



**THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA**

**Not Reportable
Case no: 268/06**

In the matter between:

SHEILA DEVI SINGH

Appellant

and

THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS

Respondent

CORAM: HARMS, CAMERON, LEWIS, CACHALIA JJA AND THERON AJA

DATE OF HEARING: 21 MAY 2007

DATE OF DELIVERY: 1 JUNE 2007

Summary: Criminal Law – Application for preservation order in respect of immovable property in terms of s 38 of the Prevention of Organised Crime Act 121 of 1998 – The NDPP bears the onus of establishing reasonable grounds to believe that the property is ‘an instrumentality of an offence’ – Property must play a real or substantial role in the commission of the offence.

Neutral citation: This case may be cited as *Singh v National Director of Public Prosecutions* [2007] SCA 82 (RSA).

JUDGMENT

THERON AJA/

[1] This appeal concerns a preservation order in respect of immovable property consisting of land and buildings situated at 21 Bell Grove, Berea, Durban ('the property'), in terms of s 38(2) of the Prevention of Organised Crime Act 121 of 1998 ('POCA').¹ The question is whether or not it has been established that the property was an instrumentality of an offence as envisaged in POCA.²

[2] The National Director of Public Prosecutions ('the NDPP') applied, on an *ex parte* basis, to the Durban High Court for a preservation order in respect of the property. The NDPP alleged that the property was an instrumentality of the offence of drug dealing in contravention of s 5(b) of the Drugs and Drug Trafficking Act 140 of 1992 ('the Drugs Act').³ The offence of contravening s 5(b) is listed in item 22 of schedule 1 of POCA. The court granted the preservation order.

¹ Section 38 of POCA reads:

'Preservation of property orders

(1) The National Director may by way of an *ex parte* application apply to a High Court for an order prohibiting any person, subject to such conditions and exceptions as may be specified in the order, from dealing in any manner with any property.

(2) The High Court shall make an order referred to in subsection (1) if there are reasonable grounds to believe that the property concerned-

(a) is an instrumentality of an offence referred to in Schedule 1;

(b) is the proceeds of unlawful activities; or

(c) is property associated with terrorist and related activities.

(3) A High Court making a preservation of property order shall at the same time make an order authorising the seizure of the property concerned by a police official, and any other ancillary orders that the court considers appropriate for the proper, fair and effective execution of the order.

(4) Property seized under subsection (3) shall be dealt with in accordance with the directions of the High Court which made the relevant preservation of property order.'

²In s 1 of POCA 'instrumentality of an offence' is defined as 'any property which is concerned in the commission or suspected commission of an offence at any time before or after the commencement of this Act, whether committed within the Republic or elsewhere'.

³Section 5(b) provides that 'no person shall deal in any dangerous dependence-producing substance or any undesirable dependence-producing substance' subject to a number of exceptions which are not relevant for present purposes.

Section 1(1) of the Drugs Act defines 'deal in' to include 'performing any act in connection with the transshipment, importation, cultivation, collection, manufacture, supply, prescription, administration, sale, transmission or exportation of the drug'.

[3] The evidence relied on by the NDPP is this. Singh (the appellant) is the owner of the property and her son administered the property on her behalf. The property comprises a main building with six bedrooms and three bathrooms, a wooden shed and an outhouse consisting of two rooms and a bathroom. The property was let to a tenant, Ms Joan Cele, who runs an unlicensed boarding establishment on the property, offering accommodation at hourly and daily rates.

[4] The property has, during the period 1996 to 2003, been the subject of sporadic continuous police action. As a result of this police action, 36 arrests have been made on the property for drug-related offences. Arising from these arrests, nine persons have been convicted of dealing in a substance prohibited in terms of the Drugs Act, and four of them gave the property as their residential address. According to the evidence, there were two outstanding warrants of arrest for persons charged with dealing in drugs on the property, who had also given the property as their residential address.

[5] During these police raids, drugs such as dagga, mandrax and cocaine were found on the property. It is alleged by the NDPP that some of the drugs found were in quantities that exceeded the needs of one person, thereby suggesting that the drugs were being sold from the property. Based on the foregoing, the allegation is made that drug dealers resided on the property and were using the property to sell drugs. In addition, the

NDPP relied on the admission by Cele, that she, as well as a previous tenant, had, at some stage, sold dagga from the property.

[6] The NDPP makes the following allegations: That despite several warnings by members of the South African Police Service (SAPS), neither Singh nor her son took reasonable steps to ensure that the property did not become a haven for drug dealers looking for a secure environment from which to ply their trade. Singh's and her son's inaction resulted in a lack of diligent care, administration and supervision of the property. The property played an integral role in facilitating drug dealing in that: (a) it provided a safe house for drug dealers seeking refuge from the law; (b) it provided a protected and secluded environment for drug dealers to ply their trade; (c) drugs are easily stored on the property; (d) the property's long history of association with drugs made it a well known drug den which attracted drug dealers and (e) the running of an unlicensed lodge perpetuated drug dealing on the property.

[7] Singh initially sought to have the preservation order set aside on the basis that the *ex parte* procedure was unconstitutional but later abandoned this course as a result of subsequent judgments.⁴ Singh then sought to have the preservation order reconsidered and rescinded, first, on the basis that immovable property could never be an instrumentality of the offence of dealing in drugs and alternatively, that the property was

⁴*National Director of Public Prosecutions v Mohamed* NO 2003 (4) SA 1 (CC) and *National Director of Public Prosecutions v R O Cook Properties (Pty) Ltd*; *National Director of Public Prosecutions v 37 Gillespie Street, Durban (Pty) Ltd*; *National Director of Public Prosecutions v Seevnarayan* [2004] 2 All SA 491 (SCA); 2004 (2) SACR 208 (SCA).

not an instrumentality of an offence. In light of the decisions in *National Director of Public Prosecutions v R O Cook Properties (Pty) Ltd*,⁵ *Prophet v National Director of Public Prosecutions*⁶ and *National Director of Public Prosecutions v Mohunram*,⁷ to the effect that immovable property can be an instrumentality of the offence of dealing in drugs, Singh has abandoned the first ground as well.

[8] The high court dismissed the application for reconsideration, finding that the frequency and extent of the drug dealing was so overwhelming that the conclusion that the property was an indispensable part of the activity of drug dealing, and thus an instrumentality, was inescapable. Singh sought leave to appeal against the refusal to rescind the preservation order but this was refused on the basis that a preservation order is not appealable. Singh is before us with the leave of this court.

[9] In *Phillips v National Director of Public Prosecutions*⁸ this court held that a restraint order granted in terms of Chapter 5 of POCA is appealable. Howie P, writing for the court, accepted that whilst a restraint order is only of interim operation and has no definitive or dispositive effect as envisaged in *Zweni v Minister of Law and Order*,⁹ it nevertheless has final effect because:

⁵ [2004] 2 All SA 491 (SCA); 2004 (2) SACR 208 (SCA).

⁶ 2006 (1) SA 38 (SCA); 2006 (2) SACR 525 (CC).

⁷ 2006 (1) SACR 554 (SCA); 2007 (6) BCLR 575 (CC).

⁸ 2003 (6) SA 447 (SCA).

⁹ 1993 (1) SA 523 (A). *Zweni* set out the general requirements for determining the appealability of a judgment or order.

‘Absent the requirements for variation or rescission laid down in s 26(10)(a) [of POCA] (and leaving aside the presently irrelevant case of an order obtained by fraud or in error) a restraint order is not capable of being changed. The defendant is stripped of the restrained assets and any control or use of them. Pending the conclusion of the trial or the confiscation proceedings he is remediless. That unalterable situation is, in my opinion, final in the sense required by the case law for appealability.’¹⁰

[10] In light of the decision in *Phillips*, counsel for the respondent conceded, and rightly so, that the grant of a preservation order is ‘final’ in the sense required for appealability - in the case of both restraint and preservation orders the court making the order may only rescind or vary it in accordance with the provisions of POCA.¹¹

[11] As I have already indicated, the NDPP’s case is that the property is an instrumentality of the offence of dealing in drugs in contravention of s 5(b) of the Drugs Act. As appears earlier, ‘instrumentality of an offence’ is defined as ‘any property which is concerned in the commission or suspected commission of an offence at any time before or after the commencement of this Act, whether committed within the Republic or elsewhere’. In *Cook Properties*¹² this court held that it is inappropriate to interpret this

¹⁰ Para 22.

¹¹In general, a restraint order granted in terms of Chapter 5 of POCA may only be varied or rescinded in accordance with s 26(10)(a) which provides that a high court which made a restraint order:

‘may on application by a person affected by that order vary or rescind the restraint order or an order authorising the seizure of the property concerned or other ancillary order if it is satisfied-

(i) that the operation of the order concerned will deprive the applicant of the means to provide for his or her reasonable living expenses and cause undue hardship for the applicant; and

(ii) that the hardship that the applicant will suffer as a result of the order outweighs the risk that the property concerned may be destroyed, lost, damaged, concealed or transferred.’

Section 26(10)(a) is, in substance, replicated in the context of Chapter 6 of POCA by section 47(1)(a).

¹² [2004] 2 All SA 491 (SCA); 2004 (2) SACR 208 (SCA) para 13 per Mpati DP and Cameron JA.

definition with ‘unbounded literalism’ and that the Constitution required a narrower interpretation for a number of reasons. Section 25(1) of the Constitution provides that ‘no law may permit arbitrary deprivation of property’. Considering that deprivation of property is arbitrary when there is insufficient reason for the deprivation,¹³ *Cook Properties* held that a literal interpretation of the definition might lead to arbitrary deprivation of property and, in order to avoid such an outcome, the definition must be interpreted in light of the purposes of chapter 6 of POCA, which include: removing incentives for crime; deterring persons from using or allowing their property to be used in crime; eliminating or incapacitating some of the means by which crime may be committed; and advancing the ends of justice by depriving those involved in crime of the property concerned.¹⁴ *Cook Properties* also held that forfeiture would be unconstitutional if it did not rationally advance the objectives of POCA because such forfeiture was ‘not contemplated by or permitted under the Act’.¹⁵ It accordingly held that: (a) there must be a reasonably direct link between the property and its criminal use and (b) the use of the property must be functional to the commission of the crime and that the property must substantially facilitate, make possible or be instrumental in, and not incidental to, the commission of the offence.¹⁶

¹³*First National Bank of South Africa Ltd t/a Wesbank v Commissioner of SARS* 2002 (4) SA 768 (CC) paras 61-66, 97-100.

¹⁴Para 18.

¹⁵Para 29.

¹⁶Para 31.

[12] This matter, in my opinion, bears a striking similarity to that of the Gillespie Street Hotel in *Cook Properties*,¹⁷ where this court was faced with the question whether a hotel was an instrumentality of an offence because drug and prostitution offences were being committed on the property. In that case, too, during police raids conducted on the property various narcotic substances and drugs were found and suspects arrested. The court had regard to the fact that the hotel was situated in an area where drug offences were rife and that in the circumstance the hotel was likely to attract a clientele who may possess drugs. The court also took into account that members of the public could rent a room or rooms at the hotel for any length of time and concluded:

‘The mere fact that drug dealers may frequent the hotel does not make it a “drug shop”. There is no evidence that the persons arrested in the various raids and searches were the same people. There is no suggestion that rooms were rented out or equipped for the purpose of drug dealing. Nor is there any evidence that the premises themselves were used to manufacture, package or distribute drugs, or that any part of the premises was adapted or equipped to facilitate drug dealing.’¹⁸

[13] Counsel for the NDPP contended that there were three factors that distinguished this matter from *Cook Properties*. First, the property is not a hotel – it is a single compact unit and Singh and her son, as owner and administrator of the property, respectively, could reasonably be expected to have acted vigilantly and exercised sufficient control over the property in order to prevent crimes being committed thereon.¹⁹ I do not agree

¹⁷ [2004] 2 All SA 491 (SCA); 2004 (2) SACR 208 (SCA).

¹⁸ Para 49.

¹⁹ This was the reasoning adopted by Nkabinde AJA in *National Director of Public Prosecutions v Parker* [2006] 1 All SA 317 (SCA); 2006 (3) SA 198 (SCA) para 17.

that this difference is material. The property had been let to Cele who in turn rented out rooms to various tenants including persons wishing to have casual sex - it is in the nature of a hotel such as the Gillespie Street Hotel in *Cook Properties*.

[14] Secondly, it was argued that this court is enjoined to consider the broader picture which emerges from the evidence regarding the raids on the property and this includes the incidents of arrest, convictions, recovery of prohibited substances, and the links between the arrested and suspected persons and the property – all of which were indicative of a regularity which goes beyond mere incidental use of the property. It was submitted that against the background of the police raids, combined with the numerous complaints lodged by members of the community regarding the property (complaints were lodged by a local councillor, a neighbour and the headmaster of a nearby school who suspected that pupils from his school had purchased drugs from the property), the inference can be drawn that the property had acquired a reputation as a place where drugs were freely available. Relying on *National Director of Public Prosecutions v Parker*,²⁰ it was further submitted that even though the property had not been specifically adapted for criminal purposes, as it was not necessary to adapt the property in order to sell drugs, this court should find that the NDPP has established (a) that the property was a well known drug haven and (b) ‘instrumentality’ on the basis of repeated use of the property as a venue for purposes of concluding drug deals.

²⁰ [2006] 1 All SA 317 (SCA); 2006 (3) SA 198 (SCA) para 22.

[15] In *Parker* the court found that the NDPP had established that the property was not merely an incidental venue from which drugs were obtainable, but was in fact a ‘drug shop’. There is insufficient evidence to support such a finding in this matter. The evidence as to the arrests, convictions and recovery of drugs from the property must be considered in context. Having regard to the fact that the police action spanned a period of seven years, this evidence is certainly not indicative of ‘regularity’ as contended by counsel for the NDPP. The convictions of drug dealing amount to a few per year and are more indicative of sporadic incidents of transgression.

[16] Thirdly, it was contended that this matter is distinguishable from *Cook Properties* by reason of the evidence suggesting that the property was used for the preparation of drugs for sale. In support of this contention counsel placed reliance on photographic evidence indicating that small plastic packets as well as newspaper wrappings, both of which contained dagga, were found on the sidewalk opposite the property. A similar plastic packet containing dagga was found in the outhouse on the property. Newspaper containing dagga pips was found at the rear of the property. It is alleged by the NDPP that pips are removed from the dagga leaves in the course of the preparation of the dagga for sale. It is further alleged that the dagga had been prepared on the property and then stored on the sidewalk as the property was subject to regular police action. To link items found beyond the boundaries of the property with items recovered from the property, and

to draw an inference, based on speculative evidence, that dagga was prepared for sale on the property is not justified on the totality of the evidence.

[17] Property only qualifies as an instrumentality if it is used to commit the offence and its use must be such that it plays a real and substantial part in the actual commission of the offence. The fact that a crime is committed at a certain place does not by itself make that place an instrumentality of the offence. A closer connection is required. In this matter the link between the property and the offences is largely incidental or fortuitous. The NDPP had to prove facts giving rise to reasonable grounds for believing that the property is an instrumentality of the offence of dealing in dependence producing drugs. The evidence had to demonstrate the role the property played in the commission of this offence. The analysis of the evidence provides no more than that persons who from time to time reside on the property either possessed or dealt in drugs. There is no evidence that these persons were identified as drug dealers or how often the same persons were involved in drug dealing or that they permanently resided at the premises or did so for any extended period of time. The drug dealing appears to have been committed by a number of different people acting independently from each other. The linking of the property and the offences is in the most general terms. These are, inter alia, that the boarding establishment has made it possible for drug dealers to ply their trade in a protected environment and for members of the public to enter the premises and purchase drugs on the pretext that they were seeking accommodation. There is no evidence that

the use of the property was *per se* important or relevant to the success of the illegal activity.²¹ The evidence established no more than that the property was a venue for dealing in drugs.

[18] For these reasons the following order is made:

- (a) the appeal is upheld with costs, such costs to include those consequent upon the employment of two counsel;
- (b) the order of the court *a quo* is set aside and replaced with the following:
‘The preservation order is set aside and the NDPP is directed to pay the costs of the application.’

L V Theron
Acting Judge of Appeal

CONCUR:

HARMS DP)

CAMERON JA)

LEWIS JA)

CACHALIA JA)

²¹ *Prophet v National Director of Public Prosecutions* 2006 (1) SA 38 (SCA) para 27.