

IN THE HIGH COURT OF SOUTH AFRICA
DURBAN AND COAST LOCAL DIVISION

CASE NO. 10087/06

In the matter between:

**THE NATIONAL DIRECTOR OF
PUBLIC PROSECUTIONS**

APPLICANT

and

LORNA M. B.

RESPONDENT

JUDGMENT

VAN HEERDEN AJ

[1] Respondent in this matter, Lorna M.B., is the owner of; inter alia, two adjacent properties at 81 and 83 I.A., M..., Durban, KwaZulu Natal. The property at 83 I.A. is comprised of a three bedroom single storey residence and grounds ("the property").

[2] In October 2006 the National Director of Public Prosecutions ("applicant"), contending that the property was a brothel operated in contravention of Section 2 of the Sexual Offences Act, Act 23 of 1957, approached the High Court in Durban with a preservation of property order in terms of s38 (2) of the Prevention of Organized Crime Act, Act 121 of 1998 ("POCA"). The order was granted. In due course application was made to this court under s48 (1) of POCA for an order

in terms of s50 (1) that the property be forfeited to the State. Respondent opposed the application.

[3] The matter was argued before me by Mr. Govindasamy who appeared for applicant and Mr. Viljoen who appeared for respondent.

[4] The events which form the subject matter of the application commenced in January 2004. One Captain Kruger, attached to the South African Police Services, suspecting that the property was used as a brothel decided to set a trap and to that end applied for and received the sum of R250.00 from the relevant authorities. He also obtained a search warrant. The money was handed to one Detective Inspector Samthram ("Samthram") who was to pose as the prospective client. On 19 March 2004 Samthram visited the property to carry out his instructions and one of the women he encountered there, later identified as Shereen D., advised him that she was prepared to give him a "Full House" in exchange for R180-00. He understood that to mean that D. was prepared to have sex with him for that amount. He pretended to agree to the transaction. D. thereupon sold him a beer and shortly thereafter asked him to accompany her to a bedroom. Upon entering the bedroom D. requested payment from Samthram. He handed to her the sum agreed upon whereafter D. left the bedroom. In her absence Samthram, as pre arranged, phoned Captain Kruger who was waiting outside the property for the call, together with other policemen. Upon receiving the call they entered the house, D. was pointed out to them by Samthram, the search warrant was presented and the ensuing search resulted in, *inter alia*, the money used in the trap being recovered. Besides D. three other women were present, later identified as Nadia N., Sandra W. and respondent.

[5] Having searched the premises Captain Kruger found:

- a) A box of condoms (including two female condoms) in one of the bedrooms;
- b) a handwritten document in the lounge with instructions on how to reach the premises from different locations;

- c) pornographic tapes near the television ;
 - d) items of clothing in one of the three bedrooms, which respondent identified as her bedroom. (no clothing was found in the other two bedrooms); and
 - e) cash in the sum of R12 884-00 also found in respondent's bedroom.
- [6] D. was placed under arrest and N. and W. were taken in for questioning. D. later paid an admission of guilt fine.
- [7] Sworn statements were obtained from D., N. and W. during the aforesaid questioning wherein they confirmed, that:
- a) They were employed by respondent at the property;
 - b) The property was used for prostitution and that they charged clients a fee of R180.00 for having sex with them;
 - c) The respondent took a cut of R80-00 from the R180-00 so charged; and
 - d) Liquor was sold on the premises
- [8] On the 5th October 2004, respondent was arrested and paid an admission of guilt fine, for keeping a brothel, in the sum of R1500-00.
- [9] The aforesaid events were referred to in argument as "the Kruger investigation".
- [10] Approximately two years later, during April 2006, one PN Sander, a detective Inspector in the South African Police Services, received information which made also him suspect that the property was being used as a brothel. Further investigations carried out by him established that advertisements advertising the services offered at the property appeared regularly in daily newspapers under the adult entertainment column. He dialled the advertised phone number and the information he received pursuant thereto confirmed his suspicion.

[11] Captain Sander also decided to set a trap at the property and for such purpose made the sum of R200.00 available to one Inspector Jerry Abraham ("Abraham") who was to pretend being the prospective client. On the arranged date Abraham, accompanied by Inspector Soobramoney, gained entry to the property where he spoke to one of the women who introduced herself to him as Nadia. He purchased a beer from Nadia and in the ensuing conversation she promised him specified sexual favours in exchange for R180.00. Abraham pretended to accept the offer and handed the money over to her. Upon Nadia leaving the room, apparently to deal with the money handed to her, Abraham gave Sander, and other police officers who accompanied him, the pre-arranged signal. They then entered the house and confronted another woman present, by the name of Amy. Upon being questioned Amy disclosed to Sander, that:

- a) The business belonged to respondent;
- b) she was in charge of the premises whenever respondent was not present;
- c) she collected an amount of R80-00 from each of the women from money paid to them by clients; and
- d) manually recorded all the transactions; and
- e) she would, from time to time, deposit respondent's share of the money received from clients into her bedroom through a "fan light" above the door.

[12] Sander thereupon received Amy's permission to conduct a search of the premises.

[13] Pursuant to the search a number of documents and an amount of R5 775-60 were seized. Amongst the items found were, inter alia, condoms, baby oil, tissues, a condom wrapper and soiled tissues. Photographs were taken of the inside of the house, and of the documents and other items found on the premises. These photographs were compiled into an album.

- [14] The four women found on the premises on the night in question were arrested and charged for prostitution. A warrant of arrest was subsequently issued against respondent for keeping a brothel.
- [15] The aforesaid events were referred to in argument as "*the Sander investigation*".
- [16] The sequence of events in the Kruger and Sander investigations was confirmed on affidavit and presented in somewhat more detail in the applicant's founding papers. A further affidavit by one Christoffel Bouwer, a detective Inspector in the South African Police Services, described the contents of the aforesaid photo album.
- [17] In respect of the Kruger investigation respondent, in her answering affidavit, simply denied that the women found on her premises were prostitutes; that the bedrooms were used for the purposes of prostitution; that a box of condoms was found in one of the bedrooms; or that pornographic tapes were found near the television. She claimed that the money (which included \$1 000-00 in foreign currency), constituted her winnings at the Sugar Mill Casino. She claimed that the women were coerced into making statements and denies any knowledge of D. having paid an admission of guilt fine. Respondent admitted that she paid an admission of guilt fine on the charge of keeping a brothel but alleged that she did so under duress and that it was convenient to do so because, according to her, it was cheaper to pay a fine than defending the charge.
- [18] In replying affidavits, deposed to by the police officers who took down the relevant statements, it was denied that the statements were procured under duress or that the women were unduly influenced to make such statements.
- [19] In respect of the Sander investigation respondent contended, in limine, that the evidence presented by applicant should not be allowed and considered, because:

- a) a warrant as required by s8 of the Sexual Offences Act No. 23 of 1957 was not obtained to enter and search respondent's premises and to seize anything; nor was
- b) a search warrant obtained in terms of s26 of the Criminal Procedure Act 51 of 1977 to enter and the premises; and nor was
- c) Samthram authorised to set a trap, as required by s252 A of the Criminal Procedure Act.

[20] On the merits of the Sander investigation respondent denied that the women on her premises offered any sexual favours; denied that she had any knowledge of the various items reflected in the photo album; admitted that an amount of R5 775-60 was found in a room occupied by her, but claimed that the money belonged to the women employed by her; stated that the rooms were used "solely for the purpose of massaging" and that her employees paid her rent to occupy the bedrooms; admitted that she placed advertisements in newspapers but denied doing so to solicit business for the purposes of prostitution. She denied that the books and documents referred to by Bouwer in any way corroborated the allegation that she used the premises as a brothel.

[21] I propose to deal firstly with the points raised in limine by the respondent in the Sander investigation.

[22] Mr Vijoer on behalf of the respondent, submitted that the evidence gathered in the Sander investigation ought to be excluded in its totality, it having been obtained illegally and that its admission would render "this application" unfair and detrimental to the administration of justice. In this regard he submitted that the members of the SAPS, in procuring the evidence presented by the applicant, had not complied with the procedures stipulated by the provisions of sections 25 and 252A of the Criminal Procedure Act 51 of 1977 and section 8 of the Sexual Offences Act 23 of 1957.

[23] It is indeed so that the procedures specified in section 25 of the Criminal Procedure Act and section 8 of the Sexual Offences Act were not followed. Both these sections relate to preliminary formalities that need to be complied with prior to evidence being gathered at premises by SAPS members. In the present instance, however, failure to comply with such formalities (assuming for the time being that such compliance was a prerequisite for a valid search) was in my view nullified by the consent given by Amy to SAPS members to conduct a search of the premises. The unchallenged evidence was that at the time Amy gave such consent she was in charge and control of the premises.

[24] Section 252A(i) provides, inter alia, as follows:

“any law enforcement officer . . . may make use of a trap or engage in an undercover operation in order to detect, investigate or uncover the commission of any offence, . . . and the evidence so obtained shall be admissible if that conduct does not go beyond providing an opportunity to commit any offence . . . “

[25] In the present matter, during the Sander investigation, the members of the SAPS no doubt provided the opportunity to those employees on the premises, more specifically the female named Nadia, to commit the offence of prostitution. Nadia declared herself willing and ready to perpetrate the offence and in fact had already taken delivery of the sum agreed upon for her sexual favours when the trap sprung into action. The question, however, remains whether the trap went beyond providing an opportunity to commit an offence because in such event, as I understand the provisions of the section, the evidence uncovered and gathered during the trap would not be admissible. Mr Viljoen, in argument, was however unable to tell me what the relevant members of the SAPS did in the Sander investigation that propelled their conduct to something beyond simply providing Nadia an opportunity to commit the offence of prostitution. I certainly could not place my finger on anything specifically done or not done by such members that could be constituted as unfair in the circumstances; there was certainly no

indication that Nadia was prompted or coaxed or encouraged into conducting the offensive transaction.

- [26] Be that as it may, the Sexual Offences Act and the Criminal Procedure Act are aimed at regulating criminal law and its procedure and such regulations are not necessarily needed to resolve disputes of a civil nature, as in the present matter. Civil proceedings are subject to dynamics which are different to that encountered in the criminal law and its procedure (i.e. the onus of proof and costs orders, to name but two) and what is fair and just in a specific situation in civil proceedings may be considered to not be so in criminal proceedings. It would appear to be well established now that in civil proceedings the court has a discretion to allow as admissible evidence otherwise illegally obtained, in certain circumstances. In *Lenco Holdings Ltd and Others v Eckstein and Others* 1996 (2) SA 693 (NPD) at 704C, Hurt J expressed himself as follows:

“I take the view that Lombard J and Myburgh J were both correct in holding that, in civil proceedings, the court has a discretion to exclude evidence which has been obtained by a criminal act or otherwise improperly. Given that there is such a discretion the next question is, what factors should weigh with the court in deciding whether to exercise it against a party who tenders such evidence In all probability the correct attitude is, and must be, that each case must be decided on its own facts”

(see also *Shell SA (edms) Bpk en andere v Voorsitter, Dorperaad van die Oranje Vrystaat, en andere* 1992 (1) SA 906 (O); *Motor Industry Fund Administration (Pty) Ltd and Another v Janit and another* 1994 (3) SA 56 (W); *Fedics Group (Pty) Ltd and another v Murphy and Others* 1998 (2) SA 617 (C))

- [27] In the exercise of my discretion the following considerations play a role:

- (a) The type of evidence gathered pursuant to the Sander investigation and thereupon presented in the present matter is the kind of evidence that could lawfully be obtained, as opposed to evidence that could never lawfully be obtained, without the co-operation of the person concerned, such as privileged communications. (Fedics Group (Pty) Ltd matter supra)
- (b) The fact remains that permission was sought and granted by Amy to search the premises and gather evidence. The unchallenged evidence was that Amy was in control of the premises and ostensibly in a position to give such permission.
- (c) The thrust of Mr Viljoen's submission was that the evidence in the Sander investigation was illegally obtained because the provisions of the relevant sections of the said Acts were not complied with and that, therefore, the presentation of such evidence would unfairly prejudice the Respondent. I cannot agree with this submission. As already indicated above the Criminal Procedure and Sexual Offences Acts were designed to serve the purposes of criminal law and its procedures and the non-compliance of its provisions does not automatically mean "unfair" in a civil law setting. In my view, however, the fairness of the conduct of the members of the SAPS does play an important role in the exercise of my discretion and I will have due regard thereto. In my view they conducted themselves in an exemplary and professional manner throughout the Sander investigation and no criticism of any substance could be levelled against the involved members by Mr Viljoen, except for his submission that they allegedly did not comply with the said provisions of the mentioned legislation.

[28] In the premises I dismiss the points raised *in limine* by respondent and admit the evidence collected during the Sander investigation.

[29] The following evidence presented by applicant was either admitted or not seriously disputed or where denied, such denials were so far fetched or untenable that they fall to be rejected.

- (a) Respondent, herself, placed advertisements in daily newspapers offering for sale the services provided by her employees at the property. These advertisements were highly suggestive of sex being on offer. Phrases like “Been here? Come again and again” and “Busty Babes for fun. All sorts and any way you like it” and “First you lick it, then you dip it. Let me show you how” cannot, even with a fertile imagination, be associated with bona fide masseuses applying their trade.
- (b) It is accordingly not surprising when Sander phoned the number advertised he was told that sexual favours were on offer at the property, in exchange for money. Respondent denied this allegation but, having regard to the nature of the newspaper advertisements, I find it overwhelmingly probable that the contents of the telephone conversation did “dove tail” with that of the advertisements.
- (c) During the Kruger investigation Inspector Santhram was offered a “full house” by Shereen D. in exchange for R180.00. Respondent’s explanation that a “full house” simply meant a full body massage is laughable and becomes even more so when it is kept in mind that D., when charged under the Sexual Offences Act, paid an admission of guilt fine and deposed to an affidavit confirming, inter alia, that the premises was used for prostitution. The other women present at the premises during the Kruger investigation similarly paid admission of guilt fines.
- (d) Respondent also paid an admission of guilt fine, on a charge of keeping a brothel pursuant to the Kruger investigation. Her explanation that she was innocent but that she simply paid the fine to avoid the inconvenience of a trial, “like paying a traffic fine when you are innocent”, does not ring true. Unlike a traffic

fine respondent must have been aware that by admitting guilt she attracted a criminal record.

- (e) In the Sander investigation Inspector Abraham was offered explicit sex in exchange for money by Nadia. Respondent did not present an affidavit by Nadia to gainsay this and no explanation was tendered as to why this was not done.
- (f) Added to the foregoing was an abundance of strong circumstantial evidence. The keeping of pornographic video tapes next to a video player and television set in the reception area where clients were received isn't in keeping with a bona fide massage parlour; nor is the seedy and sordid nature of the bedrooms and its contents of condoms, used condom wrappers, soiled tissues and baby oil as graphically illustrated in the photograph album that was presented as evidence; The huge amounts of cash found on the premises on each occasion is in line with what to expect at a brothel and the respondent's explanation that the cash was forthcoming from casino winnings was indeed feeble, especially when keeping in mind that the "winnings" included United States dollars; also in line with what one would expect the modus operandi to be at a brothel is the manner in which the books were kept, and how the respondent's share of the fee was determined and thereafter deposited into her room/office through a fan light.

[30] In my view the allegations and denials of respondent are so far fetched in certain instances and untenable in other instances that I feel myself justified in rejecting them merely on the papers. (see *Plascon Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A); *Associated South African Bakeries (Pty) Ltd v Oryx and Vereinigte Bäckereien (Pty) Ltd* 1982 (3) SA 893 (A) at 924A).

[31] I accordingly find that applicant has succeeded in establishing that the respondent actively kept and managed a brothel and as such contravened the provisions of section 2 of the Sexual Offences Act

which makes it an offence to do so. This Act defines a brothel as including: “any house or place kept or used for purposes of prostitution or for persons to visit for the purposes of having unlawful carnal intercourse . . . “ (section 1)

[32] The onus is on applicant to establish on a balance of probabilities that the premises facilitated unlawful carnal intercourse. (National Director of Public Prosecutions v R. O. Cook Properties (Pty) Ltd and Others 2004 (2) SACR 208 (SCA))

[33] As already pointed out above the evidence presented by the applicant has established overwhelmingly the occurrence of prostitution on the property. In my view the evidence also overwhelmingly establishes that respondent knew that her property was so utilised.

[34] By allowing her property to be used as a brothel respondent not only contravened the provisions of section 2 of the Sexual Offences Act but also that of section 20(1) thereof by facilitating prostitutes to have unlawful carnal intercourse with their customers on the property. Indeed she also thereby aided the customers’ simultaneous offence either by being an accessory at common law or of contravening section 18(2) of the Riotous Assemblies Act of 1956. (see Neutral Citation: National Director of Public Prosecutions v Frederik H Geyser (160/2007) [2008] ZASCA 15 (25 March 2008))

[35] Having regard to the cumulative effect of all the evidence I have no hesitation in finding that the property in question facilitated the commission of the offences under discussion. (see NDPP v Cook Properties *supra* §34; NDPP v Mohunram 2006 (1) SACR 544 (SCA) para 4; Mohunram v NDPP 2007 (4) SA 222 (CC) para 49).

[36] In my view the whole property was sufficiently linked to the offence to make it an instrumentality.

[37] Turning to the issue of forfeiture, for same to be ordered, the offence of which the property concerned is an instrumentality must be a so-called

Schedule 1 offence (section 38(1) read with sections 48(10 and 50(1) of POCA)

[38] Schedule 1 contains an itemised list of common law and statutory offences. In addition Item 33 of the schedule determines that in respect of any offence, the punishment for which may be imprisonment exceeding one year without the option of a fine, a forfeiture may be ordered. In the present instance section 22(a) of the Sexual Offences Act prescribes the penalty for brothel-keeping as three years imprisonment, with or without a fine of R6,000.00. That is also the penalty for having commercial sex i.e. the prostitutes offence of contravening section 20(1A)(a) of the Sexual Offences Act. In view of the provisions of section 18(2) of the Riotous Assemblies Act, the customer would be liable to the same penalties. Forfeiture in this case is therefore legally competent under POCA.

[39] Courts must nevertheless ensure that forfeiture does not amount to arbitrary deprivation of property even though section 50(1) of POCA requires forfeiture where property is an instrumentality of an offence. The court must be satisfied that the impact of the deprivation would not be out of proportion to that purpose. If it was then the court must in the exercise of its discretion decline forfeiture, despite section 50(1). (see *NDPP v Cook Properties supra* para 74; *NDPP v Mohunram supra* paras 56 to 63, 122, 123 and 142; *NDPP v Geyser supra* para 18)

[40] In *NDPP v Geyser (supra)* at para 19 Howie P said the following:

“ . . . gambling indeed has negative social implications and therefore requires statutory regulation. But, armed with the necessary licences and registration it is lawful. By contrast, brothels are not capable of legal regulation; they remain illicit. And there can be little doubt, to my mind, that brothel-keeping would be seen by a majority in society, if not society as a whole, as morally more reprehensible than operating unregistered gaming machines. Brothel-keepers, as mentioned, commit their own offence and aid in the commission of the prostitutes’

offence. In doing so, they themselves earn an income from prostitution”

And also at para 30:

“The primary question, therefore, is not: would forfeiture constitute punishment (whether excessive or at all), but: would forfeiture have more than the necessary remedial effect?”

And also at para 35:

“In my judgment the required remedial effect is one which will convey the unmistakable message to Mr Geyser, to other brothel-keepers and to the public at large that the law does not turn a blind eye to the persistent and obdurate pursuit of criminal business and will act to demonstrate that brothel-keeping does not pay. The appropriate means by which to convey that message in this case is by forfeiture of the property in question.”

[41] In the present matter the evidence establishes that the premises was used over an extensive period of time as a brothel. The documentation reflect that the respondent was already conducting business as a brothel-keeper in December 1999. As far back as October 2004 the respondent has paid an admission of guilt fine for keeping a brothel. The applicant has computed, in my view on a conservative basis, the respondent's income over a period of seven years in the estimated sum of R1 834,000.00. According to the report of Trevor Sean White, who was appointed as *Curator Bonis* by this court on 16 October 2006, an appraiser determined the open marked value of the property at R460,000.00 and the forced sale value at R400,000.00.

[42] Having regard to the foregoing factors I, in my discretion, am of the view and satisfied that an order that the respondent forfeits the property would not amount to an arbitrary, and thus unconstitutional, deprivation of her property. Forfeiture in the present instance would thus not have more than the necessary remedial effect. In my view the applicant satisfied the onus which rested on it in every respect.

[43] I hope that the message will go out to other brothel-keepers and also to the respondent, that their conduct would not be tolerated by courts.

Especially respondent must be careful. There is more than a hint in the papers that she also owns other properties which are likewise utilised.

[44] I accordingly make the following order, which is in line with the order in NDPP v Geyser (*supra*):

- (1) An Order is granted in terms of the provisions of Section 50 of the Prevention of Organised Crime Act 121 of 1998 ("The Act") declaring forfeit to the State:
 - 1.1 the immovable property as Sub 607 (a sub of 519) of the Farm Mobeni no 13538, situated in the City of Durban, Administrative District of Natal in extent Seven Hundred and twenty six (726) square metres ("the property");
 - 1.2 cash in the amounts of R12,844.00 and R5,77.60 ("cash")
- (2) The *curator bonis* appointed by this court in terms of the order granted on 16 October 2006 shall continue to act as such with authority to perform all the functions specified in the Act subject to the provisions of the Administrations of Estates Act 66 of 1965 and the supervision of the Master of the High Court.
- (3) The *curator bonis* shall have all such powers, duties and authority as provided for in the Act and in this order, including such powers, duty and authority reasonably incidental thereto and shall, in addition, be subject to the applicable provisions of the Administration of Estates Act 66 of 1965. The fees and expenditure of the *curator bonis* reasonably incurred in the execution of his duties shall be paid from the proceeds of the forfeited property.
- (4) In terms of section 56(2) of the Act, the property and the cash shall vest in the *curator bonis* on behalf of the State on the date on which the forfeiture order takes effect.
- (5) The *curator bonis* is authorised, as of the date on which the forfeiture order takes effect, to

- 5.1 assume control of the property and the cash and take it into his custody;
 - 5.2 dispose of the property by private sale or other means;
 - 5.3 deduct his fees and expenditure which were approved by the Master of the High Court;
 - 5.4 deposit the balance of the proceeds and the cash in the Criminal Assets Recovery account established under section 63 of the Act, number 80303056 held at the South African Reserve Bank, Vermeulen Street, Pretoria;
 - 5.5 perform any ancillary acts which are necessary in the opinion of the *curator bonis*, but subject to any directions of the Criminal Assets Recovery Committee established under section 65 of the Act.
- (6) The *curator bonus* shall as soon as possible but not later than within a period of 90 days of this order coming into effect, file a report with the applicant and the Master of the High Court indicating the manner in which he:
- 6.1 completed the administration of the property mentioned above and
 - 6.2 complied with the terms of this order
- (7) The Registrar of this court must publish a notice of this order in the Government Gazette as soon as practical after the order is made.
- (8) Any person affected by the forfeiture order, and who was entitled to receive notice of the application under section 48(2) but who did not receive such notice, may within 45 days after the publication of the notice of the forfeiture order in the Gazette, apply for an order under section 54 of the Act, excluding his or her interest in the property and/or the cash, and varying the operation of the order in respect of the property and/or the cash.
- (9) All the paragraphs of the order operate with immediate effect, save for paragraphs 4 and 5 which will only take effect on the

day that an application for the exclusion of interest in forfeited property in terms of section 54 of the Act is disposed of, or after expiry of the period in which an application may be made in terms of section 54 of the Act.

- (10) The Respondent is ordered to pay the costs of this application.

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Date of Hearing: 29/1/09

Date of Judgment: 23/4/09