THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Case No 173/05
REPORTABLE

In the matter between

THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS
APPELLANT

and

KUMARNATH MOHUNRAM **FIRST RESPONDENT**
SHELGATE INVESTMENTS CC **SECOND RESPONDENT**
BOE BANK LIMITED **THIRD RESPONDENT**

Coram: Harms, Mthiyane, Conradie, Jafta JJA and Maya AJA

Heard: 7 March 2006

Delivered: 17 March 2006

Summary: Prevention of Organised Crime Act 121 of 1998 – forfeiture – gambling premises – instrumentality of an offence – proportionality.

Neutral citation: ***National Director of Public Prosecutions v Mohunram*** **[2006] SCA 11 (RSA)**

JUDGMENT

HARMS JA:

[1] The Prevention of Organised Crime Act 121 of 1998 (to which I intend to refer as 'POCA') provides, inter alia, for forfeiture of property which, in civil proceedings, is found on a balance of probabilities to have been 'an instrumentality of an offence referred to in Schedule 1' (s 50(1)(a)). An 'instrumentality of an offence' is defined to mean any property which 'is concerned in the commission' of an offence (s 1). Listed in the schedule is 'any offence under any legislation dealing with gambling, gaming or lotteries'. Casinos and gambling fall within the legislative competence of both national and provincial legislatures (Schedule 4 of the Constitution). In KwaZulu-Natal these matters are regulated by the KwaZulu-Natal Gambling Act 10 of 1996. Since it is common cause that the respondents have contravened the Gambling Act, the appellant, the National Director of Public Prosecutions, sought to have immovable property (a sectional title unit in the town Vryheid together with an undivided share in the common property in accordance with the applicable participation quota) belonging to the second respondent, Shelgate Investments CC, declared forfeited. (The first respondent, Mr Mohunram, is the only member of Shelgate.) C N Patel J, in the Natal Provincial Division, dismissed the application with costs on the basis that the property had not been an 'instrumentality' of any offence under the Gambling Act. He refused leave to appeal but this Court subsequently granted the necessary leave.

[2] POCA has been the subject of a number of leading judgments and the

forfeiture provisions, more particularly, have been considered by this Court in recent times. This judgment does not raise any novel issues of interpretation and is more concerned with the application of the Act to the particular facts of the case. There are usually three main issues in a case such as this to decide and they are (a) whether the property concerned was an instrumentality; (b) whether any interests should be excluded from the forfeiture order; and (c) whether the forfeiture sought would be disproportionate. In the present circumstances issue (b) will be referred to at the end of the judgment because it is not an issue between the parties to the appeal.

[3] It is common cause that Mohunram used part of the property as a casino: he operated 57 gambling machines on the property in contravention of s 44 of the Gambling Act, which states that no person may operate a casino unless validly licensed. (The word 'casino' is defined in s 1 as 'any premises upon which . . . gaming machines may be played.') In terms of s 3(3)(a) of this Act, the owner of a building may not allow any other person to conduct any gambling activity therein or thereon unless that person has been duly licensed. Shelgate as owner did just that, having permitted Mohunram to conduct the casino.

[4] It will immediately be apparent that in both instances use of premises is of the essence of the crimes as defined. Without use of premises there are no crimes. The complications that arose in cases such as *Cook*,[1] *Parker*[2] or *Prophet*[3] do not arise in the present instance. It follows in my view ineluctably that the particular premises were an instrumentality of the crimes; they were intimately concerned in their commission. The High Court, on the other hand, held that the premises were, in this case, merely a venue for the commission of these crimes. It held that the gambling machines were the means or instruments of the crime and not the premises. This finding, in my judgment, does not take into account the definitions of the crimes involved. If the Gambling Act had only provided for the criminalisation of the possession or use of gambling machines, the finding might have had some merit but even then it would have been necessary to conduct, in the light of all the facts, an inquiry along the lines suggested in *Prophet* (at para 27). Another consideration relied on by the High Court was the fact that part of the property

[1] *National Director of Public Prosecutions v R O Cook Properties (Pty) Ltd* 2004 (2) SACR 208 (SCA).
[2] *National Director of Public Prosecutions v Parker* SCA judgment of 1 December 2005 case 624/04.
[3] *Prophet v National Director of Public Prosecutions* 2005 (2) SACR 670 (SCA).

only had been used for a casino. The High Court found that the provision does not apply if part of a property is used in the commission of a crime and not the whole. There is no justification for this interpretation. 'Property' is defined in POCA to include any 'immovable' thing and immovable property is identified with reference to its cadastral description, ie, it is the property as described in the deeds office.[4] It is highly unlikely that the whole of an immovable property can ever be used in the commission of a crime and the restriction would make the provision meaningless. The fact that part of a property was used in the commission of a crime generally does not determine whether or not the property was an 'instrumentality', although it may be relevant in considering proportionality.

[5] Proceeding then to the proportionality issue, ie, whether forfeiture was constitutionally justified in the light of especially the property clause and the protection against double jeopardy, it has been held that forfeiture may not be ordered if the forfeiture would be significantly disproportionate to the crime concerned. Although the respondents did not raise this issue pertinently, as was their duty, and although the High Court did not pronounce thereon in the light of its conclusion on 'instrumentality', the matter was properly argued and requires consideration.

[6] The respondents' main complaint is that Mohunram had paid admission of guilt fines amounting to R88 500,00 in respect of the illegal casino operation; under the provisions of the Gambling Act he forfeited R2 102,10, being monies that were found on the premises during a police raid; and his gaming machines (which he valued at R285 000) were, also in terms of the Gambling Act, seized. See s 94(4). This, they say, was enough punishment (as if punishment were the object of forfeiture). They again raise the fact that part only of the property had been used for gambling and not the whole property. And they argue that the loss of the value of the property would be disproportionate.

[7] As far as the first point is concerned, it should be borne in mind that the

[4] Cf *Dlamini v Joosten* unreported SCA judgment 30/05 of 30 November 2005.

property of Shelgate is the subject of the forfeiture application and not the property of Mohunram. And these are business premises, not residential. Shelgate, to date, has lost nothing due to its own illegal actions. Admittedly, Mohunram is the ultimate beneficiary of Shelgate but that should not conceal the fact that one has to respect the separate corporate personality of Shelgate. Mohunram and Shelgate have had the advantages of their separate legal personalities and they have to bear the consequences thereof. In addition, the argument loses sight of Mohunram's illicit income from the operation which, on the available evidence, amounted to about R360 000 during the one year when he ran the operation after an amendment to the Gambling Act that made it clearly illegal. It also does not take into account the seriousness of the crime as reflected in the penalties and forfeitures provided for by the Gambling Act (s 94). As first offenders Mohunram risked imprisonment of ten years and Shelgate a fine of R2m.

[8] The other two points can be dealt with as one. The area of the sectional title property is 542 sq metres. Although Mohunram did conduct a legitimate business on part of the property, we have not been informed as to the respective sizes of the two areas. Taking into account that he had 57 gaming machines and a gambling booth, the area occupied by his casino operation could not have been insignificant. One can get some indication of the size of the gambling area if one considers that after the casino was closed down he subdivided the casino area and let the two portions. Turning then to the value of the property, at least one thing is clear and that is (bearing in mind the bond of the third respondent (BOE Bank Ltd)) that the equity of Shelgate, is far less than the value of the property. The figures are in dispute, the appellant believing that there is value for the state in a forfeiture order while the respondents think not. However, since the appellant utilised motion proceedings, he is generally bound by the version of the respondents. According to Mohunram, the property market in Vryheid at the relevant time was 'severely depressed' and he thought that it was unlikely that the outstanding bond would be realised should the property be sold. (We are not concerned with the present value or the present state of the market, matters about which we in any event do not have any knowledge.) Accepting this

evidence, as we must, there does not appear to be any merit in the argument that forfeiture would have been disproportionate to the crimes involved.

[9] The appeal has, consequently, to succeed. The order that is about to issue reflects the interests of the bondholder and that prior to the proceedings before Patel J a *curator bonis* had been appointed as part of a preservation order in terms of s 38 of POCA.

ORDER:

1. The appeal is upheld with costs including costs consequent upon the employment of two counsel.
2. The order of the court *a quo* is to be replaced with the following: -

(a) An order is granted under s 50(1) of the Prevention of Organised Crime Act, No 121 of 1998 declaring forfeit to the state the property described as:

(i) Section 2 as shown and more fully described on sectional plan no SS 577/96 in the scheme known as the Malapin Centre in respect of the land and building or building situate at 244 Utrecht Street, VRYHEID, in the Transitional Local Council Area, Vryheid; and

(ii) an undivided share in the common property in the scheme apportioned to the said section in accordance with the participation quota as endorsed on the said sectional plan;

(b) the *curator bonis* appointed in terms of the preservation order made on 19 October 2001 will continue to act in such capacity;

(c) the interest of the third respondent is hereby excluded from the operation of this order;

(d) the *curator bonis*, as of the date on which the forfeiture order takes effect, shall be empowered to perform the following:

(i) subject to consultation with the third respondent, to dispose of the property by sale or other means;

(ii) deduct the fees and expenditure associated with his function as a *curator bonis*;

(iii) settle the outstanding balance on the home loan bond account number 8350103059 held by the second

respondent at a branch of the third respondent;

(iv) deposit the balance of the proceeds into the Criminal Asset Recovery Account;

(e) the Registrar of the High Court, Natal Provincial Division, is directed to publish a notice of this order in the Government Gazette as soon as possible; and

(f) the first and second respondents are directed to pay the applicant's costs jointly and severally.

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LTC HARMS

JUDGE OF APPEAL

CONCUR:

MTHIYANE JA
CONRADIE JA
JAFTA JA

MAYA AJA