IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case no. 19611/2013

Before: The Hon. Mr Justice Binns-Ward

In the matter between:

THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS Applicant

And

SAMANTHA JACOBA BAILEY Respondent

JUDGMENT DATED 21 OCTOBER 2015

BINNS-WARD J:

[1] The National Director of Prosecutions has applied in terms of s 48 of the Prevention of Organised Crime Act 121 of 1998 ('POCA') for an order declaring certain immovable property owned by the respondent forfeit to the state on the grounds that it is an instrumentality of an offence referred to in Schedule I to the Act, namely any offence referred to in s 13 of the Drugs and Drug Trafficking Act, 1992 (Act 140 of 1992).[1] The offences comprehended in s 13 of the Drugs Act include unlawfully possessing and dealing in dependence producing substances and dangerous dependence producing substances. Section 50(1)(a) of POCA provides that 'the High Court shall, subject to section 52, make an order applied for under section 48 (1) if the

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[1] Item 22 of Schedule I.

Court finds on a balance of probabilities that the property concerned is an instrumentality of an offence referred to in Schedule 1'.

[2] The expression 'instrumentality of an offence' is defined in s 1 of POCA to mean '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'. It is well established, however, that a constitutionally compliant reading of the statute requires that a restrictive meaning has to be given to the term; see *National Director of Public Prosecutions v R O Cook Properties (Pty) Ltd; National Director of Public Prosecutions v 37 Gillespie Street Durban (Pty) Ltd and Another; National Director of Public Prosecutions v Seevnarayan* 2004 (2) SACR 208 (SCA), 2004 (8) BCLR 844, [2004] 2 All SA 491. The interpretation of the term given in the appeal court's judgment in *Cook Properties* was endorsed by the Constitutional Court in *Mohunram v National Director of Public Prosecutions (Law Review Project as Amicus Curiae)* 2007 (4) SA 222 (CC), 2007 (2) SACR 145, 2007 (6) BCLR 575. At para 44 of her judgment in *Mohunram*, Van Heerden AJ summed up the import of the term as follows:

> In … *Cook Properties*, Mpati DP and Cameron JA said that '(i)t is clear that in adopting this definition the Legislature sought to give the phrase a very wide meaning'. They held, however, that in order to ensure that application of the forfeiture provision does not constitute arbitrary deprivation of property in violation of s 25(1) of the Constitution
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> > '. . . the words "concerned in the commission of an offence" must . . . be interpreted so 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 . . . the property must be instrumental in, and not merely incidental to, the commission of the offence. For otherwise there is no rational connection between the deprivation of property and the objective of the Act: the deprivation will constitute merely an additional penalty in relation to the crime, but without the constitutional safeguards that are a prerequisite for the imposition of criminal penalties.'
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> In other words, the determining question is
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> > '. . . whether there is a sufficiently close link between the property and its criminal use, and whether the property has a close enough relationship to the actual commission of the offence to render it an instrumentality'.

Reference may also usefully be had in this regard to para 14 of the judgment in *Cook Properties*, where it was noted that '[t]he purpose of Chapter 6's forfeiture provisions is signalled in the part of the Act's Preamble that states that "no person should benefit from the

fruits of unlawful activities, nor is any person entitled to use property for the commission of an offence". The "use" of property "for" the commission of crime denotes a relationship of direct functionality between what is used and what is achieved.' (The provisions of POCA bearing on the current application resort under Chapter 6 of the Act.)

[3] The evidence upon which the applicant relies in support of the relief sought is the results of a number of raids conducted by the police and the City of Cape Town metro police at the property during the period 2009 to 2013, in the course of which various persons were found in possession of varying quantities of drugs, including mandrax (methaqualone) methamphetamine ('tik') and cannabis, and varying amounts of cash. The particulars were summarised in the founding affidavit of Mr Gcobani Bam, a senior deputy director of public prosecutions and the regional head of the Western Cape office of the Asset Forfeiture Unit of the National Prosecuting Authority.

[4] Mr Bam described the seizures effected in the police raids as follows:

1. the seizure of 20 packets containing 49,2 grams of *tik* from the bedroom of the property in the presence of the respondent during a search that the SAPS conducted thereat on 26 March 2009, the evidence of which is contained in a police docket registered as Bellville South CAS 261/03/2009;
2. the seizure of 8 units of *tik* and cash amount of R11 540 both that were found in the possession of one Jonathan du Plooy during a search that members of the City of Cape Town [?metropolitan police] conducted at the property on 22 September 2009. …[The] details of [the] evidence [are] contained in a police docket registered with the SAPS under Bellville South CAS 202/09/2009;
3. the seizure of 13 packets of *tik* from certain male persons (Clayton Pietersen, Issac Morris, Maurice Florence and Walda Windvogel) that the SAPS found at the property during a search that they conducted thereat on 20 March 2010. On the said date the SAPS also seized a sum of R1 408 in cash that was in the possession of one Clayton Pietersen aforementioned from whom 3 of the aforesaid 13 packets of tik were recovered. The evidence relating to the said seizure is contained in a police docket registered with the SAPS under Bellville South CAS 325/03/2010;
4. the seizure of a cigarette-like roll of dagga from one Justin Dirks that the SAPS found on the property during a search that that they conducted thereat on

22 July 2010. …[The] details of [the] evidence [are] contained in a police docket registered as Bellville South CAS 242/07/2010;

5. the seizure of nine tablets of *mandrax* and five packets of *tik* together with R680 in cash from one Clayton February who was amongst a group of certain people that were at the immovable property during a search that the SAPS conducted thereat on 20 October 2010. …, the said group of people refused to open the gate of the immovable property when members of the SAPS demanded entry and the latter had to force their way into the property.
6. the seizure of 10 *mandrax* tablets and R3 240 in cash from one Delmarie Kiewiets who was amongst a group of female persons who were at the immovable property during a search that the SAPS conducted thereat on 20 October 2010. It is alleged that the said tablets were wrapped in a certain foil that Kiewiets hid behind a certain cupboard at the property. …[A] police docket … is registered under Bellville South CAS 230/10/2010;
7. the seizure of two packets of *tik* and R411, in cash from February aforementioned during a search that the SAPS conducted at the immovable property on 2 May 2011. … [D]etails of [the] evidence [are] contained in a police docket registered under Bellville South CAS 22/04/2011;
8. the seizure of four packets of *tik* from the respondent, February aforementioned as well as one Janine Bailey (Bailey) who were hiding in the lavatory of the house in the property during a search that the SAPS conducted thereat on 22 October 2011. On the said occasion, an amount of R3 730, in cash was found in the possession of the said Bailey. The evidence relating to the said seizure is contained in [the] police docket registered with the SAPS as Bellville South CAS 257/10/2011 …;
9. the seizure of nine packets of *tik* and two and a half *mandrax* tablets that were hidden under a washing machine at the property during a search that the SAPS conducted at the immovable property on 6 February 2012 in the presence of Bailey aforementioned, one Jonathan January and one Marius Kirchner. In this regards…[there is] a police docket registered under Bellville South CAS 83/02/2012;
10. the seizure of 34 packets of *tik* from one Jason Willemse that the SAPS found at the property during a search that they conducted thereat on 24 February 2012.

… [T]he evidence [is] contained in a police docket registered under Bellville South CAS 322/02/2012;

11. the seizure of a packet of *tik* that was sold to a certain police agent by two male persons who were at the property of 21 February 2012 during an operation that the SAPS conducted thereat in terms of section 252A of the Criminal Procedure Act, 51, 1977, as well as a sum of R280, in cash that the SAPS seized from Willemse aforementioned during a follow-up investigation at the immovable property after Willemse had allegedly been pointed out as the person who sold the aforementioned packet of *tik* to the police agent. [T]he details of the said operation ..[are] contained in a police docket that is registered under Bellville South CAS 323/02/2012;
12. the seizure of two plastic bags one containing *tik* and another containing dagga that the SAPS recovered on 18 April 2012 from a shack situated at the property. It is alleged that the said recovery was made in the presence of Windvogel aforementioned who was in the company of one Jason Pretorius and one Maurice Florence. [The] details thereof as contained in a police docket registered under Bellville South CAS 204/04/2012;
13. the seizure of two halves of *mandrax* tablets that were wrapped in a silver paper that the respondent tried to hide behind a TV cabinet in the presence of members of the SAPS who were conducting a search at the immovable property on 28 February 2012. … [A] police docket [is] registered under Bellville South CAS 467/09/2012. It is alleged that on the said occasion the respondent admitted that she was selling (dealing-in) the *mandrax*) concerned (but that is denied by the respondent, who has not been convicted of the alleged offence);
14. the seizure of eight packets of *tik* and a R100 note that was in the pockets of a pair of trousers of one Basil Davids who was at the property when the SAPS conducted a search thereat on 12 October 2012. The evidence in this regard, [is] contained in a police docket registered under Bellville South CAS 136/10/2012;
15. the seizure of three halves of *mandrax* tablets, two packets of *mandrax* powder and two packets of *tik* from Basil Davids mentioned in the latter paragraph during a search that the SAPS conducted at the property on 18 October 2012. It is alleged that Davids attempted to run away when he saw the SAPS on the date in question but the members of the SAPS managed to apprehend him. …[The]

evidence [is] contained in a police docket registered under Bellville South CAS 222/10/2012;

16. the seizure of four packets of *tik* from three male persons and two female persons who were at the garage of the property during a search that the SAPS conducted thereat on 28 July 2013. It is alleged that one of the packets was recovered from February aforementioned and three thereof were recovered from one Steven Christians who was amongst the said group. The evidence relating to the seizure is contained in a police docket that is registered under Bellville South CAS 367/07/2013 ..;
17. the seizure of 12 packets of *tik* from Steven Christians mentioned in the latter paragraph during a search that the SAPS conducted at the property on 20 August 2013. …[A] police docket ... is registered under the SAPS under Bellville South CAS 316/08/2013; and
18. the seizure of four packets of *tik* from one Simon Bantam (Bantam) who was at the immovable property during a search that the SAPS conducted thereat on 15 October 2013. It is alleged that the said Bantam had hidden the said packets in a certain packet containing dog food and that when he saw the members of the SAPS he attempted to throw it away. …[A] police docket [is] registered under Bellville South CAS 220/10/2013.

[5] It was further alleged that 'in perpetuating the unlawful activity' [apparently drug-dealing], the respondent uses messengers, the so-called "runners" to sell the prohibited drugs from the property on her behalf. Some of the respondent's messengers are February and Windvogel aforementioned who were also on certain occasions arrested for selling the drugs on behalf of the respondent at the immovable property'. The difficulty with these allegations is the absence or paucity of evidence to support them. The mere fact that persons in possession of varying amounts of prohibited substance were found at the property on a number of occasions over a period of years does not establish that any of them were the respondent's 'messengers', or that the property was being used as a 'drug shop'. There is no factual evidence to support the characterisation of February and Windvogel as the respondent's 'messengers'. A conclusion has been stated in the affidavits. The court is given no means of determining the substance of the allegations.

[6] The area in which the property is situated is known to be afflicted by gangsterism and a high level of crime, including drug-related offences. It is plain that the respondent's property was

regularly frequented by a number of dubious characters. It is also evident on a balance of probability that the respondent herself has been found in unlawful possession of small quantities of prohibited dependence-producing substances at the premises and that she habitually keeps company at the house with others who use and possess drugs, and who might even deal in them. Such behaviour does not make her house an instrumentality of crime in the sense comprehended in chapter 6 of POCA in respect of drug-dealing, as alleged by the applicant. That cognisance may properly be had to the nature of the area in assessing the facts in cases of this nature is illustrated by the remarks in *National Director of Prosecutions v Parker* 2006 (3) SA 198 (SCA), at para 29, drawing a distinction between the character of a private residence in a residential area and a hotel in a red light district. The mere fact that persons in possession of prohibited substance frequent the house does not make the property a functionality of the crime of possession, and, absent sufficient evidence thereanent, of the crime of dealing in drugs. More is required to satisfy the requirement of a directly functional relationship between the use of the property and the commission of the offences. In this regard *evidence* is needed; it is not enough for the applicant in cases like this just to show grounds for suspicion.

[7] It is not enough that the applicant's witnesses describe the property as a well-known 'drug shop'. As Cameron JA remarked in *Parker* supra, at para 45, '…the fact that the property was widely reputed to be a drug outlet does not in my view add to its character as a criminal instrumentality. It is true that the property's reputation as a known drug outlet led directly to the commission of offences there, since the reputation drew purchasers to the location. But that is the point: they were drawn by the reputation,…'. In *Parker*, the reputation of the property as a 'drug shop' was nevertheless a significant factor in the factual matrix supporting the conclusion that it was indeed an instrumentality. The evidence in that case demonstrated that a number of drug sales had been concluded at the property over a period of time. That sort of evidence is sadly lacking in the current case. Only one so-called 'sting' operation was carried out at the premises, in which a police agent purchased some 'tik' at the property from a person, Willemse, who had previously been found at the property when drugs were discovered there. (The sting operation relates to the matter described in para 4.10 and 4.11, above.) In the current case, apart from the single incident just described, there is no evidence of anyone having been successfully prosecuted for dealing in drugs at or from the property. The state's approach to the prosecution of persons arrested at the property seems to have been somewhat lackadaisical. A number of charges appear to have been withdrawn for want of prosecution and in those cases in

which a conviction has been obtained, it was, without exception, for possession of the prohibited substances involved, not for dealing in them.[2] Evidence of a course of dealing, as distinct from a single transaction, is necessary if it is to be established that premises are being used as a shop; cf. *Parker* supra, at para 43.

[8] The evidence is that the property has been exceptionally well secured. Photographs annexed to the applicant's papers bear this out. The outer perimeter of the property has been ordered in such a way that it would be virtually impossible to see into the property from the street. The respondent maintains that the property has been secured because of the high crime rate in the area. Nothing is made of it in the affidavits, but it would appear from the photographs that something that looks like a tarpaulin has been stretched over the roofing of the dwelling house and surrounding area so that it would also be impossible to obtain an aerial view of activity at the property. The effect is undeniably sinister, but what is to be made of it in assessing the functionality of the property in the context of the evidence as a whole? Nothing within the property has been identified as an adaptation to support the notion that it has been set up or furnished to serve the particular purpose of a drug shop (in this respect the case falls to be distinguished on its facts from matters like *National Director of Public Prosecutions v Prophet* 2003 (6) SA 154 (C), 2003 (8) BCLR 906; 2005 (2) SACR 670 (SCA), 2006 (1) SA 38; 2006 (2) SACR 525 (CC), 2007 (6) SA 169, 2007 (2) BCLR 140 and *National Director of Public Prosecutions v Van der Merwe and Another* 2011 (2) SACR 188 (C)).

[9] In *Parker*, at para 38, it was remarked that where evidence of adaptation or storage is lacking, the characterisation of the property as an instrumentality is a matter of degree. It depends on an assessment of the evidence as a whole. In that case the characterisation of the residential premises in question as a 'drug shop' was primarily based on the number of drug deals shown by the evidence to have been transacted there, together with evidence demonstrating that these had occurred under the centralised organisational control of the person admittedly in charge of the property. There is no evidence of that nature in the current matter.

[10] The fact that the perimeter security has been used on occasion to delay or frustrate policemen from entering the premises when raids on it have been carried out is not enough, by itself, or in the context of the other evidence adduced, to demonstrate a sufficiently direct connection between the use of the property and a dealing in drugs there. It is readily

[2] The tendency by some prosecutors to accept guilty pleas to charges of possession in terms of s 4(b) of the Drugs Act, rather than going to trial to obtain convictions on charges of dealing in terms of s 5(b) was noted in *S v Pietersen* [2014] ZAWCHC 200 (19 December 2014) (which is accessible on the SAFLII website), a copy of which was directed by the court to be sent to the Director of Public Prosecutions.

conceivable that persons on the property in unlawful possession of drugs would seek to obstruct police entry irrespective of whether or not they were trading in the prohibited substances from the property.

[11] The current application was preceded, in accordance with the scheme of chapter 6 of POCA, by an *ex parte* application for a preservation order. The averments of one Ricardo Rhoda, a senior financial investigator in the Asset Forfeiture Unit, in the principal affidavit in support of the preservation order application were incorporated by reference in support of the current application. The answering affidavit of the respondent, who at that stage was legally represented, was directed entirely at the allegations in Rhoda's affidavit. The preservation order was made on 29 November 2013. The papers in the current application were served on the respondent on 5 December 2013. Thereafter, on 26 September 2014, the founding papers were supplemented by a supplementary founding affidavit deposed to by Mr Bam on that date. The supplementary affidavit was directed at introducing evidence arising out of a search of the premises allegedly undertaken on 14 April 2014 for the purpose of following up 'information regarding drugs and firearms that were unlawfully kept at the premises'. There is no indication in the papers that the supplementary affidavit filed of record on 26 September 2014 was delivered to the respondent or her attorneys of record. When I drew the matter to her attention, Ms *Nodada-Gantolo*, who appeared for the applicant, confirmed that the supplementary affidavit did not appear to have been served on the respondent. That, no doubt, explains why there was no answer to it.

[12] The matter dealt with in the supplementary affidavit is therefore not properly before me in this application. Its content in any event left much to be desired. The affidavit stated that 'prohibited dependence-producing drugs of various types namely methamphetamine and methaqualone', six unlicensed firearms 'of various categories' and R63 630 in cash were found on the premises when they were searched in April 2014. A forfeiture order in respect of the cash discovered in the April search was obtained on 9 September 2014 in separately instituted proceedings under case no. 10018/14. Paragraphs 12 - 14 of the supplementary affidavit in the current matter went as follows:

> 12. In order not to overburden these papers, the founding papers of the preservation of property and forfeiture application relating to the latter forfeiture order are not attached. A bundle thereof will, however, be made available to the honourable court for the hearing of the pending forfeiture application **if necessary**. I accordingly pray that that the contents thereof be read as if incorporated in these proceedings.

13. I must mention further that prior to the launching of the proceedings for the forfeiture order in annexure GB5 hereto* the applicant served upon the respondent the preservation papers and the preservation order relating to the seizure of the aforementioned cash and the other exhibits referred to herein above.

14. Therefore in view of the aforesaid I submit that the aforesaid indicates clearly that the property is continuously used as an instrumentality of drug-dealing as, amongst other things, the prohibited drugs in question were of substantial quantity and valued at approximately R 176 412 000.

(Emphasis supplied.)

[13] Quite clearly, if the applicant intended any regard to be had to the facts set out in the most general terms in the supplementary founding affidavit, it was incumbent on it not only to serve the affidavit on the respondent, but also to place the material it sought to incorporate by reference before the court. I do not know what was in the material not placed before the court, but presumably it included particulars of the nature of the information that led to the search, a more precise description of the nature of the drugs found at the premises and the circumstances in which they were found there and furnished the basis on which their value had been estimated at more than R176 000. The qualification 'if necessary' in paragraph 12 of the supplementary affidavit was utterly fatuous in the circumstances; the additional material was plainly necessarily required reading for the judge if any regard was to be had to the supplementary affidavit. As it was, the 'bundle' was not made available, or indeed even referred to in the applicant's heads of argument. In terms of the practice requirements in this Division of the High Court, an early allocation of the matter was required by virtue of the volume of the papers. The applicant complied with the practice directive and duly requested an early allocation. The exercise did not properly serve the purpose, however, as an apparently important part of the papers was not provided to the judge. The efficient hearing of the matter would be materially impaired were the bundle only to be presented when the matter was called.

[14] In the result, I am of the view that the applicant has failed on the papers properly before me to adduce the evidence that would be necessary for this court to be satisfied on a balance of probability that the property is an instrumentality of the offence of dealing in drugs. This conclusion is a matter of some regret because I have the strong feeling that if sufficient trouble had been taken to establish a course of dealing there, the evidence could probably could have been found to sustain the applicant's case. Nothing in this judgment prevents the applicant from instituting proceedings afresh, if so advised, on improved evidence.

[15] The respondent appeared in person at the hearing, her attorneys having withdrawn due to lack of funding. Legal costs will have been incurred in respect of her earlier representation. The application is therefore dismissed with costs.

A.G. BINNS-WARD
Judge of the High Court