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Republic of South Africa

**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

Case No: 3214/2017

Before: The Hon. Mr Justice Binns-Ward

Hearing: 30 October 2018

Judgment: 8 November 2018

In the matter between:

THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS

Applicant

and

EUGENE JOHANNES THERON

First Respondent

EUGENE JOHANNES THERON N.O.

Second Respondent

MARTHINUS JOHANNES STRYDOM N.O.

Third Respondent

JEANNE-MARI THERON N.O.

Fourth Respondent

(The second to fourth respondents having been cited in
their capacity as the trustees of the ET 15 Familietrust (IT 1689/2001))

JUDGMENT

BINNS-WARD J:

[1] This matter concerns an application by the National Director of Prosecutions ('the NDPP'), in terms of s 48 of the Prevention of Organised Crime Act 121 of 1998 ('the Act'), for the forfeiture of certain property to the state on the grounds that it is either '*an instrumentality of an offence referred to in Schedule 1*' of the Act, or the '*the proceeds of unlawful activities*'.¹ The property in issue is described in the notice of motion as:

‘1.1 Erf [...], [...] Crescent, Sonstraal Heights, Durbanville, Western Cape (***the immovable property***); and

1.2 The cash amount of R134090

(***collectively referred to as ‘the property’***).

That was also the manner in which the property had been described in preceding preservation order made in terms of s 38 of the Act. (The immovable property was alleged to be the ‘instrumentality’ and the order in respect of the cash amount was sought on the grounds that it was the ‘proceeds’.)

[2] The Act provides that any realisable property declared forfeit shall be sold and the proceeds deposited into the Criminal Assets Recovery Account ('the Account'), or if not sold, delivered to the Account (effectively to the National Treasury). Any monies declared forfeit must be deposited into the Account.² The Account is a separate account in the National Revenue Fund. It has been established in terms of s 63 of the Act. The property and money allocated to, or standing to the credit of, the Account may be utilised by Cabinet in the manner provided in terms of s 69A, essentially for the assistance of law enforcement agencies and bodies engaged in the provision of assistance to victims of crime.

[3] The orders sought in terms of the notice of motion contemplate that the *curator bonis* appointed in terms of the preservation order will sell the fixed property and pay the balance of the proceeds into the Account, after the deduction of his fees and expenditure. The orders sought in terms of the notice of motion did not contain any provision for the preferent redemption of any debt secured by the mortgage bond that it is common ground was registered against the title deeds of the immovable property.

[4] At the time the preservation order was made the immovable property, which is situated in a residential complex and said to be the first respondent's home, was mortgaged in

¹ See s 50(1)(a) and (b) of the Act.

² See s 57 of the Act.

favour of the ET Familie Trust, and it is still so encumbered. The trustees currently in office are the first respondent and his sister, who are also beneficiaries in terms of terms of the trust instrument, and a so-called ‘independent trustee’ (the third respondent), who says he has no family connections with the beneficiaries. The trustees were cited together with the first respondent as co-respondents in the matter.³

[5] The third respondent has made an affidavit stating that the mortgage bond registered over the immovable property in the trust’s favour stands as security for a loan in the sum of R1 million advanced by the trust to the first respondent to fund the purchase of the property.⁴ His affidavit incorporated a ‘request’ by the trustees that in the event of a forfeiture order being made in regard to the immovable property ‘*the interest of the Trust in the immovable property to the value of the outstanding loan and interest thereon be excluded from such an order*’. (Whether there is, in all likelihood, a *bona fide* relationship as debtor and creditor between the trust and the first respondent (a matter that has been placed in contention), and, if so, whether the debt(s) carry interest are questions to which I shall return later in this judgment).

[6] All of the respondents were represented in the current proceedings by the same counsel. Their counsel characterised the affidavit made by the third respondent as incorporating or representing ‘a tacit application’ in terms of s 52 of the Act for an exclusion order.⁵ This is the remedy that is often described as being available to someone who is able to raise a so-called ‘innocent owner defence’⁶ in the context of a forfeiture order to obtain the exclusion of their interest in the forfeited property from the operation of the order. The Act places an onus on a party seeking exclusionary relief in terms of s 52 of the Act to satisfy the court that it had acquired its interest in the property subject to forfeiture legally, and for a

³ A former trustee, who had resigned from the position several years ago, was erroneously cited as the fifth respondent, but nothing turns on that.

⁴ The mortgage, which is a covering bond, was registered approximately eight months after the transfer of the property into the first respondent’s name.

⁵ That an application in terms of s 52 may be imputed on the answering papers in an application in terms of s 48 of the Act is confirmed in *National Director of Public Prosecutions v Parker* 2006 (3) SA 198 (SCA). See in this connection *National Director of Public Prosecutions v Van der Merwe and Another* [2011] ZAWCHC 8; 2011 (2) SACR 188 (WCC); [2011] 3 All SA 635, at para. 22.

⁶ See e.g. *National Director of Public Prosecutions v Mohamed NO* [2002] ZACC 9, 2002 (4) SA 843 (CC) at para. 18. The label has been described as ‘a misnomer’; see *Mazibuko and Another v National Director of Public Prosecutions* [2009] ZASCA 52, [2009] 3 All SA 548 (SCA), 2009 (6) SA 479, at para. 40. An example of such a ‘defence’ is to be found in the facts in *Van der Merwe supra*, where the owner of the fixed property that was declared forfeit in that case because the tenant had been using it as an outlet for the sale of illicit drugs sought (unsuccessfully) to protect her proprietary interest from forfeiture on the grounds that she had not been complicit in the unlawful activity carried on there and had taken reasonable measures to stop it.

value broadly equivalent to the value of the interest concerned, and that it neither knew, nor had reasonable grounds to suspect, that the property in which the interest is held was an instrumentality of an offence referred to in Schedule 1 to the Act.

[7] Only property that is subject to a preservation order in terms of s 38 of the Act is liable to forfeiture consequent upon an application in terms of s 48. The suggestion that the court was seized of a tacit application in terms of s 52 therefore implied an understanding by the trustees and their legal representatives that the mortgagees' rights in the immovable property had been a subject of the preservation order and accordingly susceptible to forfeiture. When I raised the question at the hearing with the NDPP's legal representative, he made it clear that he also considered that to be so. It was not clear to me, however, that the real rights of the trust in the fixed property were subject to the preservation order. If the mortgagees' interest is not subject to the preservation order, the basis for any application for an exclusion order does not exist, for it is not liable to forfeiture.

[8] The position that actually obtains demands determination at the outset because the structure of the Act requires that forfeiture applications in terms of s 48 and exclusion applications in terms of s 52 fall to be determined *pari passu*.⁷ And, if there are indeed two applications before court, it affects how disputes of fact on the papers fall to be dealt with by the court in the application of the *Plascon-Evans* rule.^{8 9}

[9] 'Property' is defined in s 1 of the Act to mean '*money or any other movable, immovable, corporeal or incorporeal thing and includes any rights, privileges, claims and securities and any interest therein and all proceeds thereof*'. It is plain therefore that 'property' within the meaning of the Act can include the rights of a mortgagee in fixed property. The defined meaning does not, however, derogate from the primary ordinary meaning of the word which is '*a thing or things belonging to someone*' or the right of the right to the possession, use, or disposal of something.¹⁰ The ordinary meaning highlights that the word pertains to the subject matter of a proprietary connection between the thing or right concerned and its owner or holder. Thus, in determining whether the mortgagees' rights in the immovable property have been made the subject of a preservation order, it has to be

⁷ See s 52(1) of the Act, and, consider, in particular, the effect of the words '*and when it makes a forfeiture order ...*'.

⁸ See *Plascon -Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634E-635C

⁹ *Van der Merwe* supra, at paras. 18-19.

¹⁰ See *The Oxford Dictionary of English*, s.v. 'property'.

acknowledged that such rights constitute ‘property’ that is quite discrete from the ‘property’ constituted by the residual rights of dominium in the fixed property. It is only the latter that is the ‘property’ that remains vested in the first respondent as registered owner of the land concerned. The Act itself appears to acknowledge and give effect to this type of distinction. It does so in s 43, which carries the subheading ‘*Orders in respect of immovable property subject to preservation of property order*’.

[10] The preservation order, in paragraphs 2 and 3 thereof, expressly prohibited all persons with knowledge of the order from disposing of or hypothecating the property, and directed the registrar of deeds to ‘*endorse the title deed of the immovable property with the restriction that the property ... shall not without the prior leave of [the court] be attached, sold in execution, further mortgaged or otherwise encumbered; provided that such endorsement shall not prevent a transfer of the immovable property effected in accordance with paragraph 7*’ (underlining supplied for emphasis). (Paragraph 7 of the order provided for circumstances in which the *curator bonis* appointed in terms of s 42 might dispose of the property before the determination of a forfeiture application or the lapsing of the preservation order, as the case might be, as provided for in terms of s 40 of the Act.) The orders made in terms of paragraphs 2 and 3 of the preservation order were of the nature provided for in terms of s 43(1) read with s 43(2)(b) of the Act.

[11] It is from s 43 of the Act that a court derives the power to make orders, such as those reflected in paragraphs 2 and 3 of the preservation order mentioned above.¹¹ Section 43(1) gives the court the power to make any of the orders binding on the registrar of deeds that are provided for in s 43(2). An order that the immovable property subject to the preservation order may not be attached or sold in execution without the consent of the court is provided for in terms of s 43(2)(b) of the Act. That an order contemplated in terms of s 43(2)(b) is of restricted effect is evident from the provisions of s 43(3)(a), which reads:

In order to give effect to subsection (1), the registrar of deeds concerned shall-

- (a) make the necessary entries in his or her registers and the necessary endorsement on the office copy of the title deed, and thereupon any such restriction shall be effective against all persons except, in the case of a restriction contemplated in subsection (2)(b), against any person in whose favour a mortgage bond or other charge was registered against the title deed*

¹¹ In paragraph [10] above.

of immovable property prior to the endorsement of the restriction on the title deed of the immovable property, but shall lapse on the transfer of ownership of the immovable property concerned

(Underlining provided for emphasis.)

In my view the underlined words in s 43(3), which appear to exclude from the operation of any order within the meaning of s 43(2)(b) the right of a mortgagee to attach and sell in execution immovable property that has been made subject of a preservation order, serve to confirm that a preservation order in respect of immovable property does not affect the real rights in the property of a mortgagee whose bond was registered against the title deed of the property prior to a restrictive endorsement of the deed effected pursuant to, or in association with, a preservation order.

[12] The NDPP's case on the papers was that the first respondent, who is the registered owner of the immovable property, had been using the residential premises at that address for the purposes of dealing in undesirable or prohibited substances.¹² It was alleged that the use of the premises in that manner rendered it susceptible to characterisation as the 'instrumentality of an offence' as defined in s 1 of the Act, viz. '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'.

[13] The relatively restricted import of the defined meaning of 'instrumentality of an offence' has been explained in the jurisprudence. So, in *National Director of Public Prosecutions v RO 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 All SA 491 (SCA), 2004 (2) SACR 208, at para. 14, the court held in this regard '... the purport of the statute itself suggests some restriction. The 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.' and further, in para. 31 (in a passage applied by the Constitutional Court in *Prophet v National Director of Public Prosecutions* [2006] ZACC 17; 2006 (2) SACR 525

¹² An offence referred to in s 13 of the Drugs and Drug Trafficking Act, 1992, listed in item 22 of Schedule 1 to the Prevention of Organised Crime Act.

(CC); 2007 (2) BCLR 140; 2007 (6) SA 169, at para. 56) that ‘... *the link between the crime committed and the property [must be] reasonably direct and that the employment of the property must be functional to the commission of the crime. . . . [T]he 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*’.

[14] A further factor that in my view supports the construction attributed to s 43 in paragraph [11] above is the unlikelihood of a mortgagee’s real right in encumbered property ever constituting property that might qualify as the ‘*instrumentality of an offence*’ in the accepted sense of that concept. It is therefore not property that is readily susceptible to attachment by means of a preservation order in terms of s 38. If, however, it had been intended, exceptionally, that the mortgagees’ interest in the immovable property be subject to the preservation order, the terms of the order should have expressly provided as much.

[15] It cannot be unusual that fixed property that the NDPP applies to have declared forfeit to the state in terms of the Act is mortgaged, and I therefore enquired of the legal representative who appeared for him in these proceedings, and does so regularly in like cases, whether he was not aware of any previous matter in which this question had been considered. I was informed that he was not,¹³ but that ordinarily, when the mortgagee is *a financial institution*, the terms of the order sought in such matters expressly excludes the mortgagee’s interest. I cannot conceive of any reason why the identity of the mortgagee should ordinarily make any difference.

[16] I have accordingly concluded that the trust’s interest in the immovable property as security for the redemption of any claim it might have against the registered owner was not property that was subject to the preservation order, and that it is therefore excluded from susceptibility to forfeiture in the NDPP’s application in terms of s 48 of the Act. On a proper reading of the statute, and consistently with the ordinary incidence of the common law of property, a preservation order simpliciter in respect of immovable property results in the preservation of the property subject to its encumbrances if any. A conclusion to the same

¹³ He might have overlooked his previous appearance for the NDPP in *National Director of Public Prosecutions v Salie and Another* [2014] ZAWCHC 40; [2014] 2 All SA 688 (WCC); 2015 (1) SACR 121 (WCC), where this very issue was addressed at para. 173, with reference to the judgment of the Supreme Court of Appeal in *Mazibuko* supra, at para. 57. I accept, however, that the mortgagees in both those matters were banks or registered financial institutions, which the applicant’s legal representative appears to have regarded as a pertinent basis for distinguishing the current case.

effect is recorded *en passant* in the majority judgment (per Nugent JA) in *Mazibuko*,¹⁴ at para. 57. In the circumstances a need for the trustees to protect their interest in the immovable property by way of an application in terms of s 52 based on the so-called ‘innocent owner defence’ does not arise on the facts.

[17] I turn now to the question whether *the first respondent’s* property should be declared forfeit.

[18] The evidence upon which the NDPP’s application was founded was garnered in a search carried out by the police at the immovable property in the early hours of 18 August 2015. The police detail did not have a warrant to search the property. The officers acted in terms of s 11(1) of the Drugs and Drug Trafficking Act which, insofar as currently relevant, provided that a police officer might, if s/he had reasonable grounds to suspect that an offence under that Act had been or was about to be committed by means or in respect of any scheduled substance, drug or property, at any time (i) enter and search any premises in which any such substance, drug or property was suspected to be found; and (ii) search any container or other thing in which any such substance, drug or property was suspected to be found; and seize anything which in his or her opinion might be connected with, or provide proof of, a contravention of the statute.

[19] Those provisions were subsequently held by the Constitutional Court in *Minister of Police and Others v Kunjana* [2016] ZACC 21; 2016 (9) BCLR 1237 (CC); 2016 (2) SACR 473 to be invalid because they conduced to unjustifiable infringements of the constitutional rights to privacy and dignity. The judgment in *Kunjana* was handed down on 27 July 2016, nearly a year after the date of search of the first respondent’s premises.

[20] The respondents’ counsel argued that the evidence related to what had been found in the search and seizure operation at the first respondent’s property should be excluded from consideration because it had been obtained unlawfully. The exclusion of the evidence would result in the collapse of the NDPP’s case.

[21] The Constitutional Court restricted its order of invalidity in *Kunjana* to operate only prospectively from the date of its judgment. It noted (in para. 34) that by framing its order in

¹⁴ Note 6 above. My attention was directed to *Mazibuko* in a note from the respondents’ counsel that was submitted after the hearing in response to a request by the court for supplementary argument on the effect of s 43(2)(b) of the Act. It does not appear that the question had been argued in *Mazibuko*. The point was made by Nugent JA incidentally in the context of the learned judge’s passing observation that an order made by the court of first instance directing the *curator bonis* in that matter to settle any outstanding balance on a mortgage bond that was registered against the property before paying the proceeds to the Account had been unnecessary.

that manner it might be depriving the respondent in that case - being the party who had successfully impugned the constitutionality of the provisions – from obtaining any effective relief from its order during her upcoming trial on charges under the Drugs and Drug Trafficking Act. The Court observed, however (at para. 37), that it nevertheless remained open to her in any event to challenge the validity of the searches during her criminal trial. The respondents’ counsel appeared to rely on the observation at para. 37 of the Constitutional Court judgment in support of their submission that the evidence should be excluded on some or other basis.

[22] It is clear from the context, however, the Constitutional Court’s remark that the respondent in *Kunjana* could still challenge the validity of the searches at her criminal trial was premised on the effect of s 35(5) of the Constitution, which provides that ‘(e)vidence obtained in a manner that violates any right in the Bill of Rights must be excluded if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice’. Section 35 is the provision in the Bill of Rights that entrenches the right of arraigned persons to a fair trial in criminal proceedings. Section 35(5) is triggered by *the effect* in the given case of the manner in which evidence has been obtained on the fairness of a criminal trial or the administration of justice. It applies irrespective of the actual or ostensible legality of the procurement of the evidence. The current proceedings are civil in character,¹⁵ and therefore not amenable to s 35(5).

[23] The Constitutional Court explained that its decision to make its order of only prospective effect was founded on its concern that a retrospectively applicable order might cause criminals who had contravened provisions of the Drugs Act to go free and undermine the administration of justice; and that a declaration with retrospective effect might result in delictual claims by persons subject to searches and seizures, thereby further burdening the police services.¹⁶ The restrictive effect of the prospective incidence of the order of invalidity made by the Constitutional Court is that the actions taken by police officials under s 11(1)(a) and (g) of the Drugs and Drug Trafficking Act before the date of the Court’s judgment are clothed with apparent validity, and fall to be regarded for practical purposes as if carried out within the ambit of the law.

¹⁵ See s 37 of the Act.

¹⁶ See *Kunjana* supra, at para. 38.

[24] The consequence of this is that it has to be accepted that the warrantless search and seizure operation conducted at the first respondent's premises was permitted at the time under the authority of an effective statutory provision. The uncontroverted evidence is that the police acted on information provided by a reliable informer. There is nothing to suggest that the information provided to the police did not afford them reasonable grounds to suspect that offences under the Drugs and Drug Trafficking Act were being committed at the premises. In the result the argument that the evidence obtained in the operation should be excluded cannot prevail.¹⁷

[25] The police found a considerable amount of cannabis at the first respondent's premises. There were 57 cannabis plants under hydroponic cultivation (capable of producing about 855 gm. of processed dagga) and a quantity (423,16 gm.) of the processed product, some of which was contained in bottles. The cultivation operation was assisted by the use of halogen lamps and bright florescent lighting. This lighting was even set up in what had been designed as the built in cupboards in the house. The doors of the cupboards had been removed and florescent lighting installed in the tops of the modified cupboards. The purpose of the lighting, which was regulated by timers it would appear, was to accelerate the growth of the cannabis plants thereby shortening the production cycle. A system for drying the harvested cannabis was set up in one of the rooms. Evidence was adduced that dagga processed from cannabis plants cultivated under controlled circumstances, such as hydroponically, commands a significantly higher market value (i.e. by tens of multiples) than does product from the field-grown variety. This, because of the much higher concentration of the active ingredient, tetrahydrocannabinol (THC), that is found in the plants cultivated under controlled circumstances.

[26] Large tins and certain other containers containing a variety of other chemicals that were prohibited substances or homologues of such substances and marketable in the illicit drug market were also found in the search. The chemicals and solvents found on the premises included 2-Butanone, Hexane and Dichloromethane, which are substances that can be used in the manufacture, processing or purification of drugs. Numerous plastic packages containing narcotic substances of drugs that were homologues of methcathinone (known on

¹⁷ The respondents' counsel also sought to argue that the evidence should be excluded because it had been obtained in a manner inconsistent with the safeguards provided in terms of s 22 of the Criminal Procedure Act 51 of 1977. The argument was founded on an averment in an affidavit by a member of the applicant's staff that the police had acted in terms of that provision. There was no basis in fact for that averment. The direct evidence by the police officers who conducted the operation, supported in this respect by the evidence of the first respondent himself, was that they had acted in terms of s 11 of the Drugs and Drug Trafficking Act.

the street as “Cat”) and lysergic acid diethylamide (LSD) were also amongst the material discovered on the premises. I find it unnecessary to list them all. They were fully described in the affidavits of Surita Smit, a forensic analyst employed at the Forensic Science Laboratory, amplified by the commentary furnished in the affidavit of Detective Captain Johan Smit. The first respondent did not challenge the evidence adduced by the NDPP concerning the forensic analysis and identification of the substances found in his house, other than by bald denial.

[27] San Pedro cactus plants were cultivated in the garden on the premises and pieces of the plants were discovered in the fridge in the house. Mescaline can be extracted from this plant. Sodium hydroxide and sulphuric acid that would be used in such an extraction process were found in the search. The types of glassware that would be useful for the purpose, such as a volumetric flask, separation funnel, ceramic suction funnel and measuring cylinder were also present.

[28] A police officer with 27 years’ experience in the investigation of drugs related offences testified that the total estimated street value of the substances found in the first respondent’s premises was just over R1,3 million. (He excluded from his valuation the values of certain of the substances, which, because of a confessed lack of necessary knowledge, were beyond his ability to value.) The uncontroverted evidence was that every room in the house, apart from the main bedroom, and also the garage were given over to, or contained evidence of, what appeared to be drug production activity. The photographs taken by the police and put in evidence speak volumes. They give the impression of something approaching a mini-industrial operation having been conducted there. The picture they present of the interior of what is supposed to be the inside of a dwelling house is far removed from that of anything approaching a conventional domestic set-up. They support the opinion evidence of two policemen with nearly 60 years’ experience between them in narcotics-related investigations that the property was used for the manufacture and preparation of illicit drugs for sale, and that the physical evidence found in the search was inconsistent with any claim that the set-up was related only to the use of the drugs found there for private consumption by the couple living there.

[29] The police also found R134 090 in cash at the premises. Some of the money was stored in a cupboard and the rest in a desk drawer. According to the first respondent and his girlfriend, who lived with him at the premises, fifteen thousand rand of the cash seized by the police had been in a knapsack.

[30] The NDPP's case is that the first respondent's house is the instrumentality of the offence of dealing in drugs in contravention of s 5 of the Drugs and Drug Trafficking Act (an offence in terms of s 13 of that Act), and that the cash seized at the premises was the proceeds of crime. The term '*deal in*' is widely defined in that Act and includes, amongst other things, performing any act in connection with the cultivation, manufacture or administration of a drug. In *Cook Properties* supra, the appeal court in analogous circumstances allowed by implication that evidence that the premises themselves were used to manufacture, package or distribute drugs, or that any part of the premises was adapted or equipped to facilitate drug dealing was a strong pointer to the property concerned being the instrumentality of an offence, as defined.¹⁸ The court affirmatively restated that proposition in *Prophet* (SCA).¹⁹

[31] The first respondent's case is that the cannabis found in his house was being cultivated and processed by him for his own private consumption. He called in aid in this regard the judgments of this court and the Constitutional Court that were subsequently delivered in *Prince v Minister of Justice and Constitutional Development and Others*; *Rubin v National Director of Public Prosecutions and Others*; *Acton and Others v National Director of Public Prosecutions and Others* [2017] ZAWCHC 30; [2017] 2 All SA 864 (WCC); 2017 (4) SA 299 and *Minister of Justice and Constitutional Development and Others v Prince (Clarke and Others Intervening)*; *National Director of Public Prosecutions and Others v Rubin*; *National Director of Public Prosecutions and Others v Acton* [2018] ZACC 30; 2018 (10) BCLR 1220 (CC), which held in essence that the prohibition against the possession of cannabis for personal consumption constituted an unjustified infringement of a person's constitutional right to privacy. The first respondent did not explain the presence of the other scheduled substances found at the premises. He claimed that he had been using the pieces of San Pedro cactus found in the house to experiment in the making of some sort of tea. He alleged that all of the cash seized at his home, apart from that found in the knapsack, was a nest egg that he preferred to hold for ready use in money-generating activities that he might engage in from time to time, rather than depositing it in a bank account. He claimed to have accumulated the cash from the purchase and resale of a used motor vehicle at some point for a profit of R14 000 and from the profit made on a similar transaction involving a motor cycle and (to the extent of R15 000) the proceeds of the sale of another vehicle that his

¹⁸ At para. 49.

¹⁹ *Prophet v National Director of Public Prosecutions* [2005] ZASCA 94; [2006] 1 All SA 212 (SCA), at para. 26.

girlfriend had received as a gift. The rest was money that he earned from the sale of small glass objects that he made and sold at fetes and flea markets. He gave no particulars of to whom he had sold the vehicles or when those transactions had occurred. In other words, he gave no details against which the veracity of his evidence could be interrogated by the applicant. That someone of the first respondent's apparently relatively modest means (he had a reported income from formal employment of R10 000 a month on average) should keep such a relatively large sum in cash is improbable.

[32] It was claimed that the money in the knapsack belonged to his girlfriend's employer, Exclusive Access Trading 815 (Pty) Ltd t/a LG Brandshop. The respondents' version was that that money had been entrusted to her when she left work the previous day to be banked at Canal Walk on her way back to work the following morning. LG Brandshop appears to be a business conducted by one Morné van Taak. There are indications on the papers that van Taak is a business associate or friend of the first respondent's. The claim that the money in the knapsack belonged to LG Brandshop was supported by a letter, dated 26 June 2017, apparently signed by van Taak, a copy of which was attached to the first respondent's answering affidavit. A supporting affidavit by van Taak confirming the truth of the letter's content was notably absent from the answering papers. As the applicant's legal representative pertinently emphasised in argument it was also significant that there was no evidence of any attempt by LG Brandshop in the ensuing three years to recover its money from the police or the *curator bonis*, as might ordinarily have been expected if there were substance in its claim.

[33] The respondents' counsel submitted that on the application of the *Plascon-Evans* rule the case should be decided on the basis of an acceptance of the respondents' evidence where that conflicted with that of the applicant. It falls to be observed in this regard that reliance on the *Plascon-Evans* rule is too frequently made by litigants without a proper appreciation of the ambit of the rule and the exceptions that form part of it. In particular, it is often overlooked that where the allegations or denials of the respondent are far-fetched or clearly untenable the court is justified in rejecting them merely on the papers (cf. *Administrator, Transvaal and Others v Theletsane and Others* 1991 (2) SA 192 (A) at 197), and that where the denial by respondent of a fact alleged by the applicant does not raise a real, genuine or bona fide dispute of fact – in the sense explained in *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 1155 (T) at 1163-5 and *Da Mata v Otto* NO 1972 (3) SA 858 (A) at 882D-H – and the respondent has not availed himself of the right to apply to cross-

examine the deponents concerned and the court is satisfied as to the inherent credibility of the pertinent factual averments in the affidavits in the applicant's case, it may proceed on the basis of the correctness thereof for the purposes of determining a case for final relief.

[34] The following observations made by Shongwe JA in *Buffalo Freight Systems (Pty) Ltd v Castleigh Trading (Pty) Ltd and Another* [2010] ZASCA 66; 2011 (1) SA 8 (SCA); [2011] 1 All SA 1, at para. 19, in the context of an argument about the application of the *Plascon-Evans* rule, underscore that the rule does not bind the court in every case to proceed on an uncritical acceptance of a respondent's version, especially where such version defies credulity or cannot withstand objective analysis:

... in *Truth Verification Testing Centre CC v AE Truth Detection CC* 1998 (2) SA 689 (W) at 698 H-J, Eloff AJ said:

'I am also mindful of the fact the so-called robust common-sense, approach' which adopted in cases such as *Soffiantini v Mould* 1956 (4) SA 150 (E) in relation to the resolution of disputed issues on paper usually relates to situations where a respondent contents himself with bald and hollow denials of factual matter confronting him. There is, however, no reason in logic why it should not be applied in assessing a detailed version which is wholly fanciful and untenable.'

I respectfully agree. The court should be prepared to undertake an objective analysis of such disputes when required to do so. In *J W Wightman (Pty) Ltd v Headfour (Pty) Ltd* [2008] ZASCA 6; 2008 (3) SA 371(SCA), [at para. 13] it was suggested how that might be done in appropriate circumstances.

[35] In assessing whether the first respondent's version so far-fetched or clearly untenable that the court would be justified in rejecting it on the papers, it is appropriate in my view to consider the evidence as a whole, and not compartmentally. So, for example, whilst the improbability that attaches to the first respondent's explanation for having such a large sum in cash on hand in his house might not be enough, in itself to satisfy the stringent test that has to be applied in deciding whether an exception to the ordinary incidence of the *Plascon-Evans* rule is justified,²⁰ the tenability of his version is seriously eroded to the point of being far-fetched when it is considered in the context of the compelling evidence indicating the conduct of a drug dealing business at the premises and his risible attempts to escape the effect of the real evidence put before the court by means of the photographic and forensic analysis evidence. On this approach, and having a holistic regard to the evidence, I am left in no doubt that a finding is justified on the papers that the premises were an instrumentality of crime and that the cash seized by the police was the proceeds of crime.

²⁰ Cf. *Mathewson and Another v Van Niekerk and Others* [2012] ZASCA 12 (16 March 2012), at para. 7 and *National Scrap Metal v Murray & Roberts* [2012] ZASCA 47; 2012 (5) SA 300 (SCA), at paras. 21-22.

[36] An order for the forfeiture of the property cannot follow, however, if the effect would be disproportionate in the sense of it resulting in an arbitrary deprivation of property, or of operating unduly harshly on the affected owner or rights holder. The proper approach to the assessment of whether or not forfeiture would be a disproportionate remedy in cases like this is well established; see *Prophet* supra, at paras. 58-62. The factors enumerated in *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another*; *First National Bank of SA Ltd t/a Wesbank v Minister of Finance* ('FNB') [2002] ZACC 5; 2002 (4) SA 768 (CC); 2002 (7) BCLR 702, at para. 100, should be weighed appropriately with regard to the circumstances of the given case in order to check that the operation of the forfeiture provisions in the Act would not impermissibly result in an arbitrary deprivation of property in contravention of s 25(1) of the Constitution;²¹ or have a disproportionately punitive effect.

[37] The facts of this case are equivalent in material respects to those in the *Prophet* matter referred to earlier.²² In that case the immovable property was a house in the Cape Town suburb of Woodstock. The house was being used as a mini-laboratory for the production of illicit drugs. In that matter too a significant portion of the house had been given over to activities connected with the manufacture of the drugs. The monetary value of the drugs-related material found there was also, as in the current matter, relatively high. The forfeiture

²¹ According to *FNB* supra, loc. cit., in cases involving the deprivation of corporeal property, 'sufficient reason' is to be established as follows:

- (a) It is to be determined by evaluating the relationship between means employed, namely the deprivation in question, and ends sought to be achieved, namely the purpose of the law in question.
- (b) A complexity of relationships has to be considered.
- (c) In evaluating the deprivation in question, regard must be had to the relationship between the purpose for the deprivation and the person whose property is affected.
- (d) In addition, regard must be had to the relationship between the purpose of the deprivation and the nature of the property as well as the extent of the deprivation in respect of such property.
- (e) Generally speaking, where the property in question is ownership of land or a corporeal moveable, a more compelling purpose will have to be established in order for the depriving law to constitute sufficient reason for the deprivation, than in the case when the property is something different, and the property right something less extensive. ...
- (f) Generally speaking, when the deprivation in question embraces all the incidents of ownership, the purpose for the deprivation will have to be more compelling than when the deprivation embraces only some incidents of ownership and those incidents only partially.
- (g) Depending on such interplay between variable means and ends, the nature of the property in question and the extent of its deprivation, there may be circumstances when sufficient reason is established by, in effect, no more than a mere rational relationship between means and ends; in others this might only be established by a proportionality evaluation closer to that required by section 36(1) of the Constitution.
- (h) Whether there is sufficient reason to warrant the deprivation is a matter to be decided on all the relevant facts of each particular case, always bearing in mind that the enquiry is concerned with "arbitrary" in relation to the deprivation of property under section 25 [of the Constitution].

²² At paragraph [13] above.

order made by the High Court in that matter was confirmed on appeal by both the Supreme Court of Appeal and the Constitutional Court in circumstances quite closely comparable to those in the current matter.

[38] The recognised objects of the Act would be well served by forfeiture in this case. Drug dealing is a scourge in our society. The social havoc it wreaks, especially amongst the young and unemployed, is well-documented, and a reality that judges in this country are confronted with daily in the discharge of various of their functions, most especially when trying offences involving violence, which are often associated with drug use, and reviewing committals for involuntary psychiatric care in terms of the Mental Health Care Act 17 of 2002, which are often necessitated for the treatment of conditions brought on by the consumption of undesirable or prohibited dependence inducing substances.

[39] The first respondent on the other hand must have, or should have, appreciated the risk that he was taking in using his house primarily for a drug-dealing enterprise rather than as the proper home that it should have provided. On the respondents' version the property is heavily bonded, and the direct financial effect of its forfeiture on him would be much less than the market value of the property. He is the beneficiary of a family trust that appears to have the means to extend him financial support if he should be in need of it.²³ He is young and, judging by his involvement in various businesses, seems to have an entrepreneurial aptitude. It seems unlikely that a forfeiture order would leave him destitute or homeless.

[40] Making a forfeiture order in the circumstances would not result in an arbitrary deprivation of property, nor would it give rise to disproportionately penal consequences.

[41] I am not persuaded that an exclusion order falls to be made in respect of the R15 000 of the seized cash that is alleged to have been the property of LG Brandshop. There was in any event no application by LG Brandshop for an exclusion order. The mere writing, more than two years after the event, of a 'to whom it may concern' letter by the alleged owner of the cash does not qualify as an application in terms of s 52, whether express or tacit. And even if it had, its content would not have sufficed in the circumstances to discharge the onus that burdens a party seeking to obtain an exclusion order on the basis of the innocent owner defence. There is no explanation why, if the police had seized its money, LG Brandshop did not lay claim to it immediately or give notice in terms of s 39 of the Act. There is also no

²³ Not only has it been alleged that the trust advanced a R1 million loan to the first respondent, but the respondents also had the means to engage the services of both senior and junior counsel to represent their interests in the current proceedings.

evidence to indicate why the first respondent's girlfriend should have been entrusted with such a comparatively large sum in cash to deal with in the manner claimed. Was this a once-off event, or something that was done regularly in the ordinary conduct of LG Brandshop's business? No corroborating detail whatsoever has been offered in support of the allegation. The statement in a single sentence of the letter signed by van Taak that '*One of Molly's duties at the company is daily banking*' is hardly illuminating. Many a trading entity will have a staff member that attends to daily banking, but I would consider it improbable that such employees would ordinarily take large sums of the business's cash takings home with them in the evening to bank the next day. And if there were any such arrangement I would expect there to be some form of documentary record, such as pre-signed deposit slips. In short, there is no evidence to lend the claim verisimilitude.

[42] The NDPP has contended, through an affidavit made by his local representative, a deputy director of public prosecutions, that the alleged loan in respect of which the mortgage bond registered in favour of the family trust is said to provide security is a sham and that if there had indeed been any flow of funds from the trust (which the applicant appears to call into question) it was a donation dressed up as a loan to avoid tax. There is insufficient evidence on the papers to determine whether there is any substance to these accusations, and they are in any event matters that lie outside of the scope of these proceedings.

[43] There are indeed some anomalies in the respondents' evidence concerning the loan. I have already pointed to the fact that the mortgage bond was not registered *simul et semel* the registration of the transfer of the title of the property in the first respondent's name, which is what ordinarily happens when security is given for a loan advanced to finance the purchase of fixed property. No substantiating evidence of a relevant flow of funds was offered by the trustees. It is also odd that the third respondent claims that the bond secures a claim not only in respect of the capital of the loan, but *possibly* also interest thereon in an unspecified basis. Odd, because if the loan were interest bearing one would expect the loan agreement to provide for the payment of instalments towards its redemption, which, as far as one is able to gather, it does not. It was also peculiar that the third respondent should have given the evidence he did concerning the loan and security without having confirmed the actual position against the trust's accounting records. The loan agreement itself, a copy of which was attached to the answering papers, is unconventional in various respects, most notably in its provision that interest might be levied on the loan at a rate to be agreed if the parties should at any time so agree.

[44] I mention these matters because it should not be misunderstood from the finding that the trust's rights as mortgagee did not form part of the property affected by the preservation order, that the existence or amount of any claim secured thereby has been found to have been established. It will be for the *curator bonis*, when the fixed property is realised pursuant to the forfeiture order that will be made, to satisfy himself as to the validity of any claim on the proceeds based on the mortgage bond. If he is not satisfied, he will be entitled to require the trustees to establish any claim to any part of the proceeds in appropriate legal proceedings.

[45] As mentioned, the NDPP sought an order directing the *curator bonis* to pay the proceeds of the sale of the immovable property after deducting his fees and expenses to the Account. The Supreme Court of Appeal held in *Mazibuko* supra, at para 57, with reference to s 57(5) of the Act,²⁴ that such an order was legally incompetent because the Act provides that the proceeds must be paid to the Account and the expenses attendant on forfeiture proceedings must be defrayed from funds appropriated for that purpose by Parliament. This court has in at least one previous reported judgment also declined to make such an order, and cited the judgment in *Mazibuko* in explanation of its approach.²⁵ It does not appear from the judgment that the matter was argued before the Supreme Court of Appeal, and it seems to me, with respect, having regard to the provisions of s 42(2)(a) of the Act,²⁶ that the observation founded on s 57(5) construed in isolation was made *per incuriam*. An order allowing for the payment of the fees and expenses of the *curator bonis* from the proceeds of the forfeited property appears to me to be a sensible and practicable provision in most cases.

[46] It was also pointed out in both of the earlier judgments to which I have referred that seeking an order confirming the appointment of the *curator bonis* who was appointed when the preservation order was made was unnecessary and inappropriate because the operation of the Act provided for this automatically. The NDPP was party to these matters. It is puzzling

²⁴ Section 57(5) provides:

The expenses incurred in connection with the forfeiture and the sale, including expenses of seizure, maintenance and custody of the property pending its disposition, advertising and court costs shall be defrayed out of moneys appropriated by Parliament for that purpose.

²⁵ See *Salie*'s case cited in note 13 above.

²⁶ Section 42(2)(a) provides:

The High Court which made an order under subsection (1) may make such order relating to the fees and expenditure of the curator bonis as it deems fit, including an order for the payment of the fees of the curator bonis-

(a) *from the forfeited property if a forfeiture order is made; or ...*

therefore that he persists in praying for orders to that effect when it has been plainly spelled out that they are superfluous.

[47] The judgment in *Mazibuko* held further that it was unnecessary to spell out in an order that the proceeds of the disposition of immovable property to be paid by the *curator bonis* to the Account should be net of any amount due to a mortgagee or other party that has a charge on the property. For the reasons discussed above, that should indeed be self-evident, but I shall nevertheless include such a provision in the orders to be made in the current matter. I consider that the making of such an order is indicated for the sake of clarity in this case in view of the confusion on both sides identified earlier as to the correct position.

[48] An order will issue in the following terms:

1. The following property, which is currently the subject matter of a preservation of property order granted by this Court on 23 February 2017, is declared forfeit to the State in terms of section 50(1) of the Prevention of Organised Crime Act 121 of 1998 ('the Act'):
 - 1.1 Erf [...], [...], Sonstraal Heights, Durbanville, Western Cape (the immovable property); and
 - 1.2 The cash amount of R134 090.
(collectively referred to as 'the property').
2. The Registrar of this Court is directed to publish notice of this order in the Government Gazette as soon as practicable after the order is made, as required in terms of s 50(5) of the Act.
3. Upon the disposal of the immovable property as contemplated by s 57(1)(c) of the Act, the *curator bonis* appointed in terms of the aforementioned preservation of property order shall, after settling any claim to any portion thereof that may be duly established by the mortgagees, being the trustees for the time being of the ET 15 Familietrust (IT 1689/2001), deposit the proceeds of the disposal, net of his fees and expenses, into the Criminal Asset Recovery Account established under s 63 of the Act, being number [...] held at the South African Reserve Bank.
4. It is directed that as soon as this order takes effect, as provided for in terms of section 50(6) of the Act, read with s 54(1) thereof, that is after 45 calendar days after the Government Gazette publication referred to in paragraph 2 hereof, the responsible finance officer of the South African Police Service currently in control of the SAPS

bank account number [...] at ABSA Bank Ltd, where the cash subject of paragraph 1.2 of this order is held, is authorised and directed, after confirming with *curator bonis* that the fees and expenses referred to in paragraph 5 below have been paid or provided for, to cause the said property (or the balance thereof remaining after the payment of the curator's fees and expenses) to be paid into the banking account of the Criminal Asset Recovery Account as mentioned above.

5. As adumbrated in paragraphs 3 and 4 above, an order is made in terms of s 42(2)(a) of the Act that the fees and expenses of the *curator bonis* shall be paid from the forfeited property.
6. The *curator bonis* 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, concerning the manner in which he has -
 - 6.1 completed the administration of the property, and
 - 6.2 complied with the terms of this order.
7. Any person, whose interest in the property concerned is affected by the forfeiture order, may within 20 days after he or she has acquired knowledge of such order, set the matter down for variation or rescission by the court.
8. The first respondent is ordered to pay the applicant's costs of suit.

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

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