undeniably penal

6 The defined meaning of the term is set out in fn 1, above.
7 Cf. *Prophet v National Director of Public Prosecutions* 2006 (1) SA 38 (SCA); 2005 (2) SACR 670; [2006] 1 All SA 212) at paras 26-27 and *Cook Properties*, supra at paras 13-14.
8 Cf. *Prophet v National Director of Public Prosecutions* 2007 (6) SA 169 (CC); 2006 (2) SACR 525; 2007 (2) BCLR 140, at para 61.
9 Described by van Heerden AJ in *Mohunram and Another v National Director of Public Prosecutions and Another (Law Review Project as amicus curiae)* 2007 (4) SA 222 (CC) at para 57 as '*broader societal purposes served by civil forfeiture*'.

effects, the primary focus in using forfeiture of property as a means under civil law of achieving the remedial objects of chap 6 is not on the guilt or wrongdoing of the owners or possessors of the property liable to forfeiture, but on the functional role of the property in the commission of criminal offences, or the character of the property as the proceeds of unlawful activities, as the case might be.

8]In accordance with the procedural order provided in chap 6,[10] the proceedings in the court *a quo* commenced with an application by the NDPP in terms of s 38 for a preservation order. After the prescribed notice of the making of the preservation order had been given, the application in terms of s 48(1) for a forfeiture order followed on notice to those parties who had entered an appearance in terms of s 39(3) of the Act.

9]Any person who has an interest in the property which is the subject of a forfeiture application has the right, in terms of s 48(4)(a), to oppose the making of the order, or, in terms of s 48(4)(b), to apply for an order excluding the interest from the operation of the forfeiture order, or varying its operation.[11] The nature of the order that may be made on application in terms of s 48(4)(b) is provided for in

10 An admirably succinct summary of the procedural order insofar as relevant in the current matter is afforded in *National Director of Public Prosecutions v Van Staden and Others* [2007] 2 All SA 1 (SCA) at para 3.

11 Section 48(4) of the Act provides:

> *Any person who entered an appearance in terms of section 39 (3) may appear at the application under subsection (1)-*
> *(a) to oppose the making of the order; or*
> *(b) to apply for an order-*
> *(i) excluding his or her interest in that property from the operation of the order; or*
> *(ii) varying the operation of the order in respect of that property,*
> *and may adduce evidence at the hearing of the application.*

s 52 of the Act. The consideration of any application in terms of s 48(4)(b) by a respondent claiming exclusionary relief occurs in 'the second stage of the proceedings' referred to by Ackermann J at para 18 of *Mohamed*, quoted above.[12] [13] A person seeking an order in terms of s 52 (and thereby raising what has been loosely called[14] the 'innocent owner defence')[15] must satisfy the court on a balance of probabilities of the existence of the requirements set out in s 52(2)[16] (in respect of the 'proceeds of unlawful activities'), or in s 52(2A)[17] (in

12 At para Error: Reference source not found.

13 The label '*second stage of the proceedings*' is firmly established, but it can be confusing because the application for a preservation order and the subsequent application for a forfeiture order are also sometimes spoken of as the first and second stages, respectively, of proceedings in terms of chap 6 of the Act. And in matters in which there is no application for exclusionary relief in terms of s 52 of the Act, the enquiry into whether a forfeiture order is a proportionately appropriate remedy in respect of property found to be an 'instrumentality of an offence' can be regarded as a stage in the proceedings. (In *Cook Properties*, in which because the property in question was found not to be an 'instrumentality it was not necessary to consider proportionality, the postulated proportionality enquiry was referred to as '*the final stage*'.)

14 See *Cook Properties* at para 24; *Mazibuko and Another v National Director of Public Prosecutions* 2009 (6) SA 479 (SCA) at para 40.

15 *National Director of Public Prosecutions and Another v Mohamed NO and Others* 2002 (4) SA 843 (CC) at para 18. The label '*innocent owner defence*' may have been inspired by the sub-heading to 18 U.S.C §983(d). (The text of the USC is accessible at http://law.cornell.edu/uscode/html .) In terms of the US Code, the matters covered in terms of s 52(2A) of the Act fall to be raised as defences proper in civil forfeiture proceedings, and not by means of an application for an exclusion order. In Australia, by contrast, affected interest holders are required to apply, by way of a similar procedure to that which applies in this country, for the exclusion of their interests in property liable to be declared forfeit in terms of the Proceeds of Crime Act 2002 (Commonwealth).

16 Section 52(2) of the Act provides:

> *The High Court may make an order under subsection (1), in relation to the forfeiture of the proceeds of unlawful activities, if it finds on a balance of probabilities that the applicant for the order-*
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> *(a) had acquired the interest concerned legally and for a consideration, the value of which is not significantly less than the value of that interest; and*
>
> *(b) where the applicant had acquired the interest concerned after the commencement of this Act, that he or she neither knew nor had reasonable grounds to suspect that the property in which the interest is held is the proceeds of unlawful activities.*

17 Section 52(2A) of the Act provides:

> *The High Court may make an order under subsection (1), in relation to the forfeiture of an instrumentality of an offence referred to in Schedule 1 or property associated with terrorist and related activities, if it finds on a balance of probabilities that the applicant for the order had acquired the interest concerned legally, and-*
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> *(a) neither knew nor had reasonable grounds to suspect that the property in which the interest is held is an instrumentality of an offence referred to in Schedule 1 or property associated with terrorist and related activities; or*
>
> *(b) where the offence concerned had occurred before the commencement of this Act, the applicant has since the commencement of this Act taken all reasonable steps to prevent the use*

respect of property characterised as 'an instrumentality of an offence'). Section 52 of the Act thus burdens a respondent asserting the so-called 'innocent owner defence' with what has been referred to on occasion as a 'reverse *onus*'.[18] The 'innocent owner defence' is, however, not a defence, properly so called, because it does not arise to be asserted against the entitlement of the NDPP on the facts to a forfeiture order, but rather by way of an application for an order excluding the affected party's interest from the effect of a forfeiture order to which the NDPP has proven an entitlement.[19] It is thus in the second stage of the proceedings, if it is reached, that the owner or affected interest holder's innocence or culpability arises becomes the focus of enquiry, and the *onus* is on such person to establish his or her innocence or lack of culpability.[20]

10]In the context of a matter such as the present case, in which the primary issues were the character of the subject property as either the '*instrumentality of an offence*' or, in respect of the cash, the '*proceeds of unlawful activities*', the relevant bases for opposition in the sense contemplated by s 48(4)(a) of the Act would be founded in grounds to oppose fixing the property under the Act with either of those statutory labels. Although the word '*or*', between the provisions of s 48(4)(a) and s 48(4)(b) might on the face of it suggest that a respondent in an

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of the property concerned as an instrumentality of an offence referred to in Schedule 1 or property associated with terrorist and related activities.

18 *Prophet* (CC) supra, at para 27.

19 This seems to me to follow from the words '*applicant for the order*' in the introductory part of s 52(2) and s 52(2A) respectively and in s 52(3)(a) and (b). The provisions of s 52(3) also create a peculiar procedure which is inconsistent with the procedure that would be followed in respect of the raising of a defence by a respondent on ordinary motion proceedings.

20 The incidence in the Act of an *onus* on the owner or other affected interest holder to prove innocence or reasonable ignorance in order to avoid civil forfeiture is not dissimilar to that provided in equivalent legislation in other parts of the world; in the USA and Australia, for example.

application brought by the NDPP in terms of s 48(1) must make an election as to which of the two courses provided in the respective paragraphs of the provision to follow, it seems to me that it would be permissible for a respondent to oppose a forfeiture application in the manner provided for in paragraph (a), and also, contingently on the failure of its opposition, to avail of paragraph (b) to seek exclusionary relief in terms of s 52. In the current matter the respondents contended that the property was used as the base for a taxi business and that the cash found there was generated in the conduct of such business. The essence of the opposition to the application for forfeiture was that the incidents of drug-dealing or possession of drugs that had occurred at the property were merely incidental and the manifestations of the private misconduct of delinquent employees. The respondents did not apply in terms of s 48(4)(b) for an exclusion order.

11]A High Court's power to make a forfeiture order in terms of s 48(1) read with s 50 of the Act is a discretionary one in the broad sense of the concept explained in *Knox D'Arcy Ltd and Others v Jamieson and Others* 1996 (4) SA 348 (A) at 360D-362G.[21] This court's ability to interfere on appeal with the decision made by the court of first instance is therefore less constrained than in the case in which the court of first instance has exercised its discretion in the strict or narrow sense. This means that this court may substitute its own view for that of the court below if its view of the merits impels a different outcome to the case. It will, of course, do so with due consideration of its role as an appellate court and will

21 See also *Hix Networking Technologies v System Publishers (Pty) Ltd* 1997 (1) SA 391 (A) ([1996] 4 All SA 675) at 401G-402C.

interfere only if it concludes that the decision of the court of first instance was wrong.

12]The wide discretionary nature of the High Court's power in treating with a forfeiture application in terms of the Act [22] is manifest in the fact that a decision to grant or refuse to make an order is made upon a weighing up of any number of relevant disparate and incommensurable considerations arising from the peculiar facts of a given case to determine whether the means of forfeiture is a rationally and proportionately appropriate manner of achieving the ends of the Act.[23] Thus, even in a matter in which an affected party does not seek an exclusion order in terms of s 52, the effect of any forfeiture on the respondents is a matter that will generally be taken into account as part of the proportionality enquiry.[24] The very availability of the remedy of an application for an exclusion order is also a factor that bears relevance in any proportionality enquiry.

13]The consideration of the effect of a forfeiture on a respondent as part of the proportionality enquiry in the first stage of the proceedings bears a quite different character from that which arises in the context of 'the innocent owner defence'. The innocence or guilt or culpability of the respondent plays no role in the consideration in the proportionality enquiry.[25] The relevant consideration in the

22 The discretionary nature of the power, notwithstanding the literary import of the statute's language, which, on an indiscriminative reading, might be construed as peremptorily obliging the court to make a forfeiture order, was identified in *Prophet* (SCA) supra, at paras 30 and 37, subsequently confirmed by the Constitutional Court in *Prophet* (CC) supra, at para 58-61.
23 Cf. e.g. *Van Staden* supra, at para 4.
24 An example of such a consideration is afforded in *National Director of Public Prosecutions v Geyser* [2008] 2 All SA 616 (SCA); 2008 (2) SACR 103.
25 See *Parker* at paras 22 and 41; *Cook Properties* at paras 19-21.

proportionality context is whether the effect of a forfeiture on the respondent, irrespective of the latter's blameworthiness or innocence, might not show that a *civil* forfeiture order would in the circumstances be a disproportionate measure to achieve the legislation's ends.[26] *Prima facie* that would be the case when the personally punitive effect of the postulated forfeiture would materially outweigh the measure of achievement of the broader societal purposes at which the remedy of civil forfeiture is directed.[27]

14]For reasons that will become apparent in the discussion of the current matter, below, it is important for a court seized with an application for forfeiture under chap 6 of the Act to be astute to the difference between the nature of the consideration of the respondent's position in regard to the effect of a forfeiture in the context of the proportionality enquiry and the nature of the consideration of the case of the respondent who seeks to satisfy the requirements of an application in terms of s 48(4)(b) for an exclusion order in terms of s 52. The dichotomy between these discrete undertakings is obviously important in the determination of whether the applicable *onus* has been discharged.

15]The NDPP is burdened with the *onus* of proving an entitlement to a forfeiture order pursuant to an application by that functionary in terms of s 48(1) of the Act. As is generally the position in regard to a true *onus*, the incidence of which is

26 Cf. V*an Staden* supra, at paras 8-9 and *Geyser* supra, at para 19.
27 The SCA's judgment in *National Director of Public Prosecutions and Others v Vermaak* [2008] 1 All SA 448 (SCA) affords a useful illustration of how our courts are able by means of a proportionality enquiry to refuse to declare an instrumentality forfeit when forfeiture in terms of chap 6 of the Act is sought in circumstances in which the effect would be '*little more than an additional* [criminal] *penalty*' without any meaningful attendant achievement of the remedial societal objects of the legislation.

fixed by law, nothing in the character of a particular case can shift that *onus* to the other party. The ambit of the *onus* on the NDPP in all forfeiture applications, irrespective of whether or not the respondent claims an exclusionary order in terms of s 52, includes the *onus* of establishing on a balance of probabilities that the remedy sought is proportionate, in the context of realising the objects of the Act, to the ends sought to be achieved by its grant – and therefore, by implication, would not amount to an arbitrary deprivation of property. The case of the respondent who applies for exclusionary relief in terms of s 48(4)(b) read with s 52 of the Act falls to be considered only if it is found that the NDPP has discharged the *onus* in the application in terms of s 48(1). That much follows from the wording in s 52(1) to the effect that a court may exercise the power to make an exclusion order '*on application…and when it makes a forfeiture order*'. Because the ambit of an exclusion order might on the peculiar facts of a case be wide enough to render the making of a forfeiture order nugatory, [28] the words '*when it makes a forfeiture order*' fall to be construed to denote '*when a forfeiture order is liable to be made*'.

16]When, pursuant to an application in terms of s 48(4)(b), a second stage of proceedings occurs in a chap 6 forfeiture application, both stages must be decided *pari passu*. This is because of the condition (i.e. '*subject to section 52'*) to which the power to make a forfeiture order in terms of s 50(1) is subject. This characteristic of the procedure does not, however, derogate from the effect of the provisions that a respondent's case for exclusionary relief in terms of s 52 of the

28 Cf. *Cook Properties* at para 22.

Act in the so-called second stage falls to be considered quite discretely from the matters germane to the determination of the first stage.

17]The discrete character of the second stage of the proceedings is underscored by the difference in the incidence of the *onus* in that stage. In the second stage of the proceedings the *onus* is, as mentioned, on the party applying for exclusionary relief to prove that the requirements described in s 52(2), s 52(2A)[29] and - if applicable on the facts - s 52(3), have been satisfied. Should a respondent who could have availed of the right to claim an exclusion order fail to exercise it by not bringing an application for relief in terms of s 52 of the Act, such failure does not operate to make evidence about the innocence or reasonable ignorance of the respondent that would have been relevant in the second stage somehow relevant by default in the determination of the first stage, nor, in a case in which the forfeiture of the instrumentality of an offence is sought, does such failure by the respondent burden the NDPP with proving that the owner or other affected respondent knew or should have known that the property was an instrumentality, or that it had not taken all reasonable steps to prevent the use of the property as an instrumentality.

18]In matters in which the material evidence is on paper, the discrete nature of each of the stages, as aforementioned, has implications in respect of the application of the *Plascon-Evans* rule.[30] The NDPP is the applicant in the s 48(1) application for relief in terms of s 50(1) in the first stage of the proceedings and

29 The provisions of s 52(2) and s 52(2A), respectively, are set out above in fn. 16 and 17.
30 *Plascon-Evans Ltd v van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (AD) at 634E-635C.

the affected respondent in the s 48(1) application is the applicant in terms of s 48(4)(b) for relief in terms of s 52(1). The position is quite distinguishable from a matter in which a defence, properly so-called, in respect of which the respondent bears the *onus*, such as extinctive prescription, or justification - as in the example of *Adbro Investment Co Ltd v Minister of the Interior* 1956 (3) SA 345 (A) at 349 used by Rabie ACJ in *Ngqumba/Damos NO/ Jooste v Staatspresident* 1988 (4) SA 224 (A) at 262B-D - is raised in motion proceedings.[31] That, no doubt, explains Nkabinde AJA's finding in *National Director of Public Prosecutions v Parker* 2006 (3) SA 198 (SCA) at para 22, that the property owner's protestations of '*lack of knowledge*' in affidavits considered by the court in the first stage of the forfeiture application proceedings had '*no bearing*' in the first stage enquiry and '*in so far as they relate*[d] *to the first stage inquiry, d*[id] *not, in any event, establish any material dispute of fact*'. The *Plascon-Evans* rule thus falls to be applied with due regard to the fact that in the second stage in the proceedings the court is considering a second application by a different applicant.[32] That both applications arise within the ambit of the single proceedings contemplated by s 48(3) of the Act does not derogate from this conclusion; the position is closely analogous to that which obtains when an application and a counter-application in terms of rule 6 of the Uniform Rules are heard at a single sitting and determined *pari passu*.

31 The description of the second stage of the proceedings as being concerned with the 'innocent owner *defence*' is a label of convenience, hence it being described in *Cook Properties* (at para 24) as a 'loosely' made reference.

32 Cf. *Luster Products Inc v Magic Style Sales CC* 1997 (3) SA 13 (A) ([1997] 1 All SA 327) at 21E-H (SALR); *Triomed (Pty) Ltd v Beecham Group plc* 2001 (2) SA 522 (T) ([2001] 2 All SA 126) at 561C-D (SALR). The statement by Nkabinde AJA in *Parker* at para 23 that a respondent's application for exclusionary relief falls to be decided on the facts averred by the respondent and on those alleged by the NDPP which the respondent admits was *obiter*, and in my respectful view, *per incuriam*.

19]The rationale for the *Plascon-Evans* rule was explained in the Appellate Division's judgment in *Ngqumba* supra, loc cit as being to exclude the granting of final relief to an applicant who chooses to proceed on motion in a matter in which material disputes of fact might reasonably be anticipated. Motion proceedings are prescribed in terms of the relevant provisions of Chapter 6 of the Act for both forfeiture orders and orders for exclusion of interests from the effect of forfeiture orders. Accordingly, it would be inappropriate for a court to penalise an applicant under those provisions for using motion proceedings notwithstanding that relevant disputes of fact might be eminently foreseeable. On the contrary, the court will always accede to a request for such disputes on the papers to be referred for oral evidence. If the party applying for an exclusion order fails to adduce persuasive oral evidence in respect of disputes of fact on the papers arising from that party's application in terms of s 48(4)(b), it is that party, and not the NDPP, who must bear the adverse consequences of the application of the *Plascon-Evans* rule.

20]As mentioned, the second respondent did not apply in terms of s 48(4)(b) for an exclusion order in terms of s 52. The learned judge appears to have considered, however, that his finding that the property was an instrumentality made it appropriate, even in the context of their having made only flimsy and unconvincing protestations of ignorance in their affidavits opposing the forfeiture order, to afford the respondents the opportunity to seek exclusionary relief. He therefore made an order at the conclusion of a first stage hearing providing (in para 3 thereof):

> The immovable property in question….having been found to be an instrumentality of an offence, and there being a dispute on the affidavits on the issue of the respondents' involvement in illegal activities at the property and the respondents' knowledge insofar as the defences provided for in s 52(2A)(a) and (b) are concerned, the matter is referred for the hearing of oral evidence on that issue.

The judge's reference of the identified issues to oral evidence was underpinned by an understanding that the evidence on the affidavits had to be treated at both stages indiscriminately. This much was apparent from paragraph 10 of the first judgment:

> The applicant is seeking final relief on notice of motion on affidavit evidence. The matter must therefore be approached on the basis set out in *Plascon-Evans Ltd v van Riebeeck Paints (Pty) Ltd* [1984 (3) SA 623 (AD) at 635] on the facts stated by the respondents together with the facts as stated by the respondents together with the facts in the applicant's affidavits that are admitted and those facts, it is clear, that cannot be denied. In addition, where the allegations or denials of the respondents are so far fetched or clearly untenable the Court will be justified in rejecting them merely on the papers. This applies to disputes of fact in both stages of the enquiry, despite the fact that in regard to the second stage, the respondents are saddled with an *onus*. [Ngqumba/Damos NO/ Jooste v Staatspresident 1988 (4) SA 224 (A) at 260H-263H]
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> (The passages between square brackets are the content of footnote references at the indicated places in the main text.)

For the reasons discussed above, this approach was incorrect in my respectful view.

21]The reference of the forfeiture application by the court of first instance to a

second stage, when there had been no application for an exclusion order, was not indicated. As mentioned earlier,[33] it was requested by the respondents' counsel, apparently inspired by the course manifested in para 2 of the order made by the SCA in *Parker*. In my view the remittal to oral evidence directed in terms of para 2 of the order made in *Parker* should not be misconstrued as having been intended to derogate from the scheme of the relevant provisions of the Act. Had there been any intention by the SCA to hold that the innocent owner defences could be raised absent any form of application in terms of s 48(4)(b) of the Act, it would no doubt have stated any such conclusion - which would be at odds with the literal import of the relevant statutory provisions - clearly. Significantly, it did not.

22]The only issue before the SCA in *Parker* was the High Court's decision that the property in question in that matter was not an instrumentality. At para 23 of *Parker* it was recorded that the respondent had not (expressly) applied for an exclusion order. The SCA nevertheless considered it '*appropriate*' to remit the case to the High Court for oral evidence; apparently because the papers revealed a dispute of fact on issues that, if decided in the respondent's favour, might establish an innocent owner defence, including, one must assume, allegations by the respondent that she not only did not know that the property was an instrumentality, but also that she had no reasonable grounds to suspect that it was. If that were so one can understand, having regard to the gravity of any decision by the court to render a person's fixed property forfeit, that the SCA

33 See para , above.

would have had regard to the substance over the form in which the so-called innocent owner defence was raised and concluded that it was appropriate that even a tacitly made application for exclusionary relief should be considered. [34]

23]In *Parker*, at para 24, Nkabinde AJA appears also, in part, to have founded the order made by the SCA to refer the matter back to the High Court for the respondent to lead oral evidence to establish her innocence, on the 'constitutional *caveat*' sounded in *Cook Properties* at para 24-26. It is thus necessary when considering the appropriateness of making an order like that made in *Parker* also to appreciate just what the nature of that '*caveat*' was.

24]The mention, *obiter*, at para 26 of *Cook Properties* of a '*serious constitutional question*' concerned the issue (which did not arise for decision either in that case, or in *Parker*) of a constitutionally compatible construction of s 52(2A) of the Act to the position of a truly innocent owner. The issue was mentioned by Mpati DP and Cameron JA, referring to Kennedy J's minority opinion in *Austin v United States* 509 U.S. 602.[35] Justice Kennedy's reference in that case to '*a serious constitutional question*' was founded on Brennan J remarks in an analogous context in the earlier US Supreme Court decision in *Calero-Toledo v. Pearson Yacht Leasing Co* 416 U.S. 663. The notion of the forfeiture of the property of a 'truly innocent owner's' property had been said by Brennan J in *Calero-Toledo* (at

34 When I speak of a 'tacitly made application', I have in mind proceedings in which the respondent makes averments in its papers opposing a forfeiture order that would on their face support an application in terms of s 48(4)(b) for an exclusion order in terms of s 52, but omits to link such averments expressly and formally to an application for such relief in the manner contemplated by the provisions.
35 See *Cook Properties* at para 26 (fn. 33).

689-690) to give rise to '*serious constitutional questions*'. The expression '*truly innocent owner*' in that context was employed by Blackmun J in the majority opinion in *Austin*, referring to the passage just cited in *Calero-Toledo*. It is evident from Brennan J's opinion in *Calero-Toledo* loc cit that what Blackmun J later called a '*truly innocent owner*' denoted an owner whose property had been '*taken from him without his privity or consent*' and then used for the purposes that rendered it subject to forfeiture, or an owner who was able to prove '*not only that he was uninvolved in and unaware of the wrongful activity, but also that he had done all that reasonably could be expected to prevent the proscribed use of his property*'. In the minority opinion in *Austin* referred to in *Cook Properties*, Kennedy J stated '*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.*' It was in that context that the 'constitutional *caveat*' in *Cook Properties* was uttered against construing s 52(2A)(a) of the Act to impose impossible demands on a truly innocent owner seeking to exclusion under the provision from a forfeiture order. It was uttered in response to the '*examples of the untoward results a literal reading* [of the provision] *could produce* [that] *proliferated in argument*' in *Cook Properties*.[36].

25]In the current matter it was evident at the time the court *a quo* gave its first judgment that the facts on record were such for it to be apparent that they did not bring this case within the spectrum of examples in which a strictly literal and

36 See *Cook* Properties at para 25.

insufficiently contextual reading of s 52(2A)(a) might give rise to a need to confront the serious constitutional question postulated in *Cook Properties*. Furthermore, as stressed earlier, the respondents had not applied for, or made out a case for relief in terms of s 52.

26]As evident from *Cook Properties* at para 26, the scheme of the statute requires the owner or interest holder to '*invoke* the second stage of the chapter's procedures' (my emphasis). Even the tacit invocation of the second stage procedures would entail the applicant for exclusionary relief having to make averments in its papers opposing the NDPP's application in terms of s 48(1) which, if accepted on their face, would satisfy the requirements of s 52(2) or s 52(2A). Palpably implausible averments of the nature that would be disregarded in the manner described in the qualification to the *Plascon-Evans* rule[37] would, I venture, not be sufficient for such purpose. The provisions of ss 48-50 and 52 of the Act indicate that the invocation of the innocent owner defence, whether on its own, or in contingent relationship to opposition to the application on the grounds that the subject property is not liable to forfeiture, should ordinarily be raised in such a manner that its existence is apparent when the hearing of the proceedings commences. This incidence of the procedures that pertain is confirmed by the provisions of s 39(3) and s 39(5), which require any person having notice of a preservation order and intending to oppose an ensuing application for a forfeiture order to give notice within 14 days of his/her intention to oppose such application or to apply for exclusionary relief and to

37 See *Plascon-Evans* supra, at 635C.

state on affidavit at that stage, amongst other things, '*the basis of the defence upon which he or she intends to rely in opposing a forfeiture order or applying for the exclusion of his or her interests from the operation thereof*'. When the innocent owner defence is raised, the respondent should also ordinarily clearly formulate the nature of the exclusion order that is sought.

27]Despite having in the first judgment referred the issue of the respondents' 'knowledge insofar as the defences provided for in s 52(2A)(a) and (b) are concerned' to oral evidence, the court *a quo*, in its second and determinative judgment, given on 21 August 2009, did not deal with the matter in any manner consistent with an apprehension that it was seized with an application for exclusionary relief in terms of s 52 by either of the opposing respondents. Indeed, at paragraph 3 of the judgment, the judge stated:

> It was common cause that since the respondents were not applying in terms of section 48(4)(b) of POCA for the respondents' interests in the cash and the [immovable] property to be excluded from the forfeiture order sought by the applicant, the *onus* rested on the applicant to establish all the requirements for a forfeiture order in terms of section 50, including the proportionality of the order sought, [had] be[en] met.

The statement that the NDPP bore the *onus* of establishing all the requirements for the grant of a forfeiture order, including that the relief sought was proportionate in the sense discussed above, was unexceptionable. However, if the learned judge understood, as the passage quoted above suggests, that the nature of the *onus* or of the requirements which the NDPP had to discharge or meet was in any manner affected by the respondent's failure to apply for an

exclusionary order, he was, with respect, misdirected. It may be, however, that the passage was just loosely expressed and that all that the judge intended to emphasise was that it burdened the NDPP to convince the court on the proportionality of the relief sought.

28]After disposing of two points *in limine* raised by the respondents, which do not concern us at this stage, the court *a quo* proceeded in respect of the application for the forfeiture of the immovable property to summarise the oral evidence that had been given by the second respondent pursuant to the order quoted in paragraph , above, as follows:

> [26] The second respondent gave oral evidence on the issue of the forfeiture of the property. She is 46 years old. She left school after she completed standard seven and she then worked in a number of clerical positions. She has not been employed or sought employment for the last fifteen years. She was formerly married to the first respondent. She resided at the property in a backyard structure since about 1995. At the time drug dealing was taking place at the premises. Her mother Miriam Morgan acquired ownership of the property in 1997. The second respondent continued living there and later moved into the main house on the property. During her lifetime, her mother, who owned a number of properties, expressed the wish that the property should go to the second respondent after her death. Her mother died in 1999 and on 27 March 2000 the property, together with other immovable properties were transferred out of her mother's estate to her sister Janap Miller. On 22 June 2000 Janap Miller 'sold' the property to the second respondent for R140 000,00 and on 19 September 2000 the property was transferred into her name.
>
> [27] The respondents continued to reside in the house on the property until about 2002/2003 when they moved from the property to reside in Costa da Gama at Muizenberg. From about 2001/2002, the first respondent rented the property from the second respondent for R2 000,00 per month and used the property to operate his taxi business.

[28] The respondents' marriage terminated during 2004 and the second respondent moved to 56 Consort Road, Retreat, a property owned by her sister Janap Miller, where she presently resides rent free with her two uncles, neither of whom are employed on a full time basis. Janap Miller is a married housewife and resides with her husband and three children whose ages range from approximately 16 years to 22 years in another one of her properties which is situated at 9th Avenue, Retreat.

[29] The second respondent's only income is the rental of R2 000,00 per month, which she received from the first respondent.

[30] Although the second respondent and her sister concluded a contract of sale for the property for an amount of R140 000,00, it is clear from the evidence of her sister that she would never, in deference to her mother's wish that the property go to the second respondent, require her sister to pay the purchase price. The respondent has no other assets.

[31] Although the second respondent has known of drug dealing at the property while she lived there, she stated that after her departure from the property in 2002/2003 she had heard from the first respondent about incidents involving dealing in alcohol and drugs taking place at the property in about 2004 and 2005.

[32] The second respondent's evidence is that she requested the first respondent do something about the issue and that he then "chased the guys away". According to the second respondent the incidents of drug dealing then stopped as far as she knew. It is not without significance that apart from the raid on 4 December 2008, the last time the police found drug dealing taking place at the property was on 21 January 2005. I return hereunder to the raid on 4 December 2008. The second respondent stated that she had never been approached by members of South African Police Service or members of the office of the National Director of Public Prosecutions and informed of unlawful activities taking place at the property involving alcohol and drugs.

[33] The second respondent testified that forfeiture of the property will leave her with no assets and no income. While she lived rent free in her sister's house, she was not certain that her sister would, if she became destitute, support her financially because she had her own family. Janap Miller, who also testified stated that if the second respondent were to become destitute, she would make an effort to support her, because 'blood is thicker than water'. I doubt very much that the second respondent will, at her age and with her skills be able to find employment. The second respondent conceded in cross-examination that she and the first respondent had been arrested with Ludick (the third

respondent) after Ludick was found in possession of drugs at the property. Following the incident Ludick was asked by the first respondent to leave the property.

[34] The second respondent had previously deposed to two affidavits, the contents of which, she states, came largely from what the first respondent had told their attorney. According to the second respondent she had no personal knowledge of what went on at the property. She claims that since leaving the property in 2002 or 2003, she had never been back and relied on the first respondent to see to the property and to control what occurred there.

[35] According to the second respondent, she knew little of the first respondent's taxi business. She stated that while she was living at the property, the drivers and guards would collect the vehicles that were parked on the property overnight in the morning and return there in the evening. The fares collected by the drivers were paid over to persons who assisted the first respondent, who had a safe on the premises to keep the money and his fire arm. While still living, 2 to 3 drivers and/or guards resided at the property. When she and the first respondent moved out the others also moved in to live there.

[36] After their separation the first and second respondent remained friends and she saw the first respondent once a month when he came to pay her the R2 000,00, which had remained unchanged since 2001/2002.

29]The oral evidence of the second respondent summarised in the passage just quoted was led on 20 October 2008. Thereafter, and after an adjournment in the hearing, the NDPP adduced evidence, on 11 December 2008, by Constable Branders who had been involved in a search of the premises at the immovable property during the course of a police raid on the property on 4 December 2008. According to Branders he had established during the search that a certain Cecilia Beckett was the person in charge of the premises. He discovered documentation addressed to the second respondent in one of the rooms being a property rates account and an electricity account in respect of the property together with receipts in respect of the payment of the said accounts in cash. Branders'

evidence, given without objection from the respondents' counsel in the court *a quo*, was that Cecilia Beckett informed him that the second respondent came to the property every month and gave her cash to settle the municipal accounts. The court *a quo* dealt with this evidence as follows at para 43 of its second judgment:

> The second respondent was not called back to deal with this evidence. No weight can consequently be given to this evidence that the second respondent regularly visited the property, which it is common cause is situated very close [to] where she lives in Consort Road, with substantial cash amounts to enable Beckett to settle the monthly municipal accounts.

30]Having (accurately) summarised the evidence in the manner described, the learned judge *a quo* reiterated that the second respondent had not invoked the innocent owner defence by means of an application in terms of s 48(4)(b) of the Act and, bearing in mind that a finding had already been made in the first judgment that the immovable property was an instrumentality, characterised the issue that remained for decision in respect of this aspect of the case as being the '*question whether the forfeiture of the second respondent's property would amount to an arbitrary deprivation of property in contravention of section 25(1) of the* [C]*onstitution*'. In the course of his ensuing analysis of the evidence in respect of the indicated question of the proportionality of a forfeiture order, the learned judge made the following findings:

> In this case the second respondent was aware of the fact that drugs had been sold from the premises. While she is not directly implicated in the commission of the offences, she is not an 'innocent owner' in the sense that she was not aware of what had happened at the premises. The extent to which, if at all, the second respondent continued to be aware

> of the sale of drugs at the property after she had according to her asked the first respondent to see to it that the people selling drugs are removed from the property, is not clear. According to her oral testimony, she never visited the property after leaving it and relied on [the first] respondent for what went on at the property. Brander's evidence that he was told by Beckett that the second respondent came to the property at least once a month with cash to pay the municipal accounts, (the November 2008 account totalled almost R1 600,00 more than 75% of her monthly income of R2 000,00), is hearsay and in the circumstances, cannot be taken into account. Such evidence would, if it were admissible, have contradicted the second respondent's evidence in an important and crucial respect. There is no indication of why the first had evidence was not adduced. (para 46)

and

> On the other hand, the property constitutes the second respondents only asset and her only source of income. In the absence of admissible evidence to contradict that the second respondent was not involved (save as owner/lessor) with the property and was not aware of what was taking place there since 2004 or 2005 (the last raid, before December 2008, having taken place on 21 January 2005), the forfeiture of the property has in my view, not been shown by the applicant, given the effect it would, on the evidence presented in this case, have on the second respondent, to be proportionate, to the public purpose it is intended to serve. The forfeiture of immovable property is a drastic step. It is often sanctioned by our courts, especially where it is employed as a means to combat the very serious crimes of dealing in drugs. The cases relied upon by the applicant's counsel, illustrate this. These crimes have a devastating effect on the community. Each case must, however, be decided on the facts presented in the particular case. In this case, in my view, the *onus* has not been discharged. (para 48)

31]It is evident from the passages in the second judgment of the court *a quo*, quoted above, that the consideration that *the NDPP* had not established the extent to which the second respondent was aware of the use of the property for drug dealing since she had left the property in 2002/3, or positively contradicted her evidence that she had not visited the property since she had left it played a material, if not central, role in the court's conclusion that that the NDPP had failed

to establish that a forfeiture of the property would be proportionate in the relevant sense. In this respect I consider, with respect, that the court *a quo*'s approach was demonstrably inconsistent with the provisions of the Act (the constitutionality of which was not impugned). As observed earlier in this judgment, the remedial objectives of chap 6 of the Act require a court seized with an application for a forfeiture order to focus, in the context of property established to be 'an instrumentality of an offence', primarily on whether the 'broader societal purposes served by civil forfeiture' are justified in the circumstances notwithstanding the unavoidably punitive consequences for the owner or other affected interest holder. The justification, which is established if the means of forfeiture is proportionate to the achievement of the statutory ends, has little, if anything, to do with the innocence, complicity or negligence of the affected owner or interest holder; those being issues falling to be dealt with, if they arise to be addressed, in a discrete and second stage enquiry in which the incidence of the *onus* does not burden the NDPP. The purpose of the proportionality enquiry is really to check that the forfeiture sought substantially serves the purposes of the Act and that it would not constitute an *arbitrary* deprivation of property (as to which see *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) at para 61-100). (Furthermore, even if I were wrong, and the respondents' 'innocence' were relevant, to burden the NDPP at the first stage with the *onus* of negativing it would be to adopt a position in contradiction of the express imposition of the Act of the *onus* on the respondents

at the second stage to establish their innocence.)

32]The evidence before the court *a quo* proved that the immovable property had been used for a period of more than ten years for drug dealing. The dangerous and destructive social effects of the widespread unlawful use of narcotics in the Western Cape are notorious, as indeed acknowledged in the Constitutional Court's judgment in *Prophet* at para 68.[38]

33]The evidence showed that during the period from June 1995 to March 2006, at least 41 search and seizure operations were conducted by the police at the property. As a consequence of these operations the first and second respondents were themselves charged with possession of cannabis (dagga) in 1995 and with dealing in drugs in 1997. Many other persons were also charged with possession or dealing in drugs at the premises during the aforementioned period. During the raids quantities of a variety of dangerous and undesirable dependence-producing substances listed in schedule 2 to the Drugs and Drug Trafficking Act 140 of 1992 were seized at the property. So, for example, during a raid on 19 October 2004, 713 Mandrax (which contains methaqualone) tablets, 509 Ecstasy (methamphetamine) tablets, 216 units of LSD (which contains lysergide/lysergic acid diethalmide), 273 units of tik (methamphetamine) and 28 units of crack cocaine[39] were seized. On 1 December 2004, 95 mandrax tablets and 123 units of tik were seized and, on 21 January 2005, 75 mandrax tablets,

38 See also *Mohunram* supra, at para 147-148.
39 Described by Cameron JA in *Parker* supra, at para 28, as 'a viciously destructive and addictive substance'.

65 Ecstasy tablets and 90 units of crack cocaine. The uncontraverted statement of one Januarie to the police in 2004 was to the effect that dealing in drugs at the property generated a daily revenue of between R20 000 and R50 000. During the raid on 19 October 2004 cash totalling R26 870 was found at the property; on 1 December 2004, nearly R32 000 and on 21 January 2005, R23 640. Traces of methamphetamine and methaqualone were found on some of the cash seized.

34]Various alterations and modifications had been effected to the property to facilitate the unlawful activities conducted there: a wooden vault had been created under the paving of the courtyard to conceal drugs, a secret compartment had been created in the domestic workers' quarters which served a similar purpose; there were spaces behind concealed panels in cupboards in the main bedroom and in the kitchen. There were also concealed spaces in the kennels and the pigeon loft on the property. A window in the main house had been modified to serve as a service hatch. It can be seen clearly from the photographic evidence that this was designed and used for the sale of drugs. The property was heavily secured and the barriers created by this security had been used to good effect on occasion to delay or impede entry to the property by the police when they had arrived to conduct searches of the property.

35]It was manifest that frequent and ongoing police activity against the unlawful activity conducted at the property during the more than five years that intervened between the second respondent becoming the owner of the property and the institution of proceedings for a preservation order at the end of March 2006 had

been unsuccessful in stopping the use of the property as a drug den. In other words, it is evident that conventional crime fighting measures were inadequate to deal with the scourge created by the use of the specially adapted property for nefarious purposes of the nature that the Act is directed to combat.

36]All of the aforementioned evidence concerning the activity at and the adaptation of the property was on record in the first stage of the proceedings. The second respondent had furthermore not made out a case for exclusion. In her affidavit made in terms of s 39 of the Act she made various factual averments, stated to be in respect of matters within her personal knowledge and belief, quite inconsistent with her later protestations of ignorance. She averred, for example, that 'the property is well maintained and kept in good condition by myself and the First Respondent'. How could she make such an averment if she had not been to the property for three or more years? And if she had been to the property, as the aforementioned averment implied, or if she had been involved in keeping it in good condition, how could she not have been aware of the alterations described earlier, which were photographed by the police in 2004, two years before the second respondent deposed to the affidavit in 2006? Her averment that she had no knowledge of the alleged unlawful activity at the property was manifestly untrue. The second respondent had been present during police raids there and had herself been arrested there on two occasions. The claim was also contradicted in her subsequent affidavit, in which she admitted to knowledge of a 'sorry trend' of drugs-related offences being committed at the property.

37]In the subsequent affidavit made by the second respondent in support of her opposition to the forfeiture application as contemplated by s 48(4)(a) of the Act, she again made averments to which she could only have deposed if she had a direct involvement with the property. In the second affidavit, she admitted that she was aware of the adapted window referred to above. Her evidence to the effect that she accepted the first respondent's alleged explanation that the window and table were used 'to accept monies when taxis return late at night from a trip and for a tuck shop' was positively risible. Why should taxi money be put through the window when her evidence was that the taxi drivers and taxi guards lived on the premises? (In her oral evidence the second respondent said there was no specific place at which the taxi drivers would pay in the money when they returned in the evenings and said that she had no knowledge about the procedure of payment being made through the window or even of the existence of the window.) The bald denials or professions of ignorance about the photographed places for secreting drugs on the property was entirely irreconcilable with the position of any property owner showing the reasonable diligence to ensure that property is not used for the purposes of crime required by the Act. Taken at face value they indicated, by their implication that the second respondent had not even troubled to physically check her property after the institution of proceedings to check on the alleged presence of such secret hiding places, that she was indifferent or utterly supine about the alleged state of affairs there.

38]Her supineness, which is the most indulgent view that can be taken on the

evidence showing her failure to take effective steps to stop the property being used as a drug-den, continued even after the first judgment in the court *a quo*, in which the property was held to be an instrumentality. It gave the lie to her evidence implying that the failure by the police or any organ of state to put on her notice before the institution of proceedings was material. There was much denying and putting to the proof, but no evidence by the second respondent on affidavit which came close to establishing on its face grounds to support an application in terms of s 48(4)(b) read with s 52 of the Act. Thus, my reason for holding that the court *a quo* should not have acceded to the request to make an order mirroring that made in para 2 of the order made in *Parker* in respect of the application for the forfeiture of the immovable property. It could not cogently be found in the first stage of proceedings in the court *a quo* that the second respondent had made allegations in her opposing papers that might be construed as averments that could support an application for an exclusion order.

39]The purposes of the Act would undoubtedly be served by the grant of a forfeiture order. The only reason why the court *a quo* refused to make such an order was because the learned judge considered that effect of forfeiture on the second respondent would be disproportionate. In this regard, as mentioned, his consideration that the NDPP had not negatived the second respondent's claim to have been ignorant about the use of the property appears to have weighed materially. For the reasons mentioned, in the absence of an application by her in terms of s 48(4)(b) of the Act, and a discharge by her of the attendant onus, this was misdirected.

40]The relevant considerations were that the second respondent on her own account derived no personal use of the property. She had acquired the property at no consideration and, despite its residential character and the fact that she had no home of her own, she did not live there. On her version, she showed no interest in it, even though she stayed only a short walking distance from where it is situated. The court *a quo* gave no consideration to the fact that on the second respondent's evidence the property was in any event an under-utilised asset. The second respondent had rented the property to the first respondent at a constant rental of R2 000 per month over several years notwithstanding the eroding effect of inflation on the nominal value of money over time and despite the fact that it was reportedly the second respondent's only source of income. The effect of the second respondent's evidence was therefore that the property was rented out by her at an ever diminishing real return. Doubtfully credible as it was, the effect of the second respondent's evidence assessed against the conspectus of the evidence as a whole was that she lived very modestly and was dependant on the support of her family. Accepting that evidence at face value, the court *a quo* should have concluded that the indications were that the forfeiture of the property would have little or no material effect on the second respondent's ability to continue living modestly with her brothers as she claimed to be. It was evident from the testimony of the second respondent's sister that, to the extent necessary, the second respondent would probably be maintained at a reasonable level of subsistence by her family should the property be declared forfeit. Indeed Ms Miller, the second respondent's sister, confirmed the

provisions of their mother's will enjoined her to provide for the second respondent by seeing to it that she had a roof over her head and food and clothing.

41]The court *a quo* also erred in my view by according the effect of a forfeiture of the property on the second respondent an inappropriately determinative weighting in the context of the proportionality enquiry. In the current case the ends to be served by the forfeiture within the scope of the objects of the Act were very compelling and the likely result of the unavoidably punitive effects of forfeiture on a completely supine property owner qualitatively much less so, especially in the absence of any basis for her to obtain an exclusion order. There is no warrant in the proportionality enquiry for the personal circumstances of the affected property owner, assessed by themselves, to trump the realisation of the objects of the legislation. The effect of the forfeiture on the owner, while an important consideration, is but one of the relevant factors to be taken into account in the proportionality enquiry; it falls to be weighed in the balance with all the other factors that are relevant on the evidence in the case. The realisation of the objects of the statute therefore also demands proper consideration in the proportionality enquiry.

42]In *Prophet* (CC), the court described as '*salutary*' an approach to the proportionality enquiry similar to that enunciated in *S v Manamela and Another (Director-General of Justice intervening)* 2000 (3) SA 1 (CC), at para 33, in respect of the determination under s 36 of the Constitution of the reasonableness and justifiability of limitations on rights in the Bill of Rights. In that regard the

majority of the Court held '*In essence, the Court must engage in a balancing exercise and arrive at a global judgment on proportionality and not adhere mechanically to a sequential check-list. As a general rule, the more serious the impact of the measure on the right, the more persuasive or compelling the justification must be*.' The corollary is that in a context in which the justification for forfeiture is compelling the owner who is not able to establish the innocent owner defences is required to suffer the impact, serious though it might be.

43]The facts of the case, which showed that the second respondent, on her own account, remained supine in her dealing with the property in the hands of the first respondent even when the property continued to be used for drug dealing purposes after the institution of the forfeiture application, suggest that the pressing public objects of the Act would be entirely subordinated to the personal considerations of an undeserving owner were a forfeiture order to be denied. It is evident that if the property is not forfeited to the state, there is no basis to believe that the second respondent will do anything at all to end its use for the purposes of crime. It is evident that the property has been especially adapted for use as a drug-den. In the context of what the probabilities suggest is the enterprise of the first respondent, it is evident that the property serves a similar purpose that a shop would afford a greengrocer – appropriately equipped accommodation at a fixed location which, by reason of those attributes, will be of assistance in attracting custom and contributing towards what in a conventional business context would be described as the goodwill of the enterprise. It is evident that conventional crime fighting exercises undertaken over an extended period have

not been successful in stopping the use of the property for these destructively anti-social purposes. All that is achieved is that minions employed front of house in the business are arrested and prosecuted while the organisational management ('*the high-flyers*', as one of the policemen testified they were colloquially called), which is evidently responsible for holding and maintaining the property, remains beyond effective reach.

44]Weighed against the aforegoing considerations, as already noted, the evidence suggests that the second respondent will not be without a roof over her head and family support for her essential requirements should the property be declared forfeit. In my view in all the circumstances the justification for a forfeiture order to be made was sufficiently compelling to bring the scales down in favour of such a result despite the adverse consequences for the second respondent. The broad societal objectives that would be served by neutralising the immovable property from use for drug dealing purposes far outweigh the considerations attending the personal consequences of forfeiture for the second respondent. I therefore consider that the court *a quo* wrongly concluded that the NDPP failed to discharge the *onus* in respect of proportionality. I would thus uphold the NDPP's appeal.

45]Turning now to consider the first respondent's cross-appeal against the order declaring that the cash seized at the immovable property be forfeited to the State as the proceeds of unlawful activities. Despite the issue of the characterisation of the cash being referred to oral evidence to resolve the factual disputes arising

from the evidence on affidavit, neither party adduced further evidence at the second hearing.

46]It will be recalled that the first respondent claimed that the cash was the proceeds of the lawful conduct by him of a taxi business. The moneys were allegedly collected from the taxi drivers on his behalf by his employees and kept on the premises. The first respondent's affidavits made in response to the application for the preservation order and in opposition to the application for a forfeiture order were bald and completely lacking in corroborative detail.

47]The greater part of the cash seized on different occasions and at different places on the property between 19 October 2004 and 21 January 2005 either bore traces of different types illegal drugs, or was found stored together with such drugs. In my view the court *a quo* was correct to hold that the evidence called for an explanation from the first respondent as to the system by which the proceeds of his taxi business were collected and administered; and that the failure to adduce such evidence, either by himself or through someone involved therewith, justified the inference that the cash was most probably the proceeds of the ongoing drug-dealing demonstrably conducted from the premises. This inference was in particular justified by the first respondent's failure to engage at all with the detail in the evidence of one Januarie who had deposed that he had been instructed by the first respondent to disguise the proceeds of the drug dealing activities as being those of the taxi business, or with the evidence that during one of the raids the first respondent did not challenge the claim by one of

the other persons present (one Ludick, who appears to have been an employee of the first respondent) that part of the cash seized on that date (R5 810) belonged to him.

48]I agree with the submission by Mr *Breitenbach* SC, who (assisted by Ms *Witten*) appeared in this court on behalf of the NDPP, that the first respondent signally failed to say enough in his affidavits to enable the court to conduct a preliminary examination and ascertain whether his denials that the cash was the proceeds of the drug dealing demonstrably carried on at the property were not fictitious. He thereby failed to create a *bona fide* dispute of fact on the papers in the sense famously described by Murray AJP in *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 1155 (T) at 1165.

49]As pointed out by Heher JA in *Wightman t/a JW Construction v Headfour (Pty) Ltd and Another* 2008 (3) SA 371 (SCA) ([2008] 2 All SA 512), at para 13: '*A real, genuine and bona fide dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed. There will of course be instances where a bare denial meets the requirement because there is no other way open to the disputing party and nothing more can therefore be expected of him. ….. When the facts averred are such that the disputing party must necessarily possess knowledge of them and be able to provide an answer (or countervailing evidence) if they be not true or accurate but, instead of doing so, rests his case on a bare or ambiguous denial the court will generally*

have difficulty in finding that the test is satisfied.' The learned judge of appeal concluded that if the content of answering papers did not engage *'with facts which* [the respondent] *disputes and reflect such disputes fully and accurately … it should come as no surprise that the court takes a robust view of the matter*'.

50]Ms *Carter*, who appeared in this court for the first respondent, stressed that the court *a quo* had found in the first judgment that the NDPP had not discharged the *onus* of proving that all the seized cash was the proceeds of unlawful activities. She submitted that as that no additional evidence was adduced before the court finally determined the matter in its second judgment, it had not been open to it to conclude that all the cash was liable to forfeiture.

51]In my view the submissions by the first respondent's counsel in this regard do not bear scrutiny. The court *a quo*'s first judgment stated in the relevant respect:

> [17] Mr *van Rooyen*, on behalf of the applicant, submitted that the dispute of fact which has arisen on the papers in regard to the question whether the cash is the proceeds of the illegal dealing in drugs, is not a genuine and *bona fide* dispute, and that given the perfunctory and unsubstantiated reply given by the respondents to the very specific allegations made by Januarie and given the strong circumstantial evidence put forward by the applicant which supports the evidence of Januarie, the respondents' denial falls to be dismissed out of hand on the papers. This is in my view a borderline case. However, since I have to accept for purposes of a decision on the papers that the first respondent does carry on a taxi business and that he parks his vehicles at the property and that he houses at least some of the taxi drivers and guards on the premises, some at least of the cash that was seized on the various occasions was taxi money, the applicant has not, on the papers, discharged the onus resting upon it. Mr *van Rooyen* has, in the alternative to a decision in regard to the cash on the papers, asked that the matter be referred to oral evidence. This is, in my view the course that should be

adopted.

That part of the first judgment was provisional in nature; it did not finally determine the issue, and the order referring it for oral evidence was interlocutory. Accordingly, the court was at liberty, when it finally determined the matter, to reconsider its initially stated position. The point may be illustrated by considering that the undetermined issue could even have been referred to another judge for determination on the reference to oral evidence. Such other judge would not have been bound to hear the oral evidence which the learned judge *a quo* afforded the parties the opportunity to adduce if such other judge considered the matter could be decided on the papers without it. (Cf. *Wallach v Lew Geffen Estates CC* 1993 (3) SA 258 (A) at 262G-263).

52]For the reasons already mentioned, I do not consider that the first respondent had in fact created a *bona fide* dispute of fact on the issue on the papers. I therefore consider that the learned judge *a quo* took an unduly generous view in favour of the first respondent when he referred to the issue in the first judgment as ‘a borderline case’. The judge was entitled to reconsider his initially expressed view after neither party adduced oral evidence, having been afforded the opportunity to do so. Insofar as might be necessary, I would agree with the argument advanced on behalf of the NDPP that an adverse inference fell to be drawn against the first respondent at that stage by reason of his failure to avail of the opportunity to cure, by way of oral evidence, the shortcomings manifested by the baldness of his answering affidavits. In this respect Mr *Breitenbach*

appositely relied on the approach taken in analogous circumstances in a Full Bench decision of this court in *Humphrys v Laser Transport Holdings Ltd and Another* 1994 (4) SA 388 (C) at 400C-E.

53]I would therefore dismiss the first respondent's cross-appeal.

54]In the context of the appeal being upheld and the cross-appeal dismissed, it is appropriate that the costs order made by the court *a quo* in its judgment given on 21 August 2009 be substituted with an order directing that the costs of the application be paid by the first and second respondents jointly and severally, the one paying, the other being absolved. The first respondent should be ordered to pay the appellant's costs in the cross-appeal and the second respondent should be ordered to pay the appellant's costs in the appeal.

55]In the result I would make the following orders:

1. The appeal by the National Director of Public Prosecutions is upheld.

2. The cross-appeal by the first respondent against the order made in terms of paragraph 1 of the order made in the court *a quo*'s judgment of 21 August 2009 is dismissed.

3. The second respondent shall be liable for the appellant's costs in

the appeal.

4. The first respondent shall be liable for the costs incurred by the appellant in opposing the cross-appeal.

5. Paragraphs 2, 3 and 4 of the order made by the court *a quo* on 21 August 2009 are set aside and substituted by the following:

    2.1 *Erf 118368 Cape Town, at Retreat, is declared forfeit to the State in terms of s 50 of the Prevention of Organised Crime Act 121 of 1998 ('the Act').*

    2.2 *The forfeiture in terms of para 2.1 hereof shall take effect subject to the provisions of s 50(6) of the Act and shall be further regulated in accordance with ss 50(5), 56(2), 56(3) and 57 of the Act.*

    3. The applicant's costs of suit shall be paid by the first and second respondents jointly and severally, the one paying, the other being absolved.

A.G. BINNS-WARD
Judge of the High Court

I agree.

D.V. DLODLO
Judge of the High Court

I agree and it is so ordered.

N.C. ERASMUS
Judge of the High Court

Appeal heard	**:**	**28 January 2011**
Judgment delivered		**24 February 2011**
Appellant's counsel		**A.M. Breitenbach SC**
		S.K. Witten
First respondent's Counsel		**T. Carter**
Appellant's attorney		**The State Attorney**
		Cape Town
First Respondent's attorney		**Lionel Cay Attorneys**
		Wynberg, Western Cape

No appearance on behalf of the Second Respondent