Republic of South Africa

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

Case No: 4444/2010

Before: The Hon Mr Justice Binns-Ward

In the matter between:

THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	Applicant
and	
MIRIAM JOHNSON	First Respondent
LARRY JOHNSON	Second Respondent
JEROME JAMES	Third Respondent
NICO STUART	Fourth Respondent
ALFONZO COGILL	Fifth Respondent

JUDGMENT DELIVERED: 29 FEBRUARY 2012

BINNS-WARD, J:

[1] The National Director of Public Prosecutions has applied under chap 6 of the Prevention of Organised Crime Act 121 of 1998 for orders declaring certain immovable property at 38 Daffodil Circle, Ocean View, Western Cape, as well as an amount of cash seized by the police at the property, forfeit to the state. It is alleged that the immovable property is susceptible to forfeiture in terms of the Act because it is an '*instrumentality of an offence*', as defined in s 1(1) of the Act. It is alleged that

the cash is susceptible to forfeiture because it qualifies as the '*proceeds of unlawful activities*', as defined in the Act.

[2] There has been no opposition to the application for the forfeiture of the cash. Being satisfied on the evidence that the money is probably the proceeds of the unlawful dealing in dependence producing substances, which is an offence in terms of s 13 of the Drugs and Drug Trafficking Act 140 of 1992, I am of the view that the NDPP is entitled, in terms of s 53 of Act 121 of 1998, to an order by default declaring the cash forfeit to the state in terms of s 50(1)(b) of the Act, together with ancillary relief in terms of s 50(2).

[3] However, the evidence does not, in my assessment, make out a case that the immovable property is an instrumentality, as defined. I have arrived at this conclusion notwithstanding the concession made in the first respondent's counsel's heads of argument that the property is an instrumentality.

[4] The term 'instrumentality of an offence' is defined as meaning:

> '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'

Property which is concerned in the commission of offences listed in schedule 1 to Act 121 of 1998 is liable to forfeiture. See s 38(2) of the Act, read with ss 48(1) and 50(1). The possession of or dealing in dependence producing substances are offences listed in item 22 of schedule 1 to the Act.

[5] Whether property alleged to be an instrumentality properly qualifies as such is a conclusion of law, which falls to be arrived at upon a weighing of the relevant facts in order to determine whether they afford sufficient evidence of the subsistence of

qualifying criteria. It is trite that the court is not bound by counsel's mistaken or misdirected submissions on the law. Courts are duty-bound to apply the law as it is, and not as counsel for any party to a matter before it might mistakenly perceive the law to be. As pointed out by Ngcobo J in *CUSA v Tao Ying Metal Industries and Others* 2009 (2) SA 204 (CC); 2009 (1) BCLR 1 (CC) at para. 68, '*Where a point of law is apparent on the papers, but the common approach of the parties proceeds on a wrong perception of what the law is, a court is not only entitled, but is in fact also obliged,* ***mero motu****, to raise the point of law and require the parties to deal therewith. Otherwise, the result would be a decision premised on an incorrect application of the law. That would infringe the principle of legality.*' In similar vein, Jansen JA observed in *Paddock Motors (Pty) Ltd v Igesund* 1976 (3) SA 16 (A), at 23F, that an intolerable situation would be created '*if a Court were to be precluded from giving the right decision on accepted facts, merely because a party failed to raise a legal point, as a result of an error of law on his part*'.

[6] The first respondent, who is the registered owner of the fixed property concerned, does not reside at the premises and professes no knowledge of the facts upon which the NDPP contends that the property is an instrumentality. The concession by counsel that the property is an instrumentality was therefore presumably premised on his conclusion of law based on the factual allegations set forth in the applicant's founding papers. For the reasons set forth below I do not agree with that conclusion. Indeed, as soon as I had made it clear to the applicant's counsel that I was not bound by the concession in the first respondent's heads of argument, the first respondent's counsel changed his approach and argued the case on the basis that the applicant had failed to establish that property was an instrumentality. So confident was he in the correctness of his altered stance that he

also decided not to call any oral evidence in support of the first respondent's tacit application in terms of s 48(4)(b) of Act in support of her so-called 'innocent owner defence',[1] despite an initially given indication of an intention to do so.

[7] It is by now well-established that the term 'instrumentality of an offence' falls to be given a relatively restricted construction. In this connection I had occasion in a recent case to remark as follows when giving the judgment of the full bench in *National Director of Public Prosecutions v Van Der Merwe and Another* 2011 (2) SACR 188 (WCC), at para 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 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*'. Property only incidentally connected with the commission of an offence is thus not subject to forfeiture in terms of the provision. (footnotes omitted)

Compare also *Prophet v National Director of Public Prosecutions* 2006 (1) SA 38 (SCA); (2005 (2) SACR 670; [2006] 1 All SA 212) at paras 56-57.

[8] The allegations upon which the application for the forfeiture of the fixed property is founded are to the effect that the local police have received a number of complaints from the community over the years about illicit drug dealing at the premises. The nature of these complaints is described in the most general manner and is not supported in the papers by the affidavit of any person able to give direct

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[1] See *National Director of Public Prosecutions v Mohamed* NO 2002 (4) SA 843 (CC) (2002 (2) SACR 196; 2002 (9) BCLR 970), at para.18; and *Mazibuko and Another v National Director of Public Prosecutions* 2009 (6) SA 479 (SCA), at para. 40.

and particularised evidence of any experience or observation in support of the complaints. I offer the following extract from the affidavit of one Pat Moatse to illustrate the point. In the relevant part it goes as follows:

> As the chairperson of Ocean View CPF I would like to raise my concerns about [the second respondent – the son of the first respondent, who resides in the property] of 38 Daffodil Circle Road Ocean View.
>
> I am actively involved with the Ocean View police, doing patrols with them in the area over weekends. In 2006 I was informed by members of the community about above mentioned address where it was said that [the second respondent] was selling drugs.
>
> On numerous occasions I went with the police to do observation and saw what was going on at the address. I am also involved with the neighbourhood watches and they also informed me about this drug house. At every CPF meeting the community complains about drugs. People are phoning me day and night to complain about 38 Daffodil Circle. I know that the police raided this house on numerous occasions where drugs and huge amounts of money was found. I also know for a fact that [the second respondent] does not work. My question is where does this money come from.

An affidavit by a local police officer, Warrant Officer (formerly Inspector) Greeff was similarly non-specific and vague. His affidavit read as follows in the material part:

> [The second respondent] is 'n bruin man met ID Nommer ....Hy woon by 38 Daffodil Sirkel, Ocean View. Nadat daar talle klagtes ontvang was deur die publiek, was daar toe observasie gehou deur CIG en myself en daar was gevind dat Larry met dwelms smokkel. Hy was toe ge-identifiseer as een van die dwelm High Flyers in Ocean View. Larry verkoop dwelms sedert 2004. Ek het Larry gevra of hy werk en hy het kon my nie antwoord nie (sic). Daar word elke dag met dwelms gesmokkel by die huis. Dwelms word ook verkoop aan skool kinders.

It should not need saying that evidence of such vague and non-specific nature carries little probative value. Why could the witnesses not describe their observations with corroborative detail? When were the observations carried out? What precisely was observed? On what did the witnesses rely for their conclusions that what they observed evidenced drug-dealing at the premises? There are no answers to these questions. The result is that the applicant is left asking this court to

find that the property is an instrumentality not on the basis of evidence, but rather on the basis of an undiscriminating and uncritical acceptance of the conclusions of certain witnesses. If the court were to grant the application on that basis it would abdicating its function of judging the case on the proven facts and deferring to the judgment of the witnesses on the basis of facts which the witnesses' statements fail to disclose in any meaningful detail. There is an evident need for the applicant to be reminded that what might suffice to obtain a preservation order in terms of s 38 of the Act will not necessarily be sufficient to satisfy the higher standard of proof required to obtain an order in terms of s 50 of the Act; see *Prophet* supra, at para. 55.

[9] All one is left with then by way of direct and cogent evidence is the evidence that a number of police raids were carried out on the property during the period from 2006 to 2009. In the course of these raids various quantities of illicit drugs were found at the property. The dates of these raids and the type and quantity of the drugs seized during them are specified in the evidence. It is evident from the quantity of drugs found on the property during the raids and the manner in which much of them were packaged that they were probably intended for use in drug-dealing. There was, however, only a single instance given in the evidence that specifically described a drug-dealing transaction conducted at the premises. That instance occurred in November 2008 when a member of the police force, acting undercover, purchased two packets of 'tik' from an occupant of the property for R100.

[10] The mere fact that drugs, apparently possessed for the purposes of trade, were found at the property on several occasions and that quantities of cash which

could be regarded as the proceeds of drug-dealing were also found on the premises does not establish that the property served as a direct functionality in the commission of the offences.' Indeed, on the evidence it is not proven who actually possessed the drugs, or to whom the cash that was seized there belonged. It does appear that a number of people used or occupied the property apart from the second respondent. While it might be inferred that the property was occupied or visited by persons who were engaged in unlawful drug-dealing, it is not established that the property served a functional purpose in such activity. A single specifically described incident of drug-dealing at the premises does not establish the character of the address as a 'drug shop'.

[11] To give an example, a drug dealer might live at a given address, but transact her drug deals at the school gates down the road. She might keep her stock at home and she might bring the proceeds of her dealing home, but that does not make her home an instrumentality. Its role in the crime is merely incidental. The fact that when the police raid the drug-dealer's home they find drugs and cash there does not, without more, make out a case that the home is an instrumentality in the directly functional sense required.

[12] This much is confirmed in the judgment of Mpati DP and Cameron JA 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; National Director of Public Prosecutions v Seevnarayan* 2004 (2) SACR 208 (SCA) (2004 (8) BCLR 844; [2004] 2 All SA 491) at para.s 33 and 34, which bears setting out in full:

> [33] .....The fact that kidnapped persons were held hostage and assaulted at the house does not make the property an 'instrumentality of an offence'. The property was the place where the crimes were committed. But the location was purely incidental to their commission.

We agree with the approach Stegmann J adopted in *National Director of Public Prosecutions re Application for Forfeiture of Property in terms of ss 48 and 53 of the Prevention of Organised Crime Act, 1998*:

> 'The mere fact that a particular offence was committed on a particular property would not necessarily entail the consequence that the property was "concerned in the commission" of the offence or that the property had become an "instrumentality of an offence". It seems to me that evidence of some closer connection than mere presence on the property would ordinarily be required in order to establish that the property had been "concerned in the commission" of an offence.'

He added:

> 'Every [scheduled] offence must be committed on some piece of property. But it would be absurd to infer that the Legislature had intended every property on which such an offence had been committed to be liable to forfeiture to the State. A closer connection must be shown than mere presence. It must be established that the property was "concerned" in the commission of the offence, and not merely that the offence was committed on the property.'

[34] We agree. The fact that a crime is committed at a certain location does not by itself entail that the venue is 'concerned in the commission' of the offence. An illuminating discussion of the Australian forfeiture cases (where property 'used in, or in connection with, the commission of' certain serious offences is subject to forfeiture) by the New South Wales Supreme Court shows that something more than mere location is essential. We consider that the same applies to our legislation. Either in its nature or through the manner of its utilisation, the property must have been employed in some way to make possible or to facilitate the commission of the offence. Examples include the cultivation of land for the production of drug crops; the appointment, arrangement, organisation, construction or furnishing of premises to enable or facilitate the commission of a crime; or the fact that the particular attributes of the location are used as a lure or enticement to the victims upon whom the crime is perpetrated (such as a houseboat whose particular attractions were used to lure minors into falling prey to sexual offences). (footnotes omitted)

[13] Thus in most of the cases in which forfeiture orders have been made in respect of immovable property on the grounds that it is an instrumentality the evidence has shown that the property has been adapted in some or other way as to give it a directly functional purpose in the commission of the offence. In *Prophet*, for example, the adaptations to the property and its directional functional role in the commission of the offences was described as follows in the Constitutional Court's judgment at para. 57:

> On the evidence before this Court it is beyond doubt that the property, to borrow the phrases used in *Cook Properties*, was appointed, arranged, organised, furnished and adapted or equipped to enable or facilitate the applicant's illegal activities. Superintendent Venter's evidence clearly indicated that all the five rooms of the house and the garage on the property were used for illegal drug manufacturing activities and associated storage of the chemicals, equipment and other articles. A small room in the house was used as a 'mini-laboratory'. It was fitted with laboratory equipment. Household furniture, including a refrigerator, table and storage cupboards in the house was used for the drug-manufacturing activities. All these clearly show that the property was concerned in the commission of the drug offences and not merely incidental thereto.

In *Van der Merwe* supra, the adaptations to the property which demonstrated its directly functional role in drug-dealing activity were described in the full bench judgment at para 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.

So also in the unreported judgment of Davis J in *The National Director of Public Prosecutions v Johannes Constable and others* (CPD case no. 5147/2004) delivered on 28 February 2006, on which counsel for the applicant sought to rely, numerous physical adaptations to the premises are described at pp. 12-14, which the learned judge held had been effected '*with the apparent purpose of enhancing its character as a drug shop*'.

[14] When I raised this with the applicant's counsel during argument, he applied for leave to supplement the founding papers in order to prove that the first

respondent's property had indeed been adapted for drug-dealing purposes. Notwithstanding opposition from the first respondent, I granted the application. As remarked in the reasons I gave *ex tempore* at the time of making the ruling, the explanation offered for the failure to have included this manifestly important evidence in the founding papers at the inception of the proceedings was not adequately explained. I was moved to grant the indulgence only because of the importance of giving effect to the pressing public policy considerations behind the legislation in issue and the desirability in that context that the court should be provided with all the relevant facts if this could be achieved without incurable prejudice to the first respondent.

[15] The supplementary evidence introduced in consequence of my allowing the application consisted of photographic material which showed a number of security measures effected to protect the property. These consisted of barred windows and security gates, and of sensor lights fitted above certain windows of the house. The first respondent, whose evidence in this regard was confirmed by the second respondent - who appears to have been responsible for effecting the features depicted in the photographs, averred that these security measures were necessary because of the high incidence of crime in the area. She illustrated, with reference to photographs of a number of other properties in the close vicinity of the subject property, that similar adaptations were commonplace in the area. She denied that they were in any way directed at facilitating the dealing in drugs at the property. In the circumstances the additional evidence introduced by the applicant was at best inconclusive.

[16] When the inconclusive nature of the further evidence the applicant had been permitted to introduce became apparent during argument, the applicant's counsel applied for leave to lead oral evidence to establish that drugs had been sold from a window of the house, above which a sensor light had been fitted. In this regard he sought to call a certain Ms Francke. I declined to accede to this application and gave reasons for my decision at the time. An affidavit by Ms Francke had been submitted as part of the applicant's founding papers. Its content was as vague and lacking in detail as the others quoted earlier. It made no mention of her having seen drugs being sold through a window on the property, nor of the function of the sensor light as an adaptation that might have facilitated the conduct of such transactions. The only averment in any of the affidavits used in support of the application of the use of a window for the purpose of selling drugs from the property was in the affidavit of one Desmond Philander. In that regard Philander stated as follows:

> Sedert 1980 was ek die Voorsitter van Atlantic Heights Neighbourhood watch. Een van ons take was om dwelmhuise dop te hou en aan die Polisie inligting te gee.
>
> Een van die wonings wat ons altyd onder observasie gehou het was 38 Daffodil Sirkel in Ocean View, die woning van [the second respondent].
>
> Ek het altyd opgemerk dat persone by die voordeur en langs die huis waar 'n venster was staan. Ek het opgemerk dat die dwelms daaruit verkoop word.
>
> Ons het al van die persone gevisenteer en het dwelms op hulle gekry nadat hulle by 38 Daffodil Circle uitgekom het.
>
> Ek ken die woning van [the second respondent] wie woonagtig is te 38 Daffodil Circle. Dit is 'n bekende dwelmhuis.

When I suggested to the applicant's counsel that I might more sympathetically entertain an application to lead the oral evidence of Mr Philander, because his affidavit at least laid an evidential basis, even if only thinly, to rebut the respondent's

explanation for the light above the window depicted in the photographs, I was informed that the applicant was in no position to call that witness.

[17] In *Van der Merwe* supra, at para 19, it was observed that because motion proceedings were prescribed for forfeiture proceedings and applications for exclusion orders in terms of chap 6 of Act 121 of 1998, '*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.*' That observation should not be misunderstood to suggest that applications to refer matters in dispute to oral evidence will be granted readily even when a proper evidential basis for the dispute has not been laid in the papers. The fact that motion proceedings are prescribed entails that the parties are required to set out their evidence in the papers. They may not content themselves in the approach that vague and inadequate evidence on paper can be cured by calling oral evidence to supply the detail necessary to give the written evidence the cogency it lacks on paper.

[18] Evidence of physical adaptation is, however, not a *sine qua non* in applications such as the current one. In *National Director of Public Prosecutions v Parker* 2006 (1) SACR 284 (SCA) (2006 (3) SA 198; [2006] 1 All SA 317) a house was declared forfeit in terms of chap 6 of Act 121 of 1998 because it was found that the evidence showing its regular use for the purpose of illicit drug deals established that it was a 'drug shop'. Cameron JA highlighted the importance of the case as one demonstrating that instrumentality could be proven in the absence of evidence of

adaptation or storage. The learned judge of appeal dealt with the question most pertinently at para. 34:

> The importance of the case is that in the absence of evidence of adaptation or storage, the NDPP sought to establish instrumentality on the basis of the repeated use of the premises as a venue for drug deals. And the evidence indeed shows that the property was the base for a very considerable drug-dealing business. Here the ten successful stings over the year of surveillance are telling, for they show that many more such transactions must have taken place during that period. All the deals were concluded brazenly and without discernible inhibition. So we must also accept the NDPP's assertions that the property 'is a well-known drug outlet in the community' and that, despite numerous complaints, drug dealing from it continued unabated. Indeed, even though some of the stings led to successful prosecutions within the year, and even though warning notices were served at the property, dealing seems to have persisted without restraint.

[19] The critical difference between the current case and that of *Parker* is that in the current case there is direct evidence of only a single instance of drug dealing at the premises over a period of several years. The other evidence which might suggest that the property is a drug shop is of an unacceptably vague and unsubstantiated nature. The inadequacy means that I have been unable on the direct evidence provided to accept, as the court was able to in *Parker*, the NDPP's assertion that the property is a well-known drug outlet.

[20] It is unfortunate that one is left with the impression that this case has fallen down not because of the absence of evidence, but due to the ineptness of its presentation in the form illustrated by the affidavits quoted in para. [8], above. If the object is to prove that premises are a drug shop, cogent evidence to that effect should be adduced. It does not suffice to rely on material which, because of its vagueness and lack of substantiating detail, does no more than raise a suspicion that the premises may be a dealing centre.

[21] The following orders are made:

(a) The cash in the sum of R12049,75, which is currently the subject of the preservation order made in this matter by Mr Acting Justice Freund on 9 March 2010 is declared forfeit to the state as the proceeds of unlawful activities. The order is made by default in terms of s 53 of the Prevention of Organised Crime Act 121 of 1998.

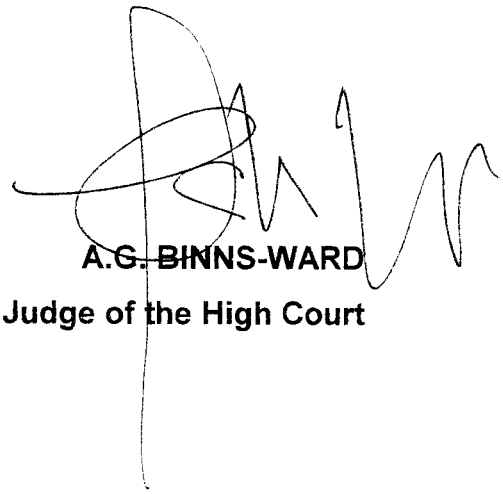
(b) Captain Wynand Wessels of the Western Cape Asset Investigation Task Team is authorised to collect the cash under the control of the SAP13 clerk in Ocean View and to pay it into the SAPS bank account number 4054522787 held at Absa Bank.

(c) The Chief Accounting Clerk of the SAPS is directed to transfer the amount deposited into SAPS account aforementioned to the Criminal Asset Recovery Account established in terms of s 63 of the said Act, held at the Reserve Bank under account number 80303056, within 45 days of the date of this order.

(d) The Registrar of the Court is directed to publish a notice of the forfeiture ordered in terms of para. (a), above, in the Gazette as soon as practicable in compliance with s 50(5) of the said Act, and the State Attorney is directed to draw the attention of the Registrar to the provisions of this paragraph.

(e) The application for the forfeiture of the first respondent's immovable property situate at 38 Daffodil Circle, Ocean View, is dismissed and the

applicant is directed to pay the first respondent's costs of suit.



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