Reportable: Yes / No
Circulate to Judges: Yes / No

Circulate to Magistrates: Yes / No

IN THE HIGH COURT OF SOUTH AFRICA

(Northern Cape Division)

Case no: 529/03

Date delivered: 26/03/2004

In the matter of:

THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS

APPLICANT

and

FIELIES, YVONNE **FIRST RESPONDENT**

VISSER, DAWID **SECOND RESPONDENT**

JUDGEMENT

TLALETSI J:

INTRODUCTION

[1] This is an application brought by the National Director of Public Prosecutions (NDPP) for civil forfeiture of property under Section 48(1) of the Prevention of Organised Crime Act 121 of 1998 (POCA, hereinafter called "the Act"). The applicant obtained a provisional preservation order in terms of Section 38(2) of the Act on the 13th June 2003 and was confirmed by this court on the 11th July 2003.

[2] The properties which are the subject matter of the application are:

(a) Erf 1748, Hartswater, situate at 78 Felecia Street, Hartswater.

(b) One Pool Table

(c) One music system ("juke box")

(d) One box freezer, and

(e) One refrigerator

[3] The NDPP had to, in terms of Section 48 of the Act apply

to the High Court for an order for the forfeiture of all or any of the property concerned. In terms of Section 50(1) the High Court shall grant the forfeiture order applied for by the NDPP if it finds on a balance of probabilities that the property concerned is an instrumentality of an offence referred to in Schedule 1 of the Act or is the proceeds of unlawful activities. The proceedings under chapter 6 are deemed to be civil proceedings and are governed by the rules of evidence and procedure applicable to proceedings of that kind. The purpose of this chapter is intended to target the asset bases of criminal enterprises, independent of criminal proceedings. The focus is on the property that has been used to commit an offence or which constitutes the proceeds of crime and not the wrongdoer's *per se*. See: *National Director of public Prosecutions and Another v MohamedNO and Others* 2002(2) SACR 196 (CC) at 204 c-d and 204 f, and *National Director of Public Prosecutions v Prophet* 2003(2) SACR 287 (CPD) at 291 d-f.

THE APPLICANT'S CASE

[4] The applicant is seeking an order against the

respondents for the forfeiture of the property which the applicant contends that it has been used in the unlawful sale of liquor. Section 154(1)(a) of the *Liquor Act 27 of 1989* makes it an offence for a person to sell liquor without a valid licence. On conviction the offender may be liable to pay a fine or sentenced to imprisonment for a period of not more than five years.

[5] The applicants' application is based on the affidavit of JULIANA GALETLANE RABAJI, the Special Director of Public Prosecutions in the Asset Forfeiture Unit, acting on the authority of the National Director Of Public Prosecutions dated 3rd April 2001. She referred to the affidavits of JACOB VAN RHENEN SAUNDERS (Saunders) a Superintendent in the South African Police Services (SAPS) stationed at Hartswater Police Station. The factual background of the application is set out in Saunders' affidavit together with annexures thereto, filed in support of the Application for a preservation order.

[6] The First Respondent is the registered owner of Erf 1748 Hartswater. Two separate buildings have been erected on the premises. The first is the main house and the second building (the shebeen) is erected towards the rear of the main house. It is alleged that the business of the shebeen is conducted mainly from this latter building although liquor is also sold and stored in the main house. Access to the shebeen is controlled through a security gate and a door. The shebeen is divided into various demarcated areas. The first is the sales area, in which liquor is stored in refrigerators and sold to the public through a security window. The second is a public area consisting of a large room wherein a music system or a 'juke box' and a pool table have been installed. The third area is the

storage room which is towards the rear of the shebeen. This area is usually used for the storage of empty beer crates.

[7] The main house consists of three bedrooms, a lounge, bathroom, store room and a kitchen. Saunders alleges that liquor is stored in the store room as well as the refrigerator in the kitchen. Sales of liquor take place from the kitchen mainly over weekends. The property is within the area Jurisdiction of this Court.

[8] During the year 2000 The Second Respondent lodged an application with the Provincial Liquor Board for a licence to operate a tavern on the premises. His application was not granted by the Liquor Board. It appears that a number of residents and interested parties lodged objections to the application with the liquor board.

[9] On the 12th January 2001 Superintendent Saunders together with other members of the SAPS conducted a trap in terms whereof the First Respondent sold liquor to a constable in the SAPS without a licence. There were many people in the premises who appeared to be shebeen patrons. When police attempted to arrest the Respondents for illegal sale of liquor the police were locked on the premises and assaulted with stones. SAPS motor vehicles used in the operation were damaged by these people. Police reinforcements were called from Kimberley for assistance. Several people including the Respondents were arrested. Large quantities of liquor and soft drinks were seized by the police. Other items seized were books containing names of various individuals with amounts of money next to the names. Second Respondent pleaded guilty to a charge of selling liquor without a licence and was convicted and sentenced to a fine of R300-00 or 120 days imprisonment. At least one of the individuals arrested at the premises pleaded guilty to unruly behaviour. In his plea explanation he disclosed that the shebeen business is operated in the premises.

[10] On the 29th June 2001 The First Respondent's daughter, who is a minor, was arrested as a result of an alleged trap for selling liquor to a member of the SAPS without a licence. Although the First Respondent was not present, she was later joined as co-accused to her daughter's charges and trial. Some quantities of liquor as well as a cash box were seized. The two were subsequently acquitted of the charges against them. Of interest is the fact that the First Respondent's daughter's defence at trial was a a denial of sale of liquor to the police officer used for the trap, and stated that she gave him liquor free of charge thinking that he was one of the guests who were to attend First Respondent's party that day.

[11] On the 25th February 2003, Inspector Willem van Staden, a member of the SAPS acting on a search warrant, conducted a search on the premises. He seized large amounts of liquor and empty crates. As the Second Respondent Could not produce a licence to sell liquor he was arrested and charged for dealing in liquor without a licence. This case is still pending before the Magistrate Court Hartswater.

[12] Superintendent Saunders referred to various crimes reported allegedly having taken place at or near the shebeen. These relate to murder, attempted murder, common assault and assault with intent to do grievous bodily harm. He referred to a statement by the Public Prosecutor who alleges that several dockets have been opened pertaining to offences which occurred at or near the shebeen. In his view closure of the shebeen will decrease crime in the area. Saunders concludes that the sound system, pool table and the refrigerators were probably purchased with the proceeds of the respondents unlawful sale of liquor and they constitute proceeds of crime. That the refrigerators are instrumentality of the offence as they are used to store and refrigerate the liquor. He stated that the respondents have demonstrated that they do not have any intention of ceasing their illegal operation from

the premises, and that criminal proceedings have thus far and will not deter the Respondents from illegal conduct.

RESPONDENTS CASE

[13] The Respondent's version of the historical background of events does not differ materially from that of the applicant. The layout of the premises by the applicant is admitted by the Respondents. They dispute that they started to sell liquor since 1998 as they only started building on the premises in 1999. They admit that liquor was sold on the premises without a licence. They however state that the sale was ceased as from March 2003 after Inspector van Staden spoke to the Second Respondent about the sale. He admits that he was fined R300-00 for unlawful sale of liquor and further that his application for a liquor licence was tuned down.

[14] In response to the incident of the 12th January 2001 Second Respondent admit the incident having taken place and that charges were withdrawn against other people who were arrested. It was then that Superintendent Saunders told him that he will '*get him*' and this started a vendetta against him. Although he does not dispute that various crimes were reported to the police, he stated that they were not necessarily connected to their premises and that there are other shebeens in the area patronised by people.

[15] The Respondents deny that the property was obtained through the proceeds of the unlawful sale of liquor. The First

Respondent already had the immovable property as an inheritance from her late husband before liquor was sold in the premises. As regards the music system or juke box, it is alleged that it was hired from one Ben and Claude since the year 2001. The box freezer was purchased in December 2002 at Price and Pride stores, Hartswater and is fully paid up. The refrigerator was purchased by the First Respondent at Bears Furniture Stores as a second hand item.

[16] The Respondents therefore do not dispute the following averments and are common cause:-

16.1 that there is a shebeen at the property,

16.2 that they are not in possession of a valid licence to sell liquor,

16.3 the layout of the buildings on the premises which was structured as such for the purpose of an application for a liquor licence, and sale of liquor.

16.4 that the SAPS took some action against the shebeen and that quantities of liquor have been confiscated,

16.5 that there was resistance to SAPS action on the property,

16.6 that the Second Respondent pleaded guilty to unlawful dealing in liquor and paid a fine of R300-00

16.7 that the First Respondent and her daughter were arrested for unlawful dealing in liquor and

were subsequently acquitted,

16.8 that there could be crimes reported in the area although the Respondents say that they may not necessarily be connected to their shebeen,

16.9 that there are various complaints from members of the community about the existence of the shebeen.

THE ISSUES

[17] Both counsel are in agreement that the issues to be decided are firstly whether the property is an instrumentality of an offence, and or whether the property or some of the property are the proceeds of crime. In addition Mr Schreudder who appeared on behalf of the Respondents raised an argument that the Act is concerned with organised crime and therefore contravention of Section 154 (1) (a) of the Liquor Act is not covered by the Act.

IS THE ILLEGAL SALE OF LIQUOR AN OFFENCE

CONTEMPLATED IN SCHEDULE 1 OF the ACT

[18] Illegal sale of liquor is not specifically listed in schedule 1 of the Act. Item 33 however makes provision for any offence, the punishment whereof may be a period of imprisonment exceeding one year without the option of a fine. It was argued on behalf of the Respondents that this item should not be interpreted widely so as to include illegal sale of liquor as there are specific offences mentioned in the schedule by name, and not by penal reference, and that the words "*without the option of a fine*" is a type of an offence, where provision for a fine is not provided for. This argument finds support in the decision of Fevrier AJ in *Ex Parte National Director of Public Prosecutions*, case no.: 2380/2000 (WLD) decided *on 05/09/2000(unreported)*.

[19] Foxcroft J in *National Director of Public Prosecutions vs Patterson and Another case no.: 12100/99 delivered on 24/04/2001 (unreported)* where he was confronted with similar argument about the applicability of item 33 to the illegal sale of liquor had the following to say at page 4 line

18 – page 5 line 9:

> *"I agree with the finding in that judgement that the words "without the option of a fine" in item 33 of Schedule 1 do mean that Parliament has prescribed that those words, as they appear in items 33, relate to the period of imprisonment exceeding one year. Clearly, Parliament was dealing with what it regarded as a category for reasonably serious offences (in addition to the ones already listed). One way of providing a broad general category for such offences would be to look at the maximum sentences provided for such offences. In my view, that is all that Parliament did. It was not saying that in the case of any offence where a fine was a possibility then the Prevention of Organised Crime Act could never apply. I regard it as illogical to force a reading which necessarily imports the word "only" between "may" and "be" in item 33 when to treat other words as understood to be included makes more sense. Those other words, in my view, would be something like "apart from other punishments which are permissible" before the words "may be a period of imprisonment exceeding one year without the option of a fine".*

I am in agreement with the above reasoning. The Court held further that:

> g c the pattern to be deduced from items 1 – 32 of the Schedule is that the legislature had not curtailed the sentence options to those providing for unsuspended imprisonment only. This also means, impliedly, that the most severe offences or sentences are not limited to (only) unsuspended imprisonment without the option of a fine. Why then, when interpreting item 33, should one hold that in that item, only Acts not allowing fines to be imposed should be capable of forming a basis for forfeiture under POCA?"

[20] I therefore with respect agree with the submission by Mr Volmink on behalf of the Applicant, that the decision of Foxcroft J is preferable to the approach adopted by Fevrier AJ, and find that the illegal sale of liquor is an offence contemplated in item 33 of Schedule 1 of the Act.

INSTRUMENTALITY OF AN OFFENCE

[21] The meaning assigned to 'instrumentality of an offence' in chapter 1 of the Act is 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. The interpretation of the phrase has been considered by our courts on a number of occasions. STEGMAN J in Ex Parte: The *National Director of Public Prosecutions re: Application for Forfeiture of Property in terms of sections 48 and 53 of Act 121 of 1998, unreported case no: 2000/12886(WLD)* at paragraph 12 held that:

> "g The mere fact that a particular offence was committed on a particular property would not necessarily entail the consequence that the property was 'concerned in the commission' of the offence. It seems to me that evidence of some closer connection than mere presence on the property would ordinarily be required in order to establish that the property had been concerned in the commission of *the offence"*

(See also *National Director of Public Prosecutions v Patterson* 2001(2) SACR 665 (C) at 667 F-G).

[22] It is accepted that a mere coincidental link between the property sought to be forfeited and the commission of the offence would not qualify the property as an 'instrumentality'. A clear nexus has to be established between the property concerned and the offence committed. (See: *National Director of Public Prosecutions v Carolus and Others* 1999(2) SACR 27 (CPD) at 39 h per Blignaught J :-

> "g It seems to me, therefore, that property would only qualify as an instrumentality where it has been used as means or instrument in the commission of the offence, or where it is otherwise involved in the commission of the offence."

Each case must be determined on its own facts and circumstances.

[23] Considering the facts of the present case it is common cause that a separate structure was erected on the premises to accommodate the business of sale of liquor. The structure consists of a sales area where liquor was stored and sold to the public, there is a public area where the public can drink, play pool and listen to the music from the music system or juke box, and there is a storage area where empty beer crates where stored. It is also not disputed by the Respondents that the main house on the premises is integrally involved in the business of illegal sale of liquor, and that liquor was also stored and sold in the main house. Under these circumstances one can justifiably conclude that the use of the property was deliberate, and planned, and that the property was important to the success of the illegal sale of liquor. The use of the property was not an isolated event.

[24] I am of the view that it will be unreasonable to conclude that the main house was erected for the purpose of carrying out the illegal activities. It has been used for residential purposes. However this factor, alone is in my view not sufficient to exclude the house from the ambit of the phrase instrumentality. My attention was directed to the decision of

Patel J in *National Director of Public Prosecutions v K. Mohunram and two Others*: case no.: 3576/01 (NPD) delivered on 02/02/2004 (unreported) in which the following remarks are made at page 8 :-

> *"When the First Respondent acquired the shares in the Second Respondent it was clear and is common cause that he did so with the intention of conducting a legitimate operation. It is also common cause that the whole building was not used as a gambling house since it was partitioned to make space for glass building operations. The entire building cannot, accordingly be deemed to be an instrumentality of the offence. Different considerations may prevail had the entire property been purchased for the purpose of running an illegal operation and illegal operations were indeed conducted on the entire property. A restrictive interpretation of the definitions must mean that the Legislature had intended a pat of an immovable property used in the commission of offences to be included within the meaning of the Act, then it should have said so in clear language. This, the legislature has not done." (My underlining)*

[25] In my view the approach of Patel J in Mohunram's case may lead to absurd results if strictly adhered to. It would mean that a drug dealer who illegally manufactures and sells drugs from his house may avoid forfeiture if he raises a defence that he only operate from one room and not the entire house. Similarly the owner of a yacht on which drugs are illegally stored may avoid forfeiture if he is able to show that the entire yacht was not involved in the storage of the drugs, but only a portion. In my view such approach would defeat the object of the Act which is intended to ensure that property concerned in the commission of crime is taken out of circulation.

[26] The approach adopted in *National Director of Public Prosecutions v Seleoane and Others* 2003 (3) All SA 201 (NC) is preferable. The immovable property and a vehicle which was used to store, cultivate and convey dagga were declared to be instrumentalities.

[27] The respondents in their defence allege that the applicant's application is part of a personal vendetta by the police against them. Second Respondent in his affidavit filed in terms of Section 39(5) of the Act states that because certain items such as a soccer play or, loudspeakers, disco lights and cash of R 2 700-00 ,which were not listed in the preservation order have been seized by the police, is an indication of the vendetta.

[28] Superintendent Saunders' response is that it is the *curator* and not the police who ceased these items. The police were only present for security reasons and they only removed the items upon the request of the *curator*. He denies any vendetta against the respondents that he ever told the Second Respondent that he will get him. He states further that it is not only the Respondent's shebeen that has been raided, but others as well. I find the vendetta argument to be spurious and without merit. They only raise this unsupported vendetta allegation to cover their unlawful activity.

CONCLUSION

[29] I am of the view that the applicant have succeeded to establish on a balance of probabilities that the property is an instrumentality of the offence. I do not think it will be necessary therefore to consider whether the property can be said to be the proceeds of crime. This is a subject of a

factual dispute raised by both parties. A third party has laid claim to the pool table and has to be excluded as request by Mr Volmink. Applicant is also entitled to the costs of the application.

I therefore make the following order:

1. **An order is granted in terms of section 50(1) of the Prevention of Organised Crime Act, Act No. 121 of 1998 ("the Act") declaring forfeit to the State the property listed hereunder (hereinafter referred to as "the property").**

    1.1 Immoveable Property described as Erf 1748, Hartswater, (Phokwane Municipality, Division of Vryburg, Northern Cape), and situated at 78 Felicia Street, Hartswater, Vryburg, Northern Cape(Title Deed Number T1029/2003)

    1.2 One Music System

    1.3 One Box Freezer

    1.4 One Refrigerator

2. **The pool table which is subject to the preservation order issued in this matter is excluded from the**

operation of this forfeiture order. The *curatorbonis* is directed to return the said pool table to its lawful owner

3. All the paragraphs of the Order shall operate with immediate effect, except that the *curatorbonis* shall not exercise his powers and duties in terms of section 57(1)(c) as outlined in paragraph 4 below, which will take effect on the day that a possible appeal is disposed of in terms of section 55, or on the day that the application for the exclusion of the interests in the forfeited property in terms of section 54 of the Act is disposed of, or after the expiry of the period in which an application may be made in terms of section 54 of the Act.

4. In terms of section 56(1) of the Act, DEREK ARTHUR FOSTER, a director of PricewaterhouseCoopers Inc, shall remain the appointed ***curatorbonis*** **to assume control over the property.**

5. The *curatorbonis* shall have all such powers, duties and authority as provided for in section 42(1) and 57 of the Act.

6. The fees and expenditure of the *curatorbonis* shall be paid from the forfeited property, or failing which by the State.

7. The Registrar of this Court is directed in terms of section 50(5) of the Act to publish a notice of this Order in the Government Gazette as soon as practicable after the Order is made.

8. Costs of the application are against the Respondents jointly and severally, the one paying, the other to be absolved.

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L P TLALETSI
JUDGE

ADVOCATE FOR THE APPLICANT	:	ADV VOLMINK

ADVOCATE FOR THE RESPONDENT : ADV SCHREIDER
ATTORNEY FOR THE APPLICANT : Neville Cloete Attorneys
ATTORNEY FOR THE RESPONDENT : Van de Wall and Associates