IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Reportable

Case No: 531/2005

In the matter between:

THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS Appellant

and

DR J A K VAN STADEN **First Respondent**
FIRSTRAND BANK LIMITED **Second Respondent**
TOYOTA FINANCIAL SERVICES **Third Respondent**

Coram: **CAMERON, NUGENT JJA, MALAN, THERON and CACHALIA AJJA**

Heard: **14 SEPTEMBER 2006**

Delivered: **9 NOVEMBER 2006**

Summary: **Chapter 6 of the Prevention of Organised Crime Act 121 of 1998 – motor vehicle an ‘instrumentality’ of the offences of driving under the influence of intoxicating liquor and driving with excess alcohol in the blood.**

Neutral citation: **This judgment may be referred to as National Director of Public Prosecutions v Van Staden [2006] SCA 135 (RSA).**

JUDGMENT

NUGENT JA

NUGENT JA:

[1] It has been said, at times, that the purpose of the Prevention of Organised Crime Act 121 of 1998 is to combat the special evils that are associated with organised crime,[1] but that is not entirely correct. That is certainly one of its purposes, and perhaps even its principal purpose, but as pointed out by this court in *National Director of Public Prosecutions v R O Cook Properties (Pty) Ltd* et al,[2] its provisions are designed to reach far beyond organised crime and apply also to cases of individual wrongdoing.[3] In this appeal the more mundane, though nonetheless serious, offences of driving a motor vehicle on a public road while under the influence of intoxicating liquor,[4] or while the concentration of alcohol in the driver's blood exceeds the prescribed level,[5] are in issue. The question that it raises

[1] *National Director of Public Prosecutions v Mohamed NO* 2002 (4) SA 843 (CC) para 14; *Prophet v National Director of Public Prosecutions* 2006 (1) SA 38 (SCA) para 37; *Prophet v National Director of Public Prosecutions*, unreported Constitutional Court judgment in Case No CCT 56/05 dated 29 September 2006 para 59.
[2] *National Director of Public Prosecutions v R O Cook Properties (Pty) Ltd*; *National Director of Public Prosecutions v 37 Gillespie Street Durban (Pty) Ltd*; *National Director of Public Prosecutions v Seevnarayan* 2004 (2) SACR 208 (SCA); 2004 (8) BCLR 844 (SCA).
[3] Para 65.
[4] Which is prohibited by s 65(1) of the National Road Traffic Act 93 of 1996.
[5] Which is prohibited by s 65(2) of the National Road Traffic Act 93 of 1996.

is whether a motor vehicle that is driven in those circumstances constitutes an 'instrumentality' of the offence liable to forfeiture to the state under the provisions of chapter 6 of the Act. Though the question was presented before us in this narrow form it requires us to consider the broader context within which the term falls to be construed.

[2] The appeal arises from five applications that came before the High Court in Port Elizabeth in which the National Director of Public Prosecutions (NDPP), in anticipation of forfeiture applications being brought, sought orders for the preservation of motor vehicles that were alleged to have been driven under those conditions. The applications were dismissed by Jones J in the court below[6] and the NDPP now appeals with his leave. The respondents were all given leave to intervene in the proceedings. The first respondent is the possessor of one of the vehicles and he abides the decision of the court. The appeal was opposed by the second respondent, who financed the purchase of one of the vehicles, and by the third respondent, who also finances the purchase of motor vehicles and thus has a more general interest in the outcome of the appeal. This is regarded by the parties as a test case, and thus the record of only one of the applications is before us, but the outcome will apply equally to the remaining applications.

[3] The scheme of chapter 6 of the Act was dealt with extensively by this court in *Cook Properties* and I need highlight only its principal components so far as they are now material. It authorises the NDPP to apply to a High Court, without notice, for an order that has the effect of temporarily depriving a person of property, so as to preserve the property in anticipation of an order being sought for its forfeiture.[7] A court is required to make such an order 'if there are reasonable grounds to believe that the property concerned . . . is an instrumentality of an offence referred to in Schedule 1' of the Act.[8] Once such an order has been made the NDPP is required to give notice of the order to interested parties that are known to him and they

[6] Reported as *Ex parte National Director of Public Prosecutions* 2005 (2) SACR 198 (SE). The decision was followed in *National Director of Public Prosecutions v Vermaak*, unreported decision in the Pretoria High Court Case No 33729/2004.

[7] Section 38(1).

[8] Section 38(2).

are entitled to intervene in the subsequent proceedings. Within 90 days of a preservation order being made the NDPP may apply to a High Court for an order declaring all or any of the property forfeit to the state.[9] A court is required to make such an order if it finds, as a matter of probability, that the property is an 'instrumentality' of such an offence,[10] subject to its power to exclude from the operation of the order certain interests that are shown to have been acquired in specified circumstances.[11]

[4] The potential of these provisions to intrude on the constitutional guarantee against arbitrary deprivation of property featured significantly in the construction that was adopted in *Cook Properties,*[12] which held that whatever more might be required to avoid a deprivation being arbitrary, and thus constitutionally objectionable, there needs at least to be a rational relationship between the deprivation and the legislative ends that are sought to be attained through the deprivation.[13] Whether that relationship is sufficient in a particular case to avoid the consequence of constitutional invalidity must necessarily depend as much upon the proximity of the property to the offence as upon the proportionality of the deprivation to the legislative ends. For even where the property is sufficiently proximate to the offence to be an 'instrumentality' of the offence the deprivation might nonetheless be so disproportionate in the circumstances as to make the deprivation arbitrary. As pointed out in *First National Bank,*[14] in another

9 Section 48(1).
10 Section 50(1).
11 Section 52.
12 *Cook Properties*, above, para 15.
13 *Cook Properties*, above, paras 15 and 16.
14 *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First*

context:

'[F]or the validity of such deprivation, there must be an appropriate relationship between means and ends, between the sacrifice the individual is asked to make and the public purpose this is intended to serve'.

The constitutional validity of the forfeiture provisions of chapter 6 is thus a function both of the ambit of an 'instrumentality of an offence' and of the capacity of a court to refuse to allow a disproportionate forfeiture.

[5] While s 50 of the Act purports to cast an obligation upon a court to order the forfeiture of property once it is satisfied that it constitutes an 'instrumentality' of the offence concerned it was said in *Cook Properties*, albeit that it was not necessary to consider the point, that 'our earlier conclusion that a proportionality analysis may be constitutionally required when forfeiture is ordered . . . is incompatible with the rigidity [of such a construction of s 50]'.[15] It was subsequently held by this court in *Prophet v National Director of Public Prosecutions*[16] that a court may decline to make a forfeiture order if the particular deprivation is disproportionate to the crime,[17] and that was subsequently approved by the Constitutional Court.[18]

[6] In *Prophet's* case the majority of this court (the Constitutional Court did not find it necessary to express itself on the matter) held that

'[a] mere sense of disproportionality should not lead to a refusal of the order sought. To ensure that the purpose of the law is not undermined, a standard of "significant disproportionality" ought to be applied for a court to hold that a deprivation of property is

National Bank of SA Ltd t/a Wesbank v Minister of Finance 2002 (4) SA 768 (CC); 2002 (7) BCLR 702 (CC) para 98.

[15] Para 74.

[16] 2006 (1) SA 38 (SCA) paras 30 and 37.

[17] See, too, *National Director of Public Prosecutions v Mohunram* 2006 (1) SACR 554 (SCA) para 5.

[18] Unreported judgment referred to in footnote 1 above, para 58.

'arbitrary' and thus unconstitutional, and consequently refuse to grant a forfeiture order. And it is for the owner to place the necessary material for a proportionality analysis before the court.'[19]

The imperative for that conclusion was the need to 'ensure that the purpose of the law is not undermined' and that purpose was said to be 'the rapid growth, both nationally and internationally, of organised criminal activity'. The minority considered that the requirement that the disproportion must be 'significant' before a deprivation would be unconstitutional was unjustified.[20]

[7] I have already observed that organised crime is but one of the targets of the Act (that is exemplified by the present case). Incursions upon conventional liberties that are justified by the particular difficulties encountered in the detection and successful prosecution of organised crime are not similarly justified in cases of ordinary crime that do not present those difficulties. I do not think it is permissible to look to one threat that the Act aims at combating (the threat posed by organized crime) in order to justify its application in relation to a quite different threat (the threat that is posed, for example, by drunken driving) that does not present the same challenges. It must be borne in mind that drunken driving, which does not ordinarily result from organised illicit activity, and presents no special difficulties to detect and prosecute, can attract substantial penalties, and the ordinary criminal law ought to be the first port of call to combat the evil. For the Act exists to supplement criminal remedies in appropriate cases and not merely as a more convenient substitute.

[8] No doubt there will be cases in which the forfeiture of a motor vehicle will complement those ordinary remedies, particularly where it will have an effective remedial impact,[21] but I do not think in cases of drunken driving there is justification for imposing the higher standard of 'significant' disproportionality referred to in *Prophet*. To avoid an order for forfeiture in such cases being arbitrary, and thus unconstitutional, a court must be satisfied that the deprivation is not disproportionate to the ends that the deprivation seeks to achieve. In making that determination the extent to which the deprivation is likely to afford a remedy for the ill sought to be countered, rather than merely being penal, will necessarily come to the fore, bearing in mind that the ordinary criminal sanctions are capable of serving the latter function. For as pointed out by Ponnan JA in *Prophet* (an observation that is not incompatible with the view of the majority):

'Courts should be vigilant to ensure that the statutory provisions in question are not used

[19] Para 37.

[20] Paras 42-47.

[21] The ends that are sought to be achieved by chapter 6 are tabulated in *Cook Properties* at para 18.

in terrorem and that there has been no overreaching and abuse.'[22]

[9] In my view that approach to forfeiture necessarily affects the approach that a court must adopt when it is called upon to grant a preservation order in terms of s 38. The only justification for granting such an order – which is itself incursive, albeit that the incursion is temporary – is the expectation that a forfeiture order will be made in the future. It follows, in my view, that where it is apparent to a court that a forfeiture order will not be made, because it would be unconstitutionally disproportionate to the crime, it will similarly be unconstitutional to make a preservation order, notwithstanding that on the face of its wording s 38 purports to oblige it to do so. That is not to say that the NDPP, when applying for such an order, need satisfy the court that a forfeiture order will indeed be made, for there is no such requirement in the Act, but only that a court is entitled to refuse a preservation order where it is apparent from the material that is placed before it by the NDPP – who is duty-bound, as in the case of any applicant for an *ex parte* order, to place all material facts known to him before the court[23] – that it would be unconstitutional for a forfeiture order eventually to be made.[24]

[10] It is in that context that I turn to the question whether the motor vehicles that are now in issue constitute an 'instrumentality of an offence referred to in Schedule 1 [of the Act]'. There is a preliminary issue that can be disposed of briefly in the light of the comments made earlier relating to the ambit of the Act. A person who commits either of the offences with which this case is concerned is liable to a fine or to imprisonment for a period not exceeding six years, which, on the face of it, falls within the terms of item 33 of Schedule 1.[25] It was submitted on behalf of the respondents that notwithstanding the clear language of item 33 the offences do not fall within its terms because, so it was submitted, that would be out of keeping with the greater scheme of the Act, which is designed to combat organised crime and related evils, and would result in absurdities. Upon a proper application of the provisions of chapter 6 in the manner I have described none of the alleged absurdities need arise. As for the submission that the inclusion of these offences would conflict with the greater scheme of the Act I have already observed, and it has been so held in *Cook Properties*, that its provisions are not confined to organised crime. In my view there is no

[22] Para 45.

[23] See, for example, *Cometal-Mometal SARL v Corlana Enterprises (Pty) Ltd* 1981 (2) SA 412 (W).

[24] Cf. the comparable approach to be taken when a restraint order is made under s 26(3) in anticipation of a confiscation order being made: *National Director of Public Prosecutions v Rautenbach* 2005 (4) SA 603 (SCA) para 56.

[25] 'Item 33: Any offence the punishment wherefor may be a period of imprisonment exceeding one year without the option of a fine'.

merit in the submission that the offences now in issue do not fall within the clear terms of item 33 of Schedule 1.

[11] Although the term 'instrumentality of an offence' is defined in the Act to encompass any property that is 'concerned in the commission or suspected commission of an offence' it was held in *Cook Properties* that the connection must be such

> 'that the link between the crime committed and the property is reasonably direct, and that the employment of the property must be functional to the commission of the crime. By this we mean that the property must play a reasonably direct role in the commission of the offence. In a real or substantial sense the property must facilitate or make possible the commission of the offence. As the term "instrumentality" itself suggests (albeit that it is defined to extend beyond its ordinary meaning), the property must be instrumental in, and not merely incidental to, the commission of the offence.'[26]

[12] Clearly the presence of a motor vehicle is indispensable to commission of the offences with which we are concerned and in that sense the vehicle 'makes the commission of the offence possible'. Yet there are many offences in which property plays a role indispensable to the commission of the offence – in some cases it is the subject of the offence, in other cases it is the necessary venue at which otherwise innocent activity becomes criminal – but I do not think that, by itself, makes it an 'instrumentality' of the offence. In my view the 'functionality' that is required by *Cook Properties* brings the term closer to its ordinary meaning, which envisages that the property is the means, or the tool or instrument, that is used to commit the offence.[27] In this regard the court below held that

> '[t]here is no close and compelling *functional* relation between the motorcar in question and the commission of the offence . . . [T]here is nothing in the nature of the motorcars or the manner of their utilisation to show that they were employed in some way to make possible or to facilitate the commission of the offence of *drunken* driving. The only link is that they were the vehicles being driven at the time of the commission of the offences, which in my view makes them purely incidental to the commission of [the] offences. In each case the identity of the vehicle is immaterial. The driver would still have committed the offence if he had chosen to drive another motorcar. In the nature of things driving a motor vehicle is a necessary incidence of the offence of driving a motor

[26] Para 31.

[27] The word 'instrumentality' seems to have been imported from the United States. In English usage (Shorter Oxford Dictionary) the word 'instrumental' means 'of the nature of or serving as an instrument or means', and 'instrument' means '1. A thing with or through which something is done or effected; a means 2. A tool, implement, weapon'.

vehicle while under the influence of liquor.'[28]

[13] That the particular property was not uniquely required for the commission of the offence does not seem to me to be determinative of whether it is an 'instrumentality' of an offence. Nor do I think that a motor vehicle is merely incidental to the commission of the offences with which we are concerned. *National Director of Public Prosecutions v Mohunram,*[29] which was decided after the present case was decided by the court below, concerned premises that were being used, and being permitted by the owner to be used, as a casino in contravention of the KwaZulu-Natal Gambling Act 10 of 1996 (which defined a casino to mean 'any premises upon which . . . gaming machines may be played'). It was held that

'use of premises is of the essence of the crimes as defined. Without use of premises, there are no crimes . . . It follows, in my view ineluctably, that the particular premises were an instrumentality of the crimes; they were intimately concerned in their commission.'[30]

Responding to the finding of the High Court that the premises were merely the venue at which the offences were committed, and that the gambling machines, and not the premises, were the 'means or instruments of the crime', the court said the following:

'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 . . .'

[14] In my view the principle is no different in the present case. A motor vehicle is not merely the unique venue at which the activity becomes criminal, and thus incidental to the commission of the offence, nor is it merely the subject of a criminalised activity. The essence of the offence is the use of the vehicle while the driver is in a particular state. The vehicle is the very means, or instrument, that is used to commit the offences.

[15] In my view the present case is materially indistinguishable from *Mohunram.* The motor vehicle concerned is indeed an 'instrumentality' of the offence of driving under the influence of intoxicating liquor, or with excessive alcohol in the driver's blood, in contravention, respectively, of s 65(1) and s 65(2) of the National Road Traffic Act 93 of 1996, and thus liable to be forfeited under the provisions of chapter 6 of the Act.

[16] That does not mean to say that the motor vehicles in the present case indeed fall to be forfeited, or to be made subject to a preservation order. Whether such orders are justified in a particular case is a matter to be weighed in the context of the particular considerations outlined earlier.

[28] Para 7.

[29] 2006 (1) SACR 554 (SCA).

[30] Para 4.

That has yet to occur in the applications that are the subject of this appeal. Counsel for the NDPP proposed, in the circumstances, that we should remit the applications for reconsideration by the court below, and in my view that would be appropriate.

[17] Because this appeal was brought before us as a test case I think it is just and equitable that each party should pay its own costs.

[18] The appeal is upheld. The order made in each of the applications is set aside. The applications are remitted to the court below for reconsideration in the light of our findings.

R.W. NUGENT
JUDGE OF APPEAL

CAMERON JA)
MALAN AJA) CONCUR
THERON AJA)
CACHALIA AJA)