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

CASE NO: 384/2012

In the matter between:

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS **Applicant**

and

SELINA SALIE **First Respondent**

NICOLE FERNANDEZ **Second Respondent**

Heard: 17 and 18 March 2014.
Reportable.

JUDGMENT: 26 MARCH 2014

BREITENBACH, AJ:

1. The National Director of Public Prosecutions ('the NDPP') applies in terms of ss 48(1), 50(1)(a) and (b) and 53(1)(a) of the Prevention of Organised Crime Act

121 of 1998 ('POCA') for an order declaring forfeit to the State certain property owned by the first and second respondents.

2. The first respondent and the second respondent are mother and daughter.

3. The property concerned is the following:

3.1. the money in the Standard Bank account numbers 2…… and 6…….. in the name of the first respondent ('the first respondent's bank accounts');

3.2. the money in the First National Bank account numbers 6……. and 6…….. in the name of the second respondent ('the second respondent's bank accounts');

3.3. an immovable property situate at 7… B…. Road, W…., also described as Erf 9…., W…….., owned by the first respondent ('the Broad Road property');

3.4. an immovable property situate at 1…. P….. Road, W….., also described as Erf 6…., W…., owned by the first respondent ('the Perth Road property');

3.5. an immovable property situate at 7 C….. Street, M….. P…., also described as Erf 7……, M……. P……, owned by the second respondent ('the Cuckoo Street property'); and

3.6. a silver Toyota Rav 4 motor vehicle with registration number CA 4… registered in the name of the first respondent ('the Rav 4').

4. Section 48(1) of POCA provides that if a preservation of property order is in force the NDPP may apply to a Division of the High Court for an order forfeiting to the State all or any of the property that is subject to the preservation of property order. Since 17 January 2012 the property has been subject to a

preservation of property order made in terms of s 38(1) of the Act and under the control of a *curator bonis*, Mr A C Van Heerden. The *curator bonis* has filed five reports, namely three reports in the ordinary course dated 1 March 2012, 2 May 2012 and 6 February 2013 respectively and two reports in response to a request by me dated 24 and 25 March 2014 respectively.

5. Section 50(1)(a) and (b) of POCA provide that the court shall, subject to section 52 (the provisions of which are not relevant in this matter), make an order applied for under s 48 (1) if the court finds on a balance of probabilities that the property concerned is an instrumentality of an offence referred to in Schedule 1 of POCA or is the proceeds of unlawful activities.

6. The NDPP contends that, on the probabilities, all of the property is the proceeds of contraventions of ss 2 (keeping a brothel) and 20(1)(a) (knowingly living wholly or in part on the earnings of prostitution) of the Sexual Offences Act 23 of 1957 ('the Sexual Offences Act').

7. The NDPP further contends that, on the probabilities, the Broad Road property and the Rav 4 are instrumentalities of those offences, which are offences referred to in Schedule 1 of POCA. Item 33 of Schedule 1 of POCA refers to any offence punishable by a period of imprisonment exceeding one year without the option of a fine. Section 22(a) of the Sexual Offences Act provides that a person convicted of contravening s 2 or s 20(1)(a) is liable to be sentenced to imprisonment for a period not exceeding three years with or without a fine not exceeding R6 000 in addition to such imprisonment. In addition, item 11 of Schedule 1 of POCA refers expressly to a contravention of s 20(1)(a) of the Sexual Offences Act. See *National Director of Public Prosecutions v Geyser* 2008 (2) SACR 103 (SCA) ('*Geyser*') para 18 and *National Director of Public Prosecutions v Bosch* 2009 (2) SACR 547 (KZD) ('*Bosch*') para 38. See generally *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) SACR 208 (SCA) ('*Cook Properties*') para 42.

8. The preservation of property order was duly served on the respondents and published in the *Government Gazette*. Neither the respondents nor anyone else entered an appearance in terms of s 39(3) of POCA.

9. However, on 8 May 2012 this Court (*per* Saldanha J) ordered that copies of the papers be served on them and on their former attorney as well as on a non-government organisation known as the Sex Worker Education and Advocacy Taskforce ('SWEAT'). The objectives of SWEAT are the empowerment of sex workers, the decriminalisation of adult commercial sex work and the promotion of safer sex work practices (see *S v Jordan and Others (Sex Workers Education and Advocacy Task Force and Others as Amici Curiae)* 2002 (6) SA 642 (CC) para 38 note 16). The NDPP duly complied with the service order, with the service on the respondents being personal service.

10. During the second half of 2012 this matter was postponed on several occasions to afford the respondents an opportunity to obtain legal representation. The last postponement granted during 2012 was to 23 October 2013, subject to a timetable which, amongst other things, required the respondents to file answering papers by 19 February 2013.

11. Only the first respondent filed an answering affidavit, which though undated appears to have been filed on 31 July 2013.

12. As a result of the late filing of the first respondent's answering affidavit, the hearing of this application was postponed, yet again, this time to March 2014 with the NDPP to file replying papers by 13 December 2014 and with heads of argument to be filed in accordance with the rules of this Court, i.e. 10 days (the NDPP) and 5 days (the respondents) before the date of the hearing.

13. The NDPP duly filed his replying papers and heads of argument.

14. Following a reminder from my registrar to the first respondent's attorney Mr William Booth, late on 17 March 2013, which was the day before the hearing, counsel instructed by him, Adv Anél du Toit, filed heads of argument and Mr Booth delivered an application for condonation for the late filing of the first respondent's heads. The application for condonation was not opposed by the attorney who appeared for the NDPP, Mr Muhammed Kagee. At the start of the proceedings on 18 March 2014 condonation was granted.

15. As to the procedural history of this matter I should also mention that, flowing from this Court's order of 8 May 2012, on 9 July 2012 attorneys acting for SWEAT wrote to the NDPP's attorneys indicating that SWEAT intended applying for admission as an *amicus curiae*. The attorneys indicated SWEAT's intention to make submissions concerning, amongst other things: (a) whether an order declaring forfeit to the State property acquired by sex workers using the proceeds of unlawful activities would amount to an arbitrary deprivation of property in contravention of s 25(1) of the Constitution of the Republic of South Africa, 1996 ('the Constitution') and (b) whether the forfeiture of the immovable properties would result in any sex workers living there being evicted. On 13 July 2012 the NDPP's attorneys responded saying the NDPP had no objection to SWEAT's admission as an *amicus curiae*. On 4 September 2012, however, SWEAT's attorneys delivered a memorandum saying SWEAT would not be persisting with its application because on numerous occasions they had tried unsuccessfully to contact the sex workers who had been residing at the three premises described below and it appeared no sex workers would be evicted if this application were to be granted.

16. The second respondent has not delivered an answering affidavit. There was no appearance for her at the hearing of this matter on 18 and 19 March 2013. The NDPP's application for the forfeiture of the property belonging to her is therefore an application for an order by default in terms of s 53(1)(a) of POCA.

However, any order made under that provision must be one which the court could have made under s 50(1) and (2). It follows that as is the case with the property owned by the first respondent, I cannot make a forfeiture order in relation to the second respondent's property unless I am satisfied that it is liable to forfeiture in terms of s 50(1). In what follows, therefore, I shall analyse the evidence relating to the offences and both the first respondent's property and the second respondent's property.

THE OFFENCES

17. As mentioned earlier, the NDPP contends that, on the probabilities, all of the property is the proceeds of contraventions of ss 2 and 20(1)(a) of the Sexual Offences Act.

The relevant provisions of the Sexual Offences Act

18. Section 2 of the Sexual Offences Act provides:

'***2 Keeping a brothel***

Any person who keeps a brothel shall be guilty of an offence.'

19. Section 20(1)(a) of the Sexual Offences Act provides:

'***20 Persons living on earnings of prostitution or committing or assisting in commission of indecent acts***

(1) Any person who-

(a) knowingly lives wholly or in part on the earnings of prostitution; or

(b) ...;

(c) ...,

shall be guilty of an offence.'

20. Section 3 of the Sexual Offences Act adds that for the purposes of s 2 the following persons, amongst others, shall be deemed to keep a brothel: '*any person who manages or assists in the management of any brothel*' (s 3(b)) and '*any person who knowingly receives the whole or any share of any moneys taken in a brothel*' (s 3(c)).

21. The Sexual Offences Act defines '*brothel*' as including '*any house or place kept or used for purposes of prostitution or for persons to visit for the purpose of having unlawful carnal intercourse or for any other lewd or indecent purpose*'.

22. The Sexual Offences Act defines '*house*' widely as including '*a dwelling-house, building, room, out-house, shed or tent or any part thereof*'; and it similarly defines '*place*' widely as including '*any field, enclosure, space, vehicle, or boat or any part thereof*'.

23. There is no definition of the word '*keeps*' as it appears in s 2 of the Sexual Offences Act, or for that matter of the word '*kept*' in the definition of '*brothel*' in s 1. In S *v M* 1977 (4) SA 886 (A) 896B, however, Corbett JA held that the essential concept underlying the '*keeping*' of a brothel is that of exercising powers of management and control over the brothel. Corbett JA also said (895G-H) that where the definition of '*brothel*' speaks of a house or place '*used for purposes of prostitution*' '*it means a house or place which is consistently or habitually so used: it does not refer to a house or place where a single act, or a few isolated acts, of prostitution may have taken place*'.

24. The Sexual Offences Act does not define '*prostitution*'. In *S v Jordan*, *supra*, paras 48-50, however, the minority of the Constitutional Court ('CC'), with whom the majority did not differ on this issue, held that for purposes of the provision which is now s 20(1A)(a) of the Act (discussed in paragraph 47 below), '*prostitution*' must be restrictively interpreted to mean '*commercial sex, that is sex where the body is made available for sexual stimulation on a paid basis*'; and consequently it does not extend to '*sexual intercourse between*

consenting adults which does not constitute prostitution or commercial sex'. (See also *Geyser, supra*, para 6.) As nothing in the Act or its context indicates otherwise, the word '*prostitution*' in the definition of '*brothel*' in s 1 and in s 20(1)(a) bears the same meaning as it does in s 20(1A)(a). (As to the presumption that where the legislature uses the same word in different places in a statute it intends the word to have the same meaning, see *South African Transport Services v Olgar and Another* 1986 (2) SA 684 (A) 688G-H.)

25. The Sexual Offences Act defines '*unlawful carnal intercourse'* widely as meaning *'carnal intercourse otherwise than between husband and wife*'.

26. In *S v Jordan, supra,* paras 99-101, however, the minority of the CC, with whom the majority agreed on this issue, held that, when interpreted in conformity with the rights to human dignity, freedom and privacy in the Constitution of the Republic of South Africa Act 2000 of 1993, the part of the definition of '*brothel*' (when read with the definition of '*unlawful carnal intercourse*') excluding the last part (i.e. the words '*or for any other lewd or indecent purpose*') was, again, limited to a house or place kept or used for purposes of commercial sexual intercourse and did not extend to a house or place kept or used for purposes of non-commercial sexual intercourse between persons who were not husband and wife. More simply stated, the expression '*unlawful carnal intercourse*' in the Sexual Offences Act is confined to commercial sexual intercourse and, despite its wide, literal wording, does not extend to non-commercial sexual intercourse between persons who were not husband and wife.

27. The Sexual Offences Act does not define '*lewd or indecent purpose*' and the meaning of this phrase is not discussed in *S v Jordan*, *supra*, either. There are however several earlier cases which shed some light on the meaning of this expression.

28. In *S v H* 1977 (2) SA 954 (A) it was common cause that the performance of so-called pelvic massages (masturbation) by female assistants employed by the

appellant at his massage salon constituted a lewd or indecent purpose within the meaning of s 2 of the Sexual Offences Act (then named the Immorality Act). (The parties' and the Court's approach to the matter followed findings to that effect in S v P 1975 (4) SA 68 (T) and S v D 1975 (4) SA 835 (T).) In the course of his judgment Wessels JA added, without any elaboration, that '*[t]here could no doubt be a great variety of lascivious purposes which could be characterised as being lewd or indecent within the meaning of sec. 2 of the Act*'.

29. In S v M 1977 (3) SA 379 (C) 381B-382C this Court (*per* De Kock J (Steyn J concurring)) held that s 2 of the (then) Immorality Act was contravened by a person (the appellant) who held shows at regular intervals at his house in which women performed various acts before an audience of men. In reaching the conclusion that s 2 had been contravened, this Court rejected the appellant's contention that by virtue of the *eiusdem generis* principle of statutory interpretation the words '*or for any other lewd or indecent purpose*' must be restrictively interpreted to refer only to a purpose that falls under the same *genus* as prostitution or unlawful carnal intercourse. (A similar argument was rejected in S v P, *supra*, 70B-71G.)

30. However, one of the consequences of the meaning ascribed to '*prostitution*' and '*unlawful carnal intercourse*' in S v Jordan, *supra,* is that a '*lewd or indecent purpose*' falls within the definition of '*brothel*' in s 1 of the Sexual Offences Act only if the relevant act or event is performed or offered on a paid basis. It does not extend to non-commercial sexual acts or events.

31. It follows that the offence created by s 2 of the Sexual Offences Act is committed by a person who exercises powers of management and control over any building or place or any part thereof which is habitually or consistently used:

    31.1. for purposes of prostitution, that is sexual intercourse on a paid basis (commercial sexual intercourse), or

31.2. for persons to visit for any other purpose which is lewd or indecent on a paid basis, including so-called pelvic massages (masturbation).

32. It further follows that the offence created by s 20(1)(a) of the Sexual Offences Act entails knowingly living wholly or in part on the earnings of commercial sexual intercourse.

The NDPP's evidence concerning the offences

33. The evidence concerning the offences in the NDPP's affidavits may be summarised as follows.

34. On 17 June 2010, acting on complaints and information received about and observations of brothels operating from three premises in Cape Town, namely at 148 Belvedere Road in Claremont ('the Belvedere Road premises'), at 90 Constantia Road in Wynberg ('the Constantia Road premises') and at the Broad Road property, officers of the 'Vice Squad' of the City of Cape Town Specialised Law Enforcement Services ('the City's Vice Squad') and of the South African Police Service ('SAPS') raided those premises.

35. At the Belvedere Road premises, in the lounge, the officers found four women, all of whom said they were sex workers and worked as masseuses there. In one of the other rooms the officers found a naked man and a naked woman, the man saying he was there as a first-time client. The officers also found and confiscated registers relating to the money the women had received at the premises. The registers showed a total income between January and 17 June 2010 of R150 235. While the officers were at the premises the first respondent and her sister arrived in the Rav 4. The first respondent confirmed she was the owner of the business conducted at the premises.

36. At the Constantia Road premises the officers were admitted by the second respondent, who was the manageress of the business. There were five women

there. In one of the rooms the officers found a man and a woman having sexual intercourse. In the reception area the officers found and seized a diary which had been maintained daily and showed how many clients had been seen by each of the women as well as the monies paid. It showed a total income between January and 17 June 2010 of R347 050. The second respondent said the premises were used as a massage parlour; when clients wanted sex this was provided at a higher fee; the money made by each woman was written next to her name; and half of the money made by each of the women went to the first respondent who came every morning to collect her money.

37. At the Broad Road property the officers found a further five women. The officers also found and seized another 2010 diary containing the number of clients each woman had seen and the amount of money each woman had made. It showed a total income between January and 17 June 2010 of R254 600.

38. All three premises had similar lay-outs. There was a reception area and the rooms were equipped with, amongst other things, toilet paper, massage creams, condoms, towels and bins.

39. The officers arrested the first and second respondents on suspicion of brothel keeping, other offences under the Sexual Offences Act and '*human trafficking*' (presumably trafficking in persons for sexual purposes by a person as contemplated in section 71(1) or (2) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007).

40. Later that day, after the first and second respondents had been warned of their constitutional rights, in particular their right to remain silent, both of them chose to make signed written statements.

41. The first respondent's signed statement of 17 June 2010 reads as follows:

'*I own the house at 18 Perth road and I live there with my children. <u>I also own 78 Broad road Wynberg, from where I operate one of my businesses</u>. <u>I then rent</u>*

148 Belvedere road Claremont for about six months, from this address I also run a business. I also rent 90 Constantia road Wynberg. I have 5 girls working from each one of the 3 business addresses. The girls all approach me from word of mouth and I provide them with a room and the agreement is that they can use the room and everything they earn in the room I get 50%. Some of them are also paying a small rental to me. I am aware of them providing massaging and other services including sex. I can never be sure that I am getting my fair share. I also want to put it on record that I do not have all the details or controls of what happens behind the closed door. The Constantia road trades under the name of Aromatics Salon. The Belvedere road one is Nikki's Angels. The Broadroad business is also called Aromatics. I keep a book at each one of the businesses where I have them record their work on a daily basis. I have a computer at 78 Broadroad, one at 90 Constantia and one at home that I do not use for business. The girls are free to come and go as they please. When I interview them I enquire about their work experience and they normally come from another agency. I want to put it on record that I have these girls living at these mentioned business premises. Ideally the client arrives, selects a girl pays for what he wants, goes to a room and gets what he paid for. The charge R400 is for an hour and three hundred for ½ hour. The client can get anything he wants for R400-00. My daughter is not a partner in the business except that the House at Belvedere road is on her name and the business Nikki's Angels is also her name. The only other income I have besides the 3 venues is that I sell anything I can buy informally. I declare my income from the businesses and pay tax on it. I therefore believe that it is a legitimate businesses and I do not think I am doing anything wrong. I was previously raided by the City law enforcement and they did not close me down. This happened about 3 months ago. I am a family person who wants to make an honest living. I was going to close down the business and start up a new business soon. The girls place adds in the papers and pays for it. Some of them also advertise on the internet. I passed standard 4 at school and worked at a number of places. I started these business about 4 years ago. When the girls need to travel to clients I transport them myself. This

seldom happens. I use my Toyota rav which I own to do the transport. This is a very unstable business. My share varies between R25 000 and R30 000 per month. I have a son of 10 years old and a daughter of 22 years. I am not married. I do not force anyone to work' (my underlining).

42. The underlined parts of the first respondent's statement strongly support the NDPP's allegation that she is probably guilty of the offence of keeping brothels at 78 Broad Road, Wynberg, 148 Belvedere Road, Claremont and 90 Constantia Road, Wynberg, and of the offence of knowingly living on the earnings of prostitution.

43. The second respondent's signed statement of 17 June 2010 reads as follows:

'*I want to put it on record that the address at 148 Belvedere road is leased in my name and the business is called Nikki's Angels also after me. There are 2 girls that live at the house and they pay R250-00 per week rent and 50% of their earnings. My mother supply them with food and toiletries. I help my mother to run the businesses and she pays me R500 per week whenever she can. My mother also has businesses at Broad road and Constantia road. The girls offer massage as well as sex to clients and my mother get 50% of everything. My mother sends them for medical tests and drug tests. I own a Golf 4 valued at about R35 000 and I live with my mother. I do not think there is anything wrong with this business but my mom was going to close it. The girls can leave whenever they want to. We sometimes deliver girls to a client and it is called an out booking. This cost extra*' (my underlining).

44. The underlined parts of the second respondent's statement strongly support the NDPP's allegation that both respondents are probably guilty of the offence of keeping a brothel at 148 Belvedere Road, Claremont, and of the offence of knowingly living on the earnings of prostitution.

45. On 17 June 2010 the officers also obtained other written statements, notably a statement from the man found having sexual intercourse at the Constantia Road premises and statements from the fifteen women found at the three premises.

46. In his statement to the SAPS the man said he first became aware of the place two months earlier when he saw an advert in a newspaper. He said that on 17 June 2010 he had booked the woman who he had dealt with on his only previous visit and he paid her R300 for sexual intercourse during a half hour session.

47. Some of the statements by the fifteen women implicated them in the offence in s 20(1A)(a) of the Sexual Offences Act while a few were exculpatory or at least partly so. That section provides that any person 18 years or older who has unlawful carnal intercourse or commits an act of indecency with any other person for reward shall be guilty of an offence. As to the restricted meaning of '*unlawful carnal intercourse*', namely it is confined to commercial sexual intercourse, see the discussion in paragraph 26 above. The Sexual Offences Act does not define '*act of indecency*'. A description is not necessary for purposes of this judgment because it undoubtedly includes the giving of so-called pelvic massages (see S v H, *supra*, S v P, *supra* and S v D, *supra*). For present purposes it is also not necessary to describe in detail the contents of all the women's statements, which are in the form of affidavits. Instead I shall give two excerpts from each type of statement. Together they give a general idea of how the women came to work at the first respondent's businesses, the nature of their work there and their payment arrangements with the first respondent.

48. One of the statements implicating the person making it in the offence in s 20(1A)(a) of the Sexual Offences Act contains the following:

> '*3. Om en by 1 x maand gelede het ek 'n advertensie in the Cape Argus gesien, "Ladies Required" ....*
>
> *4. Ek is na Bellverdere tr. nr. 148, Claremont waar ek 'n k/v [kleurling vrou] ek kan nie haar naam onthou nie, my ontmoet het. Sy het aan my*

verduidelik vir een uur vir 'n massage en 'n happy ending. Dit is pulvec massage. R300-00 vir 'n half uur en R400-00 vir een uur. R200-00 gee ek vir die besigheid en R200-00 hou ek vir my self.

5. Om en by 3 weke gelede het Roxy oorgeneem as bestuurderes. As kliënte na die huis skakel ... vir 'n afspraak. As die kliënt daar opdaag, gaan hy na 'n kamer. Dan gaan die meisies een vir een na hierdie kamer. Dan sal die kliënt besluit wie hy wil hê. Die kliënt betaal die seks werker persoonlik na die diens. Dan sal die sekswerker weer haar deel aan die bestuurderes betaal, nl 50%. My ure is sleg vanag 09:00 tot 15:00 in die dag, en twee aande in die week tot 21:00.

6. ... Ek weet wat seks werk behels en ek doen dit uit my eie vrye wil.'

49. Another of the statements implicating the person making it in the offence in s 20(1A)(a) of the Sexual Offences Act contains the following:

'*2. Ek werk tans 3 maande as 'n ''masseuse'' te 90 Constantiaweg, Wynberg. Dit behels sensuele massage, asook Body to Body massage. Bg. perseel behoort aan Selena Salie. Ek werk vir haar. My werk behels verder ook om seks met kliënte te hê, op hul versoek teen vergoeding.*

3. Ek is oorspronklik van Namakwaland en het ongeveer 3 maande terug in die Argus gesien dat meisies benodig word vir 'n Massage-parlor. Ek het toe die telefoonnommer wat ge-adverteer was gekontak en met 'n vrou gepraat wat haarself bekend gestel het as Selina.

4. Sy het vir my gesê dat sy meisies benodig vir massage-werk en dat ek af moet kom Kaap toe sodat sy vir my kan sien.

5. Toe in die Kaap aankom, het ek Selena gespreek, waarop sy my ouderdom, ID Boek gevra het en toe vir my gesê het dat ek reg is vir die werk.

6. Sy het toe vir my gesê dat die werk behels Body to Body massages, pelvis-massages ens. Op die stadium het sy nie melding gemaak dat ek seks met enige iemand moes hê nie.

7. Ek het wel seks met kliënte gehad. Selena het ook kennis gedra dat ek en die ander meisies seks met kliënte gehad het.

8. My kliënte behels Internet- asook huiskliënte. My Internet-kliënte het ek (R500) Vyfhonderd rand gevra en my huiskliënte het ek (R400) Vierhonderd rand gevra. Ek het dan die helfte van my inkomste vir Selena gegee. Die res van die geld was myne, wat ek gaan bank het.

9. Ek moes verder R300 per week vir Selena betaal vir my verblyf, toiletware ens. Ek moes my eie klere en kos koop.'

50. One of the statements which is exculpatory as far as having sexual intercourse is concerned (but which includes an admission of giving so-called pelvic massages), contains the following:

'*2. On July 2009 I picked an ad from either Cape Times, or Cape Argus from the adult entertainment section. I then phoned a lady who had advertised herself there and she gave me directions to no. 78 Broadway Road, Wynberg, which was where she worked from as a masseuse.*

3. I then proceeded to the house as mentioned above and started to work as a masseuse and I was doing Indian head massage, Swedish massage, Tantric massage and pelvic massage. I did not get any training because I had experience from where I was working before at Cupid, Sea Point.

4. The verbal agreement with the owner of the business is that you get 50% of the service fee. The amount clients pay for massage is R300-00. I got R150-00 and give the other R150-00 to the manager.

5. I then became a manager in September 6, 2009 on a Sunday. My duties consisted of collecting the owner's share that is 50% and answering the phone and writing up the book and make sure the place is neat and tidy.

I get paid R500-00 a week but must still work for myself to make more money.

6. The rule is that you charge the client R300-00 for massage and whatever else happens in the room like for example sex is between the client and the girl. The extra money the girl charged for sex becomes hers and as the manager I am not interested to know how much she got. It is not condoned to charge for sex or have sex but it does happen.

....

11. All the three places of Selina Salie, namely the Secrets, Nikkies and Aromatic Salon are massage parlours. What the girls do extra behind closed doors with clients remains their business. Sex as I have mentioned before is not condoned even though in my understanding it does take place.'

51. Another of the exculpatory statements contains the following:

'*2. To get this place I read an article on the local newspaper Cape Times and the articles read as follows, ladies required for employment for massage at Aromatic Salon and Secret. I became interested because I wanted the job. I phoned the place and applied for the job and was invited for interview.*

3. There I was interviewed by the owner of premises Selina and I went alright with my interview. Selina showed me as to how they operate and asked me if I would stay in the premises or I would stay outside. I told her that I also needed accommodation as well because I didn't have a place to stay. I then went to fetch my belongings at my former boyfriend's place at Table View and I moved it. Then I started operating massaging the clients and most of them are males.

4. You would find clients who would during the process ask to have sexual intercourse with you. It would depend to you whether you do agree to have sexual intercourse with the man or not. That would be your extras

and has got nothing to do with business. I never had sex with clients not at all. We charge and amount of R300-00 massage for half an hour and R400-00 for an hour. The half of the amount I charge the client goes to Selina the owner of the house and the other half is mine.'

The first respondent's answer to the NDPP's evidence concerning the offences

52. In her answering affidavit the first respondent denies that any of the property was bought with the proceeds of unlawful activity or was used as an instrument of the offences because, she says, she was not complicit in keeping brothels at the three premises raided on 17 June 2010 in contravention of s 2 of the Sexual Offences Act she did not knowingly live on the earnings of prostitution at those premises in contravention of s 20(1)(a) of the Sexual Offences Act.

53. The first respondent elaborated on her defence in various passages in her answering affidavit, including (notably) the following:

    53.1. '*The business was run by my staff on the premises and I would only be on the premises to collect my share of the fees. I cannot comment on what the ladies do behind the closed doors of the rooms as I have no knowledge regarding this.*'

    53.2. '*The women were working as masseuses; whatever they did for extra fees is their own business.*'

    53.3. '*If the girls offered sex as an extra fee I knew nothing about it and I received no portion of that fee.*'

    53.4. '*The diaries show fees charged for the massages; any extra fees the women had charged the clients for sex would not be in the diaries as I had nothing to do with that.*'

53.5. '*The R400 for an hour and R300 for half an hour are the fees for a massage.*'

53.6. '*I very rarely interacted with the masseuses at the premises, the only person I would interact with was the manageress and that was for a few minutes a day when I came to collect my share of the massage fees.*'

53.7. '*Upon my arrival [at the Belvedere Road premises on 17 June 2010] I told the police present that the business was a massage parlour, and if there were any other activities happening on the premises I would have no such knowledge of it as it would be the girls themselves acting in their private capacity and for their own personal gain.*'

53.8. '*I deny … that I used my Toyota Rav to transport prostitutes to clients. The ladies were, to my knowledge, masseuses and as far as I was concerned did not offer sex to clients. I rarely used my Toyota Rav to transport the ladies home, or to a taxi rank, or to provide them with a lift to the shops. Most of the ladies, however, had their own transport to use as they pleased.*'

53.9. '*The staff would use their own transport to travel to clients.*'

54. The gist of the first respondent's defence, therefore, is that she was running legitimate massage parlours at the three premises, she did not know whether any of the masseuses had sexual intercourse with their clients for money, if they did that was their private business and had nothing to do with her and she never used her Rav 4 motor vehicle to transport prostitutes to clients.

55. In *Fakie NO v CCII Systems (Pty) Ltd* 2006 (4) SA 326 (SCA) paras 55-56 Cameron JA described the modern approach to motion proceedings where there are contradictory affidavits by applicants and respondents, as follows:

'*55. That conflicting affidavits are not a suitable means for determining disputes of fact has been doctrine in this court for more than 80 years [Frank v Ohlsson's Cape Breweries Ltd 1924 AD 289 at 294, per Innes CJ]. Yet motion proceedings are quicker and cheaper than trial proceedings and, in the interests of justice, courts have been at pains not to permit unvirtuous respondents to shelter behind patently implausible affidavit versions or bald denials. More than 60 years ago, this Court determined that a Judge should not allow a respondent to raise "fictitious" disputes of fact to delay the hearing of the matter or to deny the applicant its order [Peterson v Cuthbert & Co Ltd 1945 AD 420 at 428, per Watermeyer CJ]. There had to be "a bona fide dispute of fact on a material matter" [Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd 1949 (3) SA 1155 (T) at 1162-4, per Murray AJP]. This means that an uncreditworthy denial, or a palpably implausible version, can be rejected out of hand, without recourse to oral evidence. In Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd [1984 (3) SA 623 (A) at 634-5, per Corbett JA], this Court extended the ambit of uncreditworthy denials. They now encompassed not merely those that fail to raise a real, genuine or bona fide dispute of fact but also allegations or denials that are so far-fetched or clearly untenable that the Court is justified in rejecting them merely on the papers.*

56. Practice in this regard has become considerably more robust, and rightly so. If it were otherwise, most of the busy motion courts in the country might cease functioning. But the limits remain, and however robust a court may be inclined to be, a respondent's version can be rejected in motion proceedings only if it is "fictitious" or so far-fetched and clearly untenable that it can confidently be said, on the papers alone, that it is demonstrably and clearly unworthy of credence.'

56. In *Buffalo Freight Systems (Pty) Ltd v Crestleigh Trading (Pty) Ltd and Another* 2011 (1) SA 8 (SCA) para 19 Shongwe JA, following *Truth Verification Testing Centre CC v PSE Truth Detection CC and Others* 1998 (2) SA 689 (W) 698H-J, held that if a respondent's version is a relatively detailed one, not just a bald and hollow denial, that is no bar to the application of the '*robust*' approach to the resolution of disputed issues on paper (as to which see cases such as *Soffiantini v Mould* 1956 (4) SA 150 (E)) which is alluded to in *Fakie NO*, *supra*, para 56.

57. If, on the other hand, the respondent's allegations raise a genuine dispute of fact and are not so far-fetched or clearly untenable that they may be rejected on the papers alone, the matter must be decided on one of two bases. Either the court must take the facts asserted by the respondent together with the facts asserted by the applicant which are either admitted or not disputed by the respondent, or the disputed issue(s) may be referred to oral evidence or the matter as a whole may be referred to trial under Uniform Rule 6(5)(g). See *Wightman t/a JW Construction v Headfour (Pty) Ltd and Another* 2008 (3) SA 371 (SCA) para 12 citing *Plascon-Evans Paints Ltd*, *supra*, 634E-635C and *Ripoll-Dausa v Middleton NO and Others* 2005 (3) SA 141 (C) 151A to 153C.

58. To sum up on this aspect, subject to the possibility of a referral to oral evidence or trial under Uniform Rule 6(5)(g), an applicant, like the NDPP, who seeks final relief on motion must, in the event of a factual conflict, accept the version set up by the respondent unless the latter's allegations are, in the opinion of the court, not such as to raise a genuine dispute of fact or are so far-fetched or clearly untenable that the court is justified in rejecting them merely on the papers.

59. At the hearing Mr Kagee confirmed the NDPP was not seeking a referral to oral evidence because, in his submission, the first respondent's allegations in her answering affidavit are indeed not such as to raise a real, genuine or *bona fide* dispute of fact or they are so far-fetched or clearly untenable that they should be rejected merely on the papers.

60. For the reasons which follow, I agree with this submission.

61. The main difficulties with the first respondent's defence are, firstly, that it is inconsistent with both her and the second respondent's statements of 17 June 2010 and in her answering affidavit she does not explain adequately why she and the second respondent said what they did on 17 June 2010 and, secondly, it is inherently improbable.

62. In her answering affidavit the first respondent does not dispute that as a matter of fact she and the second respondent made the statements quoted in paragraphs 41 and 42 above. On the contrary, she '*notes*' the contents of the paragraphs in the affidavit by the investigating officer saying the respondents were warned of their constitutional rights, particularly their right to remain silent, they chose to give statements and their statements were reduced to writing and are the ones annexed to that affidavit.

63. In her affidavit the first respondent also does not dispute that she and the second respondent made the statements freely and voluntarily. Had she wished to do so, she would have had to deal with the fact that the document containing each of their statements includes a pre-printed page in English and Afrikaans on which their names have been added and which they have signed. The form contains the following declarations by each of them (I quote the English statements in the form following the first respondent's statement, striking through the words deleted in hand-writing on the form):

    63.1. '*I ~~was~~/was not assaulted or threatened in any way to induce me to make the above statement and/or answer questions.*'

    63.2. '*I ~~am~~/am not at present under the influence of any alcoholic beverage and/or narcotic related substance.*'

63.3. '*I am/~~am not~~ satisfied that everything I stated was noted down correctly*.'

63.4. '*I am/~~am not~~ satisfied that this statement and/or answers reflect my version regarding the matter.*'

63.5. '*I ~~have~~/do not have objections to the manner in which the statement was taken down and/or questions were put to me.*'

64. The passages in the first respondent's affidavit in which she disputes her statement of 17 June 2010 read as follows:

64.1. '*I never admitted to the police that I knew the girls had sexual intercourse with the clients, neither did I ever tell the girls they must have sexual intercourse with the clients. I am disputing the statement allegedly made by me to the police contained as A19 of the police docket.*'

64.2. '*I deny that I ever claimed to know the girls provided sexual intercourse for money. The police officer Mr Innes put that into my statement without my consent. I deny that I ever claimed that I was worried that I was never getting a fair share, my take is from the massage and whatever the girls do otherwise has nothing to do with me.*'

64.3. '*I never admitted to running a brothel business. As stated above, the businesses were massage parlours.*'

65. If the first respondent wants her version in her answering affidavit to be believed, she cannot simply say in her answering affidavit, as she did in the passage quoted in paragraph 64.1 above, that she is '*disputing the statement allegedly made by me to the police*', without indicating the grounds on which she is doing so.

66. The first respondent does not provide an adequate answer to the obvious question arising from a comparison between her version in her answering affidavit and what is stated in her signed statement of 17 June 2010. Why did she sign her statement, including the pre-printed page with the declarations quoted in paragraph 63 above, when it contained the following series of admissions: '*I am aware of them [the women working in her businesses] providing massaging and other services including sex*', '*The charge R400 is for an hour and three hundred for ½ hour. The client can get anything he wants for R400-00*', '*I provide them with a room and everything they earn in the room I get 50%*', '*When the girls need to travel to clients I transport them myself*' and '*I use my Toyota rav which I own to do the transport*'? (Similarly, why too did the second respondent say in her statement '*The girls offer massage as well as sex to clients and my mother gets 50% of everything*' and '*We sometimes deliver girls to a client and it is called an out booking*'?)

67. The first respondent's answer in her answering affidavit appears from the passage quoted in paragraph 64.2 above. It is that the police officer who wrote out the statement wrongly inserted an admission she had not made, namely that she knew the women were providing sex for money. The first respondent's answer is inadequate because she does not explain why at the time she declared she was satisfied everything she had said was noted down correctly and the statement reflected her version regarding the matter.

68. Turning to the inherent improbability of the first respondent's defence. It will be recalled she says: she was a fleeting daily visitor to the three businesses; when she was there she interacted with the manageress and only rarely with the masseuses; and she did not know what they did with their clients behind closed doors and in particular whether any of them they had sex for money with their clients. It is not plausible that the first respondent's involvement in the businesses was as limited as she describes. What did the manageress of each business, including the second respondent (who is the first respondent's

daughter), know about what was really going on? And what did they tell her about the businesses they were managing? Given the obvious risks posed to the first respondent and her businesses if the women (on her version) offered sex for money in addition to legitimate massages, why did she not institute any controls aimed at ensuring that nothing untoward happened while the women were alone with their clients in the rooms?

69. The corollary of the first respondent's assertions that she did not know about any illegal activity is that she believed her businesses were legitimate, something which in fact she asserted in her statement of 17 June 2010 with reference to her tax affairs (a matter to which I return below). However, at best for the first respondent, any such belief on her part (which I strongly doubt in fact has ever existed), is the result of her deliberately turning a blind eye to what was really happening between the women and their clients. As Greenberg JA said in *R v Myers* 1948 (1) SA 375 (A) at 382, quoting *Halsbury's Laws of England*, a belief is not honest which '*though in fact entertained by the representor may have been itself the outcome of fraudulent diligence in ignorance - that is, of a wilful abstention from all sources of information which might lead to suspicion, and a sedulous avoidance of all possible avenues to the truth, for the express purpose of not having any doubt thrown on what he desires and is determined to, and afterwards does (in a sense) believe*'.

70. Turning to what the first respondent said about her tax affairs in her statement of 17 June 2010, for the reasons which follow it is another pointer to her dishonesty as a witness. It will also be recalled that in her statement the first respondent gave the following exculpatory explanation. She said she believed the businesses she was running at the three premises raided that day were legitimate and she was not doing anything wrong because she declared her income from the businesses and paid tax on it.

71. The NDPP's founding papers however point out that information concerning the respondents' tax affairs was requested from the South African Revenue Services

('SARS') in terms of s 71(1) of POCA. According to an affidavit of 6 October 2010 from Mr R C Terblanche, a Senior Manager: Enforcement Risk Planning at the SARS, the first respondent was registered for income tax but her returns for the 2006 to 2009 tax years were outstanding and she consequently had not declared any income to SARS. Mr Terblanche added there is no record of the second respondent on the income tax or value added tax register.

72. In her answering affidavit the first respondent said because she left school in standard 4 and knew nothing about tax matters, her then partner, one Christopher Hannival, attended to her tax affairs and she believed Mr Hannival '*had dealt with everything*'. The first respondent did not however put up an affidavit from Mr Hannival explaining why no income tax returns for the first respondent for the 2006 tax years onwards have been filed. Moreover, in her 17 June 2010 signed statement the first respondent said that she herself had declared her income from her businesses and paid tax on it. What the first respondent noticeably fails to do is give any reason why she said that.

73. In my view by the time the first respondent came to make her answering affidavit in these proceedings, which as stated was in mid-2013, she realised she and the second respondent had made a tactical blunder by making the statements they did on 17 June 2010 in which, in effect, they admitted running brothels at the three premises which had been raided earlier that day and living off the proceeds of the prostitution at those brothels. It appears she then decided her best hope was to deny any knowledge of any of those illegal activities. However, the cumulative effect of the problems with the first respondent's factual allegations in her answering papers is that her version is clearly untenable.

THE PROPERTY

The NDPP's evidence concerning the property

74. The facts concerning each item of property which the NDPP asks be declared forfeit to the State, as they emerge from the NDPP's affidavits and the annexures supporting the affidavits, are as follows. (The evidence referred to below concerning the values of the immovable properties in March 2014, the trade and retail values of the motor vehicle in February 2014 and the outstanding amounts on the loans secured by mortgage bonds over the immovable properties in March 2014, comes from the reports dated 24 and 25 March 2014 by the *curator bonis*. The parties were afforded the opportunity to make supplementary written submissions regarding the contents of those reports. Both of them elected not to do so.)

The money in the first respondent's Standard Bank account numbers 275 717 712 and 624 816 095

75. The first respondent opened Standard Bank account number 275 717 712 in January 2002. Between 2002 and 2006 the first respondent made relatively modest deposits into this account, namely deposits totalling R28 150 (2002), R15 441 (R2003), R8 450 (2004) and R48 450 (2005). From 2006 until mid-2010, i.e. which corresponds with the period of about four years during which according to the first respondent's voluntary statement she had been running the businesses at the three premises raided on 17 June 2010, the amounts deposited each year were significantly higher. There were deposits totalling R189 610 (2006), R312 060 (2007), R386 402 (2008), R341 032 (2009) and R137 350 (1 January to 12 June 2010), i.e. R1 366 454. The first respondent used debit orders from this account to pay the monthly loan repayments on the money she had borrowed from Standard Bank and Absa Bank against the security of mortgage bonds over the Broad Road property and the Perth Road property. On 31 August 2010 the credit balance in this account was R24 706.34. When the

preservation order was granted on 17 January 2012 the credit balance in this account was R17.40. In his report dated 1 March 2012 the *curator bonis* said he anticipated that amount would be used by bank charges and the account would be closed. Given that the bank service fees on the statement for the month ended 31 August 2010 far exceed that amount, it is safe to assume that has happened. It follows that if a forfeiture order is warranted, it cannot be made in respect of any money in this account. This was accepted by counsel for the NDPP at the hearing.

76. The first respondent opened Standard Bank account number 624 816 095 on 12 January 2010 by making a cash deposit of R20 000. Following a series of further deposits totalling R140 000 later in January and in February, March and April 2010, the credit balance in this account on 30 April 2010 was R160 881. In his 1 March 2012 report the *curator bonis* said this account had been closed by 17 January 2012 when the preservation order was granted. It follows that if a forfeiture order is warranted, it cannot be made in respect of any money in this account either.

<u>The money in the second respondent's First National Bank account numbers 622 295 579 81 and 620 890 204 09</u>

77. The second respondent opened First National Bank account number 622 295 579 81 on 23 June 2009. Between that date and 31 August 2010 there were cash deposits into this account totalling R80 500. The second respondent used this account to pay the monthly loan repayments on the money she had borrowed from the Standard Bank against the security of a mortgage bond over the Cuckoo Street property. On 23 September 2010 the balance in this account was R16.77. In his 1 March 2012 report the *curator bonis* said the credit balance in the account was R10.49, which would be used up by bank charges whereupon the account would be closed. For the reason given earlier, I shall assume that has happened and if a forfeiture order is warranted it will not extend to any

money in this account. This too was accepted by counsel for the NDPP at the hearing.

78. The second respondent's First National Bank account number 620 890 204 09 showed little activity and was closed on 6 June 2009 with a nil balance. Therefore any forfeiture order will not extend to any money in this account either.

The Broad Road property

79. On 4 May 2004 the first respondent bought the Broad Road property for R450 000. On 25 August 2004 the transfer to her of the property was registered and a mortgage bond of R300 000 over the property was registered. On 25 May 2007 a new mortgage bond over the property of R700 000 in favour of Sanlam Home Loans Guarantee Co (Pty) Ltd (administered by Absa Bank) was registered and the earlier bond was cancelled. As stated the first respondent used debit orders from her Standard Bank account number 275 717 712 to pay the monthly loan repayments on the new mortgage bond account. (There is nothing in the record about the monthly loan payments on the R300 000 mortgage bond account or about the balance of that account when it was replaced by the new account.) Between November 2007 and August 2009 (the only period prior to 17 June 2010 for which there are statements in the record) the monthly repayments on the new mortgage bond account ranged between R5 415 and R7 360. In addition, in the year ended 28 February 2009 the first respondent made additional payments totalling R50 000 into this bond account. According to the bondholder, on 20 March 2014 the amount owing on the new bond account was R599 261. According to a Windeed automated valuation report the property was worth R880 000 on 24 March 2014. Therefore, the first respondent's 'equity' in the property is R280 739.

80. The first respondent used the Broad Road property for one of her three brothels.

The Perth Road property

81. On 18 January 2007 the first respondent bought the Perth Road property for R1 350 000. She paid a deposit of R370 000, part or perhaps all of which came from the new mortgage bond registered over the Broad Road property in May 2007 (as to which see the first respondent's evidence about this discussed in paragraph 88 below). On 12 May 2008 the transfer of the Perth Road property to her was registered and a mortgage bond over the property of R980 000 in favour of the Standard Bank was registered. As stated the first respondent used debit orders from her Standard Bank account number 275 717 712 to pay the monthly loan repayments on this mortgage bond account too. Between April 2008 and October 2010 the monthly repayments ranged between R8 741 and R12 440. She did not make any additional payments. On 28 October 2010 the closing debit balance in this mortgage bond account was R943 515.50. According to the bondholder, on 24 March 2014 the amount owing on this mortgage bond account was R971 012. According to a Windeed automated valuation report the property was worth R1 450 000 on 24 March 2014. Therefore, the first respondent's 'equity' in the property is R478 988.

82. No unlawful activity is known to have taken place at the Perth Road property.

The Cuckoo Street property

83. On 25 February 2010 the second respondent bought the Cuckoo Street property for R250 000. She paid a deposit of R50 000. On 1 June 2010 the transfer to her of the property was registered and a mortgage bond over the property of R200 000 in favour of the Standard Bank was registered. As stated the second respondent used debit orders on her First National Bank account number 622 295 579 81 to pay the monthly Standard Bank mortgage loan repayments. The monthly payments ranged between R2 064 and R2 129. According to the bondholder, on 24 March 2014 the amount owing on this mortgage bond account was R239 550. According to a Windeed automated valuation report the property

was worth R350 000 on 24 March 2014. Therefore, the second respondent's 'equity' in the property is R110 450.

84. The NDPP does not allege that any unlawful activity has taken place at the Cuckoo Street property, which has been the second respondent's home since she acquired it.

The Rav 4 motor vehicle

85. In early 2005 the first respondent acquired the Rav 4 motor vehicle for R174 264 using finance from Toyota Financial Services. With the exception of an initial debit order of R3 227.12 paid on 1 May 2005, between May 2005 and September 2007 the first respondent made monthly cash repayments ranging between R2 000 and R10 000 towards this loan. Between October 2007 and August 2009 first respondent paid monthly instalments of R3 227.12 by debit order from her Standard Bank account number 275 717 712. By 25 August 2009 the first respondent had paid for the vehicle in full. In February 2014 the vehicle had a trade value of R78 700 and a retail value of R83 900.

The first respondent's answer to the NDPP's evidence concerning the property

86. In her answering affidavit (which as stated earlier was delivered in July 2013) the first respondent says she resides at the Broad Road property with her son, who she says was twelve years old in July 2013 when she made her affidavit and suffers from a learning disability. She then says the Broad Road property should not be sold because she requires it for purposes of housing for herself and her son and if it is sold they will have nowhere to go. I note, however, that in the affidavit by a candidate attorney from the first respondent's attorneys dated 17 March 2014 supporting the application for condonation for the late filing of her counsel's heads of argument, the deponent says the first respondent is now residing in Gauteng after recently getting re-married. Her counsel repeated this in court at the hearing of this matter.

87. Further as to the Broad Road property, in her answering affidavit the first respondent says at the time when she acquired the Perth Road property, which happened on 25 May 2007, she was running a hair-dresser at the Broad Road property on a part-time basis. Once again, the first respondent has provided no proof of her having run a hair-dressing business there. She also does not mention receiving any income from a hairdressing business in her statement of 17 June 2019 or in the parts of her affidavit dealing with her sources of income. I consequently do not accept first respondent's *ipse dixit* that the Broad Road property was used for a part-time hairdressing business in 2007. Instead, I shall approach this matter on the basis that the Broad Road property has been used as a brothel from 2006 when, according to the first respondent's statement of 17 June 2010, she started her brothel-keeping business.

88. In her answering affidavit the first respondent alleges she took out a second mortgage bond of R500 000 over the Broad Road property and used the proceeds to purchase the Perth Road property. However, as appears from paragraph 79 above, while it is correct the first respondent registered a new mortgage bond over the Broad Road property on 25 May 2007 the amount of the new bond was R700 000 not R500 000 and the registration of the new bond coincided with the cancellation of the original bond of R300 000 she had taken out on 25 August 2004. It appears, therefore, that part of the new bond (up to R300 000) was used to pay off the debt secured by the earlier bond. Moreover, as appears from paragraph 81 above, when on 18 January 2007 the first respondent bought the Perth Road property the purchase price was R1 350 000, she paid a deposit of R370 000 and, thereafter, on 12 May 2008 she registered a mortgage bond over that property of R980 000. Consequently, at most the first respondent used R370 000 of the proceeds of the loan secured by the new bond over the Broad Road property towards her purchase of the Perth Road property.

89. Turning to the first respondent's evidence in her answering affidavit about her sources of income, she says she made the large number of cash deposits into her

Standard Bank accounts using income she had received from selling bulk clothing and from an 'old' business she had with Mr Hannival called C & S Shuttle and Tour. She adds that the money paid into one of the second respondent's First National Bank accounts was the proceeds of her and the second respondent's selling of bulk clothing, perfume and '*GHD products*' and was also money earned by the second respondent and her boyfriend who earned it from working at the first respondent's businesses. She also says some of the money paid into that bank account was used by the second respondent to purchase the products to sell. Finally she says she used the proceeds of the sale of another vehicle (a Volkswagen Golf 4) to pay the deposit on the Rav 4 and some of the instalments, and that the rest of the instalments were paid using money she received from selling the bulk clothing, perfume and '*GHD products*'.

90. The first respondent has provided no evidence to substantiate her allegations that she and the second respondent sold perfume and '*GHD products*', that she earned income from C & S Shuttle and Tour and that she used the proceeds of the sale of the Volkswagen Golf 4 to pay the deposit on the Rav 4. She has also given no explanation for not providing that evidence or, for that matter, for the absence of an affidavit from the second respondent, the second respondent's boyfriend or Mr Hannival.

91. The following remarks by this Court in *National Director of Public Prosecutions v Van Der Merwe and Another* 2011 (2) SACR 188 (WCC) paras 48-49 apply to the first respondent's failure to substantiate those allegations:

'*48. ... 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), 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".*'

92. The first respondent did however substantiate her allegations concerning the bulk selling of clothing. She did so by attaching a note from one Bronwyn Courie of BAT clothing which, she said, confirmed she had bought clothing from Ms Courie. The note, which is not signed or dated and which does not refer to the intervals between transactions, reads as follows:

'*This is to certify that Selena Salie has been buying stock from my clothing store from 2008 to the value of R5000.00 and up*'.

93. The NDPP obtained an affidavit dated 23 October 2013 from Ms Courie and filed it together with his replying affidavit. The relevant parts of Ms Courie's affidavit read as follows:

> '*2. I have opened my business in 2000 and I buy and sell clothing. I have known Selena Salie since 2000. Over this period up to approximately four months ago, she has been buying clothes from me.*
>
> *3. At times she would buy clothing totalling ±R5000 per month, but some months passed without her buying anything.*
>
> *4. Over the past three years she visited my business less frequently and would spend R200 to R300 once every three months. I never got the impression that she was buying clothing to re-sell. She would be selective in choosing garments that would fit her, whereas my regular "bulk buying customers" would take more of the same item, but in different sizes. My regular "bulk buying" customers would also visit more frequently, like weekly and if I got in new stock.*
>
> *5. About three years ago Selena Salie enquired about the possibility of buying in bulk and selling clothing, but nothing further transpired from that. I have a discount system for my regular "bulk buying customers", but she was not one of them.*'

94. Not only are the contents of Ms Courie's affidavit wholly inconsistent with the first respondent's version that the money deposited into the bank accounts was income from selling bulk clothing, but even if the first respondent had bought approximately R5 000 worth of clothing each month from Ms Courie, who is the only supplier she identifies in her answering affidavit, what she does not explain is how she managed to translate those relatively modest stock purchases into revenues in the four years from January 2006 to June 2010 totalling more than R1.5 million (taking the deposits into her two Standard Bank accounts alone). That she could do so is so implausible that without an explanation it cannot be accepted as true.

95. In this regard I also note that the deposits of R1.5 million over that 54 month period translates into a monthly average of just over R27 500. That is strikingly similar to what the first respondent said in her statement of 17 June 2010 she earned from the three businesses which had been raided that day. She said her monthly share of the income of the women working there '*varies between R25 000 and R30 000*'.

96. For these reasons I do not accept the first respondent's averment in her answering affidavit that the money deposited into her and the second respondent's bank accounts was income they derived from the bulk selling of clothes and other items and money she obtained from the C & S Shuttle and Tour business. The first respondent has put up no evidence to substantiate any of that income even though she was best placed to do so, save for the evidence concerning the purchases from Ms Courie which Ms Courie in effect refuted in the affidavit she made at the instance of the NDPP.

97. There is no evidence from the second respondent about her sources of income.

98. I thus agree with the NDPP's contention that there is no evidence that, from 2006 onwards, either of the respondents had any income from legitimate sources with which to service the loans they had taken to acquire the three immovable properties and the motor vehicle, and consequently the money they used to make the necessary repayments emanated from the three brothel businesses.

IS THE PROPERTY THE PROCEEDS OF THE OFFENCES?

99. The next issue for consideration is whether any or all of the property is the proceeds of contraventions of ss 2 or 20(1)(a) of the Sexual Offences Act.

100. Section 1 of POCA defines '*proceeds of unlawful activities*' as meaning '*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'.

101. In Cook Properties, *supra*, para 64 Mpati DP and Cameron JA pointed out that in essence the definition requires that the property in question be *'derived, received or retained' 'in connection with or as a result of'* unlawful activities. In para 66, applying *Lipschitz NO v UDC Bank Ltd* 1979 (1) SA 789 (A) 804C-G, they added that although the words '*in connection with*' may literally have a very wide connotation, they are seldom used in legislation in their wide, literal sense and they are not used in that sense in the definition of '*proceeds of unlawful activities*'. When the judgment in Cook Properties is read as a whole, the implication is that the words '*in connection with*' in the definition of '*proceeds of unlawful activities*', like the words '*concerned in*' in the definition of '*instrumentality of an offence*' requires a reasonably direct link between the crime committed and the property to be forfeited.

102. However, the definition of '*proceeds of unlawful activities*' makes it clear that the connection between the proceeds and the unlawful activities need not be direct. The proceeds for instance include benefits which someone legitimately acquired but retained by or as a result of his or her offences.

103. The NDPP submits that the first respondent was able to retain the Broad Road property, the Perth Road property and the Rav 4 motor vehicle, and the second respondent was able to retain the Cuckoo Street property, by using the proceeds of the three brothel businesses.

104. For the following reasons, I agree. As mentioned above, in her 17 June 2010 statement the first respondent said she started her 'massage parlour' businesses about four years before then, i.e. sometime in 2006. Although the first respondent acquired the Broad Road property and the Rav 4 vehicle before 2006 (in 2004 and 2005 respectively), she continued repaying the loans secured by

those assets for several years after 2006. In the case of the Broad Road property, which the first respondent refinanced in May 2007, the NDPP's evidence shows she continued with her monthly repayments until August 2009. In the case of the Rav 4, the NDPP's evidence shows the first respondent continued with the monthly repayments until the loan was paid off in October 2009. The first respondent acquired the Perth Road property in 2007 and continued with her monthly repayments until October 2010. The second respondent acquired the Cuckoo Street property in early 2010 and thereafter made the required monthly repayments. It is reasonable to assume that had the respondents fallen into arrears with the monthly repayments, the financial institutions from which they had borrowed the money would have foreclosed and taken judgment against them for the outstanding amounts and, ultimately, succeeded in selling the immovable properties in execution and, in the case of the motor vehicle, taking possession of it and selling it to repay the amount owing.

105. I did not understand the first respondent's counsel to dispute that the NDPP has established that the three immovable properties and the motor vehicle are the proceeds of the offences, if her client failed with her defences regarding the offences and her other sources of income.

106. I conclude, therefore, that the Broad Road property, the Perth Road property, the Cuckoo Street property and the Rav 4 motor vehicle are the proceeds of unlawful activities as defined in POCA because they are assets which the respondents were able to retain using the money which they made in connection with or as a result of the operation of the three brothels and their consequent contraventions of ss 2 and 20(1)(a) of the Sexual Offences Act.

107. In the light of this finding, it is not necessary for me to consider whether the Broad Road property and the motor vehicle are the instrumentalities of those offences.

PROPORTIONALITY

108. The first respondent's counsel submitted that even if the three immovable properties and the motor vehicle were the proceeds of the offences, none of them should be declared forfeit to the State. She submitted the forfeiture of any of them would be disproportionate and consequently infringe the right not be arbitrarily deprived of property in section 25(1) of the Constitution.

109. The first question arising from this submission is whether proportionality applies to the forfeiture to the State of the proceeds of unlawful activity under POCA. As far as I am aware, this question has not been squarely addressed in any judgment dealing with Chapter 6 of the POCA because, as explained below, the proportionality requirement was developed and has been applied in cases in which the NDPP has sought the forfeiture to the State of instrumentalities of offences not the proceeds of unlawful activities.

110. The second question arising from the submissions concerning proportionality on behalf of the first respondent is whether, if there is a proportionality requirement for the forfeiture to the State of the proceeds of unlawful activity under POCA, the forfeiture to the State of the property at issue in this matter would meet that requirement.

Is proportionality a requirement for the forfeiture of proceeds?

111. The proportionality requirement was first mentioned in *Cook Properties*, *supra*, by the Supreme Court of Appeal ('SCA'). That judgment related to three cases, all but one of which were confined to the forfeiture to the State of the instrumentalities of offences under POCA.

112. In the part of its judgment in *Cook Properties*, *supra*, paras 15-16 and 18 dealing with the forfeiture of instrumentalities of property, the SCA made the general point that the forfeiture provisions in Chapter 6 of POCA, including those

relating to the forfeiture of the proceeds of unlawful activities, must be interpreted consistently with the Constitution:

'*15. ... The Bill of Rights provides that "no law may permit arbitrary deprivation of property" [Bill of Rights s 25(1): 'No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property'.]. And a literal application of the provisions could well lead to arbitrary deprivation. The Constitutional Court has held that a deprivation of property is arbitrary when the statute in question does not provide sufficient reason for the deprivation or is procedurally unfair. What "sufficient reason" is may vary from statute to statute. "Arbitrary" deprivations are not limited to those that are non-rational: the constitutional prohibition "refers to a wider concept and a broader controlling principle that is more demanding than an enquiry into mere rationality". But the court held that non-arbitrariness at any event requires a rational relationship between the deprivation and the legislative ends sought to be attained through it. [First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and another [2002] ZACC 5; 2002 (4) SA 768 (CC) paras 61-66, 97-100.] And in applying that standard, it is apposite to bear in mind in the context of the forfeiture legislation that the aim of the property clause "is not merely to protect private property but also to advance the public interest in relation to property". [First National Bank [2002] ZACC 5; 2002 (4) SA 768 (CC) paras 50, 52, 64.]*

16. This entails that the means chapter 6 employs (forfeiture of instrumentalities of crime and proceeds of unlawful activities) must at the very least be rationally related to its purposes ...' (my underlining).

113. Later in the part of its judgment dealing with the forfeiture of instrumentalities of property in *Cook Properties*, *supra*, the SCA described the purposes of Chapter 6 of POCA as '*complex but inter-related*' (para 16) and then went on to say (para 18):

'The inter-related purposes of chapter 6 ... seem to us to include: (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", as counsel put it, property that has been used and may again be used in crime); and, we would add, (d) advancing the ends of justice by depriving those involved in crime of the property concerned'.

114. In my view the purpose described in (a) relates to the forfeiture to the State of the proceeds of unlawful activities not the instrumentalities of offences and the purpose described in (d) includes both types of forfeiture.

115. Finally as to the part of its judgment dealing with the forfeiture of instrumentalities of property in Cook Properties, *supra*, the SCA held that, in an application for the forfeiture of property as an instrumentality of an offence, '*the relationship between the purpose of the forfeiture and the property to be forfeited must be close, that the purpose of the forfeiture must be compelling and that a proportionality analysis may be appropriate in which the nature and value of the property is assessed in relation to the crime involved and the role it played in its commission*' (paras 30-31). In support of this conclusion the SCA pointed out that the CC had held in First National Bank, *supra*, para 71 that there was '*broad support in other jurisdictions for an approach based on some concept of proportionality when dealing with deprivation of property'* (Cook Properties, *supra*, para 30 footnote 35).

116. Turning to the part of the SCA's judgment in Cook Properties, *supra*, dealing with the one case in which the NDPP had sought the forfeiture of property contended to be the proceeds of unlawful activity, the SCA remarked that '*the risk of unconstitutional application [of the definition of 'proceeds of unlawful activities'] is smaller*' than it is with the definition of '*instrumentality of an offence*', which refers to property '*concerned in*' the commission or suspected commission of an offence (para 66). The SCA's reason for considering there is a

lower risk of the unconstitutional application of the definition of '*proceeds of unlawful activities*', as follows (also para 66):

'*As we showed earlier, the forfeiture of a good deal of property that could literally be said to be "concerned in" an offence would run unconstitutionally counter to the Act's objectives of removing incentives, deterring the use of property in crime, eliminating or incapacitating the means by which crime may be committed and at the same time advancing the ends of justice. In our view it is less likely that forfeiture of benefits derived, received or retained 'in connection with or as a result of any unlawful activity' would fail rationally to advance those objectives…*'.

117. The implication of this explanation is that in some cases the forfeiture of the proceeds of unlawful activities will fail rationally to advance the objectives of Chapter 6 of POCA.

118. The proportionality requirement for the forfeiture to the State of the instrumentalities of offences under POCA was affirmed by the CC in <u>*Prophet v National Director of Public Prosecutions*</u> 2007 (6) SA 169 (CC) when it held (para 58):

'*The general approach to forfeiture once the threshold of establishing that the property is an instrumentality of an offence has been met is to embark upon a proportionality enquiry – weighing the severity of the interference with individual rights to property against the extent to which the property was used for the purposes of the commission of the offence, bearing in mind the nature of the offence.*'

119. In <u>*Prophet*</u>, *supra*, in a generally-worded passage, the CC explained that a proportionality requirement was necessary because the '*unrestrained application of Ch 6 may violate constitutional rights, in particular the protection against arbitrary deprivation of property particularly within the meaning of s 25(1) of the Constitution*' (para 61).

120. In my view there are three equivalences between s 18(1) of POCA (which is located in Chapter 5) and s 50(1)(b) of POCA (which is located in Chapter 6) which, together, support the proposition that proportionality is a requirement for the forfeiture to the State of proceeds not just instrumentalities.

121. Chapter 5 of POCA, more specifically s 18(1), vests the criminal courts with a discretionary power to make a confiscation order against anybody convicted of any crime who benefited from it or from a related offence. When a defendant is convicted of a crime and the prosecutor applies for a confiscation order, s 18(1) requires that the court first determine whether the defendant derived any benefit from the crime or from a related offence. If a court finds that the defendant has so benefited, s 18(1) confers on the court a discretion to make a confiscation order against the defendant for payment to the state of '*any amount it considers appropriate*' over and above the sentence it imposes on the defendant. The relevant part of s 18(1) reads as follows: '*the court may, in addition to any punishment which it may impose in respect of the offence, make an order against the defendant for the payment to the State of any amount it considers appropriate*'.

122. The purpose of a Chapter 5 confiscation order is to deprive the defendant of the proceeds of the crime and any related offences. This appears from the ninth paragraph of the preamble to POCA, which provides that '*no person convicted of an offence should benefit from the fruits of that or any related offence*'. A confiscation order also serves broader penal and public purposes by ensuring and demonstrating that crime does not pay. Although its purpose is to deprive the defendant of the proceeds of his or her crimes, it is not an order for the confiscation of the proceeds themselves. Sections 18(1) and 23 provide that it is a civil judgment for payment of an amount of money determined with reference to the value of, amongst other things, the defendant's proceeds of his crime.

123. Sections 18(1) and (5) of POCA provide that an application for a Chapter 5 confiscation order may only be made after conviction of the defendant. An

application for a confiscation order is therefore an adjunct to the criminal proceedings against the defendant. This is one of the important differences between the confiscation mechanism under Chapter 5 and the forfeiture mechanism under Chapter 6. The latter provides for forfeiture by a civil process which is separate from any criminal proceedings and, as s 50(4) necessarily implies, may be undertaken even in the absence of any criminal proceedings.

124. Chapter 6 of POCA, more specifically s 50(1), provides for the forfeiture of property to the State in special-purpose civil proceedings like the present where it is established on a balance of probabilities that the property is the proceeds of unlawful activities (s 50(1)(b)) or, another difference from Chapter 5, an instrumentality of an offence referred to in Schedule 1 (s 50(1)(a)). (Section 50(1)(c), which provides for the forfeiture to the State of property shown on the balance of probabilities to be property associated with terrorist and related activities, is not relevant to the present matter.)

125. The purpose of a Chapter 6 forfeiture order appears from the tenth paragraph of the preamble to POCA, which provides 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*'. Apart from the absence of a reference to the person having been convicted, the part of the preamble which explains the purpose of Chapter 6 forfeiture orders in relation to the proceeds of unlawful activities ('*no person should benefit from the fruits of unlawful activities*') is essentially the same as part of the preamble which explains the purpose of Chapter 5 confiscation orders in relation to the benefits of crime ('*no person convicted of an offence should benefit from the fruits of that or any related offence*'). This is the first equivalence between ss 18(1) and 50(1)(b) referred to above.

126. On the face of things, unlike s 18(1), which as explained confers on the court a discretionary power to make a confiscation order once the jurisdictional requirements are met, s 50(1) is couched in peremptory language. It provides that a court '*shall*' make a forfeiture order if it finds that the property is the

proceeds of unlawful activities. However, as pointed out in *Mohunram and Another v National Director of Public Prosecutions and Another (Law Review Project as Amicus Curiae)* 2007 (4) SA 222 (CC) para 121 by Moseneke DCJ, in one of two judgments for the majority of the CC, '*courts have consistently interpreted "shall" to mean "may". They have correctly held all requests by State prosecutors for civil forfeiture to the standard of proportionality which amounts to no more than that the forfeiture should not constitute arbitrary deprivation of property or the kind of punishment not permitted by s 12(1)(e) of the Constitution*'. The discretionary nature of the power conferred on the court by ss 18(1) and 50(1), including s 50(1)(b), is the second equivalence between those provisions referred to above.

127. Another difference between the wording of ss 18(1) and 50(1) is that whereas s 18(1) expressly confers on a court which decides to make a confiscation order a further discretion to determine the amount (subject to the lesser of two maximum limitations imposed by s 18(2) the details of which are not relevant for present purposes), s 50(1) does not confer a discretion regarding the extent of forfeiture. However, as explained by the SCA in *Cook Properties*, *supra*, para 74, s 50(1) must be read in conjunction with s 48(1), which empowers the NDPP to apply for the forfeiture of '*any or all*' of property that is subject to a preservation order. Section 50(1) therefore confers on the court a discretion to declare forfeit less than all of the property which it finds is the proceeds of unlawful activity or the instrumentality of a relevant offence. This is the third equivalence between the provisions of ss 18(1) and 50(1), including s 50(1)(b).

128. To sum up on the equivalences between ss 18(1) and s 50(1)(b): both s 18(1) and s 50(1)(b) are directed at preventing people from benefiting from the fruits of crime; and, once the jurisdictional requirements for a confiscation order or a forfeiture order relating to the proceeds of unlawful activities are met, both of them confer on the court a discretion as to whether or not to make any such order

at all and, if so, the extent of the benefit to be confiscated or the property to be forfeited to the State.

129. In *S v Shaik and Others* 2008 (5) SA 354 (CC) paras 68-71 the CC discussed three considerations relevant to the exercise of the discretion conferred on the court by s 18(1) of POCA. It started by pointing out that the considerations it mentioned were not comprehensive and added that '*the enquiry as to whether proceeds of crime should be confiscated is not the same enquiry as that to be undertaken to determine whether an instrumentality of an offence should be confiscated. The purpose of confiscating proceeds of crime is primarily to ensure that criminals do not benefit from their crimes. Instrumentalities of crime are confiscated for different reasons and the considerations are therefore not the same*' (para 68).

130. Turning to the considerations the CC said are relevant to determining an appropriate amount as contemplated in s 18, the first consideration is '*all the circumstances of the criminal activity concerned*' (*S v Shaik*, *supra*, para 69).

131. The second relevant consideration is '*the extent to which the property to be confiscated derived directly from the criminal activities*' (*S v Shaik*, *supra*, para 69). The CC elaborated on this consideration as follows (*S v Shaik*, *supra*, paras 69-70):

'*69. ... In most circumstances it will be entirely appropriate that all direct profits of crimes of which the defendant has been convicted be confiscated. So, a bank robber caught red-handed in possession of R50 million which he or she has just stolen from the bank may quite appropriately be required to pay that money back. In these circumstances, the primary purpose of the Act - to ensure that a criminal does not enjoy the fruits of his or her crime - will be directly served.*

70. On the other hand, the more removed the derivation of the property from the commission of the offence, the less likely it may be that it will be appropriate to order the full confiscation of the property. In taking this consideration into

account, however, a court must take care to remember that often criminals do seek to disguise the profits of their crime. One of the purposes of the broad definition of "proceeds of unlawful activities" is to ensure that wily criminals do not evade the purposes of the Act by a clever restructuring of their affairs.'

132. The third consideration is '*the nature of the crimes that fall within the express contemplation of the Act*' (*S v Shaik*, *supra*, para 71). The CC elaborated on this consideration as follows (*S v Shaik*, *supra*, para 71):

'*The closer the crimes or criminal activity concerned to the ambit of organised crime, the more likely it will be that the appropriate amount will constitute all the proceeds of the unlawful activities as defined in the Act. The reason for this is that the larger the value of the confiscation order, the greater the deterrent effect of such an order. The Act clearly seeks to impose its greatest deterrent effect in the area of organised crime; and so where organised crime is involved, the purpose of general deterrence will often be best achieved by a maximum confiscation order, although of course that will always be subject to a full consideration of all the relevant circumstances.*'

133. It follows from the equivalences between ss 18(1) and 50(1)(b) of POCA that the three considerations, identified and discussed in *S v Shaik*, *supra*, relevant to the exercise by a court of its discretionary powers to determine whether to make a confiscation order in terms of s 18(1) and, if so, to fix the amount that is appropriate, are also relevant to the exercise by a court of its discretionary powers to determine whether to make an order for the forfeiture of the proceeds of unlawful activities in terms of s 50(1)(b) and, if so, to fix the extent of the proceeds to be forfeited.

134. That these three considerations are elements of a proportionality enquiry, is underscored in a later passage in the judgment in *S v Shaik*, *supra*, concerning an argument by the appellants that the amount of the confiscation order determined by the trial court was '*disturbingly inappropriate*' (that being the standard for

interference by a court of appeal with a confiscation order made by a court of first instance). The CC's discussion of this argument included the following statement of the applicable general principles (*S v Shaik*, *supra*, para 79):

'*Section 18 requires a court to determine an appropriate amount. This exercise requires a court to determine an amount in the light of the direct relationship between the proceeds and the criminal activity concerned, as well as the nature of the criminal activity and its closeness to the purposes of the Act. The question on appeal, as I have described above, is whether the amount confiscated by the court is disturbingly inappropriate. Clearly an amount that is disturbingly inappropriate would be disproportionate and an appeal court would therefore interfere with such an order.*'

135. I consequently conclude that proportionality is indeed a requirement for the forfeiture to the State of the proceeds of unlawful activity under POCA.

136. It is implicit in the passage from the CC's judgment in *S v Shaik*, *supra*, quoted in paragraph 134 above that the court must make an overall assessment of the appropriateness of declaring forfeited to the State an asset with the value of the property which the NDPP has targeted. This entails a comparison between, on the one hand, the value of the property or of the interest of the owner in it (if someone else, e.g. a financial institution with real security, also has an interest which reduces the economic value of the owner's interest) and, on the other hand, the value of the total benefit from the unlawful activity. The comparison is relevant because the wide definition of '*proceeds of unlawful activities*' may have the result that a very valuable property is susceptible to forfeiture even if, for example, it was retained by using the direct profits of crimes to make relatively modest repayments to a lender with real security over the property. (Cf. *Geyser*, *supra*, paras 22-24 and *Bosch*, *supra*, para 41.)

137. There is however at least one other matter not mentioned in *S v Shaik*, *supra*, which must be considered in the proportionality enquiry. It is the use to which

the property is being put. If, for example, a criminal uses some of the profits of his crimes to build and endow a crèche in a deprived area, the forfeiture of the building and the endowment will not advance the purposes of confiscating the proceeds of crime. As the CC pointed out in *S v Shaik*, *supra*, para 68, the purpose of confiscation is primarily to ensure that criminals do not benefit from their crimes. In an earlier passage in *S v Shaik*, *supra*, the CC added the following (*S v Shaik*, *supra*, para 52):

'*From this primary purpose, two secondary purposes flow. The first is general deterrence: to ensure that people are deterred in general from joining the ranks of criminals by the realisation that they will be prevented from enjoying the proceeds of the crimes they may commit. And the second is prevention: the scheme seeks to remove from the hands of criminals the financial wherewithal to commit further crimes. These purposes are entirely legitimate in our constitutional order.*'

138. However, it also follows from the primary purpose and the secondary purposes of confiscating proceeds of crime which the CC identified in *S v Shaik*, *supra*, that full confiscation (Chapter 5) or forfeiture (Chapter 6) will be the norm and an order refusing confiscation or forfeiture or an order granting only partial confiscation or forfeiture will be exceptions to the norm. The discretionary (proportionality) enquiry under ss 18(1) and 50(1)(b), is not an open-ended one. Rather it is aimed at determining whether, having regard to all the relevant considerations, the case at hand is an exceptional one in which there should be no or only partial confiscation or forfeiture.

139. The approach to the discretionary (proportionality) enquiry under ss 18(1) and 50(1)(b) of POCA, outlined in the preceding paragraph, is supported by *dicta* in two SCA judgments.

140. The first is the statement in the SCA's judgment in *Cook Properties*, *supra*, para 66, discussed in paragraph 116 above, that '*the risk of unconstitutional*

application [of the definition of 'proceeds of unlawful activities'] is smaller' than it is with the definition of '*instrumentality of an offence*'.

141. The second is the following statements in the SCA's judgment in <u>*National Director of Public Prosecutions v Gardener and Another*</u> 2011 (4) SA 102 (SCA) paras 19 and 32 concerning the granting of confiscation orders under s 18(1):

'*19. In the exercise of its discretion a court must bear in mind the main object of the legislation, which is to strip sophisticated criminals of the proceeds of their criminal conduct. To this end the legislature has, in Ch 5 of POCA, provided an elaborate scheme to facilitate such stripping. The function of a court in this scheme, as appears from what I have said above, is to determine the "benefit" from the offence, its value in monetary terms and the amount to be confiscated. It is undoubtedly so that a confiscation order may often have harsh consequences, not only for the defendant, but also for others who may have innocently benefited, directly or indirectly, from the criminal proceeds. This is what the legislation contemplates, and a court may not, under the guise of the exercise of its discretion, disregard its provisions — harsh as they may be.*'

and

'*32. This brings me to the third stage of the enquiry, the amount of money that should appropriately be confiscated from the respondents. I have said earlier that the rationale for the legislation is to deprive offenders of the full extent of the benefit they have received from the commission of the offences. This includes the value of the appreciation of the assets that were acquired with the criminal proceeds, and not just the appreciation in the money benefit they received. This is what the legislation requires and is what the High Court ought to have ordered…*'.

Proportionality in this case

142. When considering all the circumstances of the criminal activity concerned it is necessary, first, to consider the nature and inherent seriousness of the offences of contravening ss 2 and 20(1)(a) of the Sexual Offences Act.

143. As appears from the judgments of the CC in *S v Jordan*, *supra*, especially the minority judgment of O'Regan J and Sachs J, these and several other related provisions in the Sexual Offences Act pursue an important and legitimate constitutional purpose, namely the control (suppression) of commercial sex (*S v Jordan*, *supra*, paras 114-120; see also *Geyser*, *supra*, para 26). Section 22(a) of the Sexual Offences Act provides that a person convicted of an offence referred to in s 2 or s 20(1)(a) is liable to imprisonment for a period not exceeding three years with or without a fine not exceeding R6 000 in addition to such imprisonment. The offences of contravening ss 2 and 20(1)(a) of the Sexual Offences Act must therefore be regarded as serious.

144. The offences of keeping a brothel and knowingly living on the proceeds of prostitution are however less serious than many others. An example of a far more serious offence is the crime of corruption at issue in *S v Shaik*, *supra*, which the CC described as a very serious offence which is regarded as such not only in South Africa but internationally because of its very harmful effect on the political and economic life of a nation (*S v Shaik*, *supra*, para 72). By contrast, the action from which both the offences in ss 2 and 20(1)(a) of the Sexual Offences Act ultimately derive – prostitution in contravention of 20(1A)(a) of the Sexual Offences Act – is, essentially, sexual intercourse between consenting adults for money; and, as the minority pointed out in *S v Jordan*, *supra*, para 90:

'*Open and democratic societies vary enormously in the manner in which they characterise and respond to prostitution. Thus practice in such countries ranges from allowing prostitution but not brothel-keeping; to allowing both;*

suppressing both; to setting aside zones for prostitution; and to licensing brothels and collecting taxes from them.'

145. As appears from S v Jordan, *supra*, para 86, in that case the State argued that the prohibition on prostitution (now located in s 20(1A)(a) of the Sexual Offences Act), which for obvious reasons is closely related to the offences of contravening ss 2 and 20(1)(a) of that Act, is motivated by the following eight factors:

'*(a) prostitution in itself is degrading to women;*

(b) it is conducive to violent abuse of prostitutes both by customers and pimps;

(c) it is associated with and encourages the international trafficking in women, which South Africa is obliged by its international law commitments to suppress;

(d) it leads to child prostitution;

(e) it carries an intensified risk of the spread of sexually transmitted diseases, especially HIV/AIDS;

(f) it goes hand in hand with high degrees of drug abuse;

(g) it has close connections with other crimes such as assault, rape and even murder; and

(h) it is a frequent and persistent cause of public nuisance.'

146. These factors provide a helpful matrix for assessing the facts and other circumstances of the present case.

147. As to factor (a), in the light of the reasoning of both the majority and the minority of the CC in S v Jordan, *supra*, I must accept that prostitution by women is inherently degrading to them. The majority said it agreed with the conclusion by the minority that by engaging in commercial sex work, all prostitutes, male and female, '*knowingly accept the risk of lowering their*

standing in the eyes of the community, thus undermining their status and becoming vulnerable' (S v Jordan, *supra*, para 16). The minority said, amongst other things, '*[a] woman who is a prostitute is considered by most to be beyond the pale*' (S v Jordan, *supra*, para 64) and that female prostitutes:

'*are a marginalised group to whom significant social stigma is attached. Their status as social outcasts cannot be blamed on the law or society entirely. By engaging in commercial sex work, prostitutes knowingly accept the risk of lowering their standing in the eyes of the community. In using their bodies as commodities in the marketplace, they undermine their status and become vulnerable. On the other hand, we cannot ignore the fact that many female prostitutes become involved in prostitution because they have few or no alternatives...*' (S v Jordan, *supra*, para 66).

148. There is no evidence in the present matter that the prostitution at the first respondent's brothels was marred by any of the problems referred to in factors (b) to (g).

149. On the contrary, the general impression created by the NDPP's evidence concerning the offences, especially the descriptions and photographs of the three brothels raided on 17 June 2010 and the contemporaneous statements by the second respondent and the fifteen women found working there, is that the brothels were established, tidy and well-run places with no violent abuse of the prostitutes, no pimps, no compulsion, no trafficking in persons for sexual purposes, no child prostitution, no drugs on the premises and no connection with other crimes, and that care was taken to protect the women against sexually transmitted diseases. For instance, in addition to what is said in the statements quoted in paragraphs 43 and 48 to 51 above, the woman in charge of the Belvedere Road premises says in her statement that her duties were to make sure that the house is clean, taking care of the '*girls*', making sure that they are safe and interviewing the clients; and the woman in charge of the Constantia Road premises says in her statement that her duties included ensuring the place was

clean from possible drug use. In addition, it appears from several of the statements that the first respondent also provides some of the women with accommodation at the premises.

150. As to factor (h), while the papers say the action by the 'Vice Squad' and the SAPS followed, amongst other things, anonymous complaints from members of the public in the vicinity of one of the brothels (the one at the Belvedere Road premises), there is no evidence about the nature and numbers of the complaints. There is no evidence showing that any of the brothels was a frequent and persistent cause of public nuisance. On the contrary, the fact that the brothels were able to operate for several years without being 'raided' and shut down suggests, that, in keeping with their being established, tidy and well-run places, they were not major public nuisances.

151. Overall as to the first consideration identified in S v Shaik, *supra*, therefore, my assessment is that although contravening ss 2 and 20(1)(a) of the Sexual Offences Act must be regarded as serious, the commission of those offences in the present matter was not accompanied by any aggravating factors and indeed there are a range of notable mitigating factors.

152. It is convenient to deal, next, with the third consideration identified in S v Shaik, *supra*, namely how close or distant the contraventions of ss 2 and 20(1)(a) of the Sexual Offences Act in the present case are to organised crime as envisaged in POCA.

153. The contraventions in this case may well constitute an organised crime offence specified in POCA, namely the racketeering offence created by s 2(1)(e) of POCA. It provides that '*[a]ny person who ... whilst managing or employed by or associated with any enterprise, conducts or participates in the conduct, directly or indirectly, of such enterprise's affairs through a pattern of racketeering activity*' is guilty of an offence.

154. The offence created by s 2(1)(e) of POCA entails the existence of an enterprise, a pattern of racketeering activity and a link between them and the perpetrator.

155. The word '*enterprise*' is widely defined in POCA as including any individual, partnership, corporation, association, or other juristic person or legal entity, and any union or group of individuals associated in fact, although not a juristic person or legal entity. As Cloete JA pointed out in S v Eyssen 2009 (1) SACR 406 (SCA) para 6, a single person is covered as well as every other type of connection between persons known to the law or existing in fact. He held that all that is required for a group of individuals associated in fact, is that the association would at least have to be conscious; that there would have to be a common factor or purpose identifiable in the association; that the association would have to be ongoing; and that the members would have to function as a continuing unit. In my view these requirements are met in relation to the brothels at issue in the present case.

156. The term '*pattern of racketeering activity*' is also defined widely in POCA as meaning the planned, ongoing, continuous or repeated participation or involvement in any offence referred to in Schedule 1, provided it includes at least two offences referred to in Schedule 1, of which one of the offences occurred after the commencement of POCA (on 21 January 1999) and the last offence occurred within 10 years (excluding any period of imprisonment) after the commission of the prior offence. In S v Eyssen, *supra*, para 5 Cloete JA held that the relevant meaning of the word '*planned*', which qualifies '*ongoing, continuous or repeated*', is '*pattern*', which in turn means a pattern of behaviour. Consequently, a pattern of racketeering activity cannot be established by unrelated instances of proscribed behaviour nor an accidental coincidence between them. In the present case the first respondent's participation in the offences formed part of a pattern of behaviour.

157. Turning to the link between the enterprise, the pattern of racketeering activity and the perpetrator, in S v Eyssen, *supra*, para 5 Cloete JA said '*[t]he essence of*

the offence in ss (e) is that the accused must conduct (or participate in the conduct) of an enterprise's affairs. Actual participation is required (although it may be direct or indirect'. Cloete JA added (also at para 5) that the offence in s 2(e) '*covers a person who was managing, or employed by, or associated with the enterprise… "Manage" is not defined and therefore bears its ordinary meaning, which in this context is: 1 be in charge of; run. 2 supervise (staff). 3 be the manager of (a sports team or a performer)"*'. In the present case the first respondent was the overall manager of the enterprise's affairs.

158. The first respondent's involvement and criminal conduct is not dissimilar from that of the accused in *S v Dos Santos and Another* 2010 (2) SACR 382 (SCA) who conducted an illegal diamond dealing enterprise and was convicted of the offence under s 2(e) of POCA. In dismissing the accused's appeal in that matter, Ponnan JA reasoned as follows (*S v Dos Santos*, *supra*, para 38):

'*The affairs of the enterprise entailed [the accused] purchasing unpolished diamonds from people who were not entitled to possess them. All five of the offences of dealing in unpolished diamonds in contravention of the Diamonds Act, of which the [accused] was convicted, constituted participation in such affairs. And all occurred after the commencement of POCA. None of them was an unrelated instance of proscribed behaviour nor an accidental coincidence with any of the others (see Eyssen para 8)*'.

159. Although the second respondent played a lesser role in the commission of the offences, she was nevertheless the manager of one of the brothels and was paid for her services by the first respondent from the proceeds of the prostitution there.

160. It is common cause that, following their arrest on 17 June 2010, the respondents are currently on trial in a Regional Court on a range of charges, including a charge of contravening s 2(1)(e) of POCA. This charge reads as follows:

'*Contravention of section 2(1)(e) read with sections 1, 2(2), 2(3) and 3 of Act 121 of 1998: Conducting an Enterprise through a pattern of racketeering activities*

(Accused 1 and 2)

IN THAT prior to January 2010, the exact date being unknown, and up until 17 June 2010, and at or near Wynberg in the Regional Division of the Cape, accused 1 and 2 wrongfully and unlawfully whilst managing or employed by or associated with the enterprise to wit the brothels situated at 78 Broad Road; 148 Belvedere Road and 90 Constantia Road as described in the preamble above, conducted or participated in the conduct, directly or indirectly, of such Enterprises' affairs through a pattern of racketeering activity'.

161. The third relevant consideration identified in *S v Shaik*, *supra,* is whether the property at issue derived directly from the criminal activities and, if not, how far its derivation is removed from the commission of the offences. As explained in paragraphs 103 to 106 above, although none of the property derived directly from the commission of the offences, all of it comprises assets which the respondents were able to retain – i.e. keep from being sold to satisfy their debts to the financial institutions from which they had borrowed to acquire the assets – using money which they had made from the commission of the offences. There is therefore a relatively close connection between the property and the commission of the offences.

162. This brings me to a comparison between the value of the respondents' interest in the property and the value of the proven total benefit from the unlawful activity.

163. As appears from paragraph 79 above the Broad Road property is worth R880 000 and the value of the first respondent's interest in the Broad Road property is R280 739; as appears from paragraph 81 above the Perth Road property is R1 450 000 and the value of the first respondent's interest in the Perth Road property is R478 988; as appears from paragraph 83 above Cuckoo

Street property is worth R350 000 and the value of the second respondent's interest in the Cuckoo Street property is R110 450; and as appears from paragraph 85 above the value of the Rav 4 motor vehicle is R83 900. Therefore the total value of the property is R2 763 900 and the total value of the respondents' interests in the property is R954 077.

164. Turning to the respondents' proven benefit from the three brothels, the relevant evidence is the income entries in the 2010 diaries found at the three brothels on 17 June 2010 and the cash deposits into the respondents' bank accounts from 2006 onwards. As appears from paragraphs 35 to 37 above, according to the diaries the total takings from the women's work at the brothels between 1 January and 17 June 2010 was R751 903. The first respondent's 50% share of that was R375 951.50. As appears from paragraph 75 above, between 2006 and 12 June 2010 there were deposits into the first respondent's Standard Bank account number 275 717 712 totalling R1 366 454, which reduces to R1 229 104 if the 2010 deposits of R137 350 are left out of account; as appears from paragraph 76 above, between 12 January 2010 (when the account was opened) and 30 April 2010 there were deposits into the first respondent's Standard Bank account number 624 816 095 totalling R160 000; and as appears from paragraph 77 above, between 23 June 2009 (when the account was opened) and 31 August 2010 there were deposits into the second respondent's First National Bank account number 622 295 579 81 totalling R80 500. As most of the deposits during 2010 probably derive from the first respondent's brothel income in that year, when calculating the proven income they should be left out of consideration in favour of the first respondent's 50% share of the brother income. On that basis, and leaving aside the money deposited into the second respondent's account, the proven brothel income between 2006 and 17 June 2010 is R1 605 055.50.

165. Therefore, the total value of the respondents' interest in the property (R954 077) is less than the proven brothel income (R1 605 055.50) and the proven total

brother income is a significant percentage (58%) of the total value of the property (R2 763 900). As a result, the present is not case where the forfeiture to the State of the whole of the property would be disproportionate when viewed in monetary terms. In saying that I am mindful of the fact that the Broad Road property and the Rav 4 vehicle stand on a somewhat different footing to the Perth Road property and the Cuckoo Street property, because the first respondent acquired the former assets before she started the brothel businesses in 2006. However, as explained in paragraph 104 above, she continued repaying the loans secured by those assets for several years after 2006. She also refinanced the purchase of the Broad Road property in May 2007.

166. Finally, as to use to which the property is being put, prior to the granting of the preservation order all of the immovable properties and the motor vehicle were being used by or for the benefit of the respondents. Since the granting of the preservation order the *curator bonis* permitted the first respondent and her son to live in the Broad Road property and he has also permitted her to use the Rav 4 vehicle. (Incidentally, in her written submissions Adv. Du Toit makes something of the lengthy period during which the property has been subject to the preservation order, but as appears from paragraphs 8 to 12 above that is due to this Court and the NDPP affording the respondents a further opportunity to oppose and to obtain legal representation and to the late delivery of the first respondent's answering affidavit.)

167. When all of the considerations discussed above are weighed together, then, in my judgment, even though the commission of those offences in the present matter was not accompanied by any aggravating factors and even though there are a range of notable mitigating factors, the forfeiture to the State of all of the property is justified. The contraventions may well constitute the racketeering offence created by s 2(1)(e) of POCA, albeit not the large-scale racketeering to which the offences in Chapter 2 of POCA are primarily directed (*National Director of Public Prosecutions and Another v Mohamed NO and Others* 2002

(4) SA 843 (CC) paras 14-15). There is a relatively close connection between the property and the commission of the offences in ss 2 and 20(1)(a) of the Sexual Offences Act. The total value of the respondents' interest in the property is far less than the proven brothel income and the latter is a significant proportion of the total value of the property. Before the property was placed under the control of the *curator bonis* all of it was being used by or for the benefit of the respondents.

168. The case at hand is therefore not an exceptional one in which an entire forfeiture, as opposed to a partial forfeiture or no forfeiture, will constitute an arbitrary deprivation of property in contravention of s 25(1) of the Constitution.

ANCILLARY RELIEF AND COSTS

169. The NDPP sought ancillary orders providing for the following: (a) the continuation in office of the *curator bonis*; (b) the regulation of the sales of the property; (c) the utilisation of the proceeds of the sale to pay, first, the fees and expenditure of the *curator bonis* as approved by the Master of the High Court and, secondly, in the case of the immovable properties, to pay the outstanding balances of the mortgage bonds registered over those properties; (d) the payment of the balance of the proceeds into the Criminal Assets Recovery Committee established in terms of s 65 of POCA; (e) the submission by the *curator bonis* of a final report on his administration of the property and compliance with the terms of the forfeiture order; and (f) the publication of the forfeiture order in the *Government Gazette* by the Registrar of this Court as required by s 50(5) of POCA.

170. With three exceptions, I shall grant the ancillary relief sought by the NDPPP with certain minor modifications discussed with Mr Kagee and Adv. Du Toit at the hearing.

171. The first exception is the NDPP's request for the inclusion in the order of a provision that the *curator bonis* shall continue in office. In *Mazibuko and Another v National Director of Public Prosecutions* 2009 (6) SA 479 (SCA) para 57 Nugent JA held such an order was not necessary as the continuation in office of the *curator bonis* follows as a matter of law. This means that the *curator bonis* continues to be subject to the provisions of the preservation of property order which are appropriate to the final phase of the process which shall start upon the making of the order in the present matter, including paragraph 6 of the preservation of property order which requires that he exercise his powers and perform his duties subject to the provisions of POCA, the provisions of the Administration of Estates Act 66 of 1965 and the supervision of the Master of the High Court.

172. The second exception is the NDPP's request for the inclusion in the order of a provision that the *curator bonis* may deduct and pay from the proceeds of the sale of the forfeited property his fees and expenses approved by the Master. In *Mazibuko*, *supra*, Nugent JA held (also in para 57) that such an order was not competent because '*[t]he incidence of the costs and expenses arising from a forfeiture order is regulated by s 57(5) of POCA, which requires those costs and expenses to be defrayed from moneys appropriated for that purpose by Parliament*'.

173. The third exception is the NDPP's request for the inclusion in the order of a provision that the *curator bonis* shall deduct from the proceeds of the sale of the forfeited property and pay over to the mortgage bondholders the outstanding amount of the loans secured by their bonds, before paying the proceeds into the Criminal Assets Recovery Account. (The mortgage bondholders are Sanlam Home Loans Guarantee Co (Pty) Ltd (administered by Absa Bank) in the case of the mortgage bond over the Broad Road property and the Standard Bank in the case of the mortgage bonds over the Perth Road property and the Cuckoo Street property.) In *Mazibuko*, *supra*, Nugent JA further held (once again in para 57)

that an order of that sort is not necessary because '*[t]he rights that vest in the curator bonis are necessarily subject to other real rights in the property and will be accounted for in the ordinary course upon transfer of the property*'. This means that, before paying the proceeds of the sales of the forfeited property into the Criminal Assets Recovery Account, the *curator bonis* must in any event deduct and pay over to the mortgage bondholders the outstanding amounts of the loans secured by their bonds.

174. The NDPP sought costs in the event of unsuccessful opposition. As the first respondent has unsuccessfully opposed this forfeiture application, I shall order that she pays the NDPP's costs in this application.

ORDER

175. I make the following order:

175.1. The immovable property owned by the first respondent situate at 78 Broad Road, W…., namely Erf 9…., W…. and the immovable property owned by the first respondent situate at 18 P…. Road, W…., namely Erf 6…., W…. are declared forfeited to the State in terms of sections 48(1) and 50(1)(b) of POCA.

175.2. The immovable property owned by the second respondent situate at 7 C…. Street, M….. P…., namely Erf 7……, M…. P…, is declared forfeited to the State in terms of sections 48(1), 50(1)(b) and 53(1)(a) of POCA.

175.3. The silver Toyota Rav 4 motor vehicle with registration number CA 420 441 registered in the name of the first respondent is declared forfeited to the State in terms of sections 48(1) and 50(1)(b) of POCA.

175.4. The *curator bonis* appointed by this Court on 17 January 2012 is authorised and directed to:

175.4.1. as soon as possible but not later than 45 calendar days after the granting of this order, sell the said motor vehicle on auction or by private sale, at best;

175.4.2. as soon as possible but not later than 180 calendar days after the granting of this order, sell the said immovable properties on auction or by private sale, at best;

175.4.3. as soon as possible but not later than 210 calendar days after the granting of this order, or such longer period as the Master of the High Court may on good cause allow, pay the nett proceeds of such sales into the banking account of the Criminal Assets Recovery Account, namely account number 8……. held at the South African Reserve Bank; and

175.4.4. as soon as possible but not later than within a period of 240 days after the granting of this order, or such longer period as the Master of the High Court may on good cause allow, file with the applicant and the Master a report indicating the manner in which he has completed his administration of the property subject to the preservation of property order of 17 January 2012 and complied with the terms of this order.

175.5. The Registrar of this Court is directed to publish a notice of this order in the *Government Gazette* as soon as possible.

175.6. The first respondent shall pay the applicant's costs of suit in the forfeiture application.

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BREITENBACH, AJ

For the Applicant:	Mr Muhammed Kagee Office of the State Attorney, Cape Town
For the First Respondent:	Adv. Anél du Toit Instructed by William Booth Attorneys, Cape Town