

IN THE HIGH COURT OF SOUTH AFRICA
(ORANGE FREE STATE PROVINCIAL DIVISION)

Case No. : 4999/2006

In the matter between:-

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS Applicant

and

PETER MLAMBO Respondent

HEARD ON: 6 DECEMBER 2007

JUDGMENT BY: RAMPAL, J

DELIVERED ON: 29 MAY 2008

[1] These proceedings are about an application in terms of section 50 of The Prevention of Organised Crime Act, No. 121 of 1998. The property which is the object of this application is owned by the respondent. The members of the national investigation team of the South African Police Service seized the property on 22 May 2006. The property is currently subject to the preservation of property order granted in terms of section 38 of POCA, No. 121 of 1998, which was granted on 29 June 2007. Now the director in this current application seeks to have the preserved property

declared forfeited to the State. That is the main relief sought. The forfeiture of property order sought contains certain ancillary reliefs. The respondent opposes the application.

- [2] In this matter the applicant is the National Director of Public Prosecutions, a public official appointed in terms of section 10 read with section 179(1)(a) of the 1996 Constitution of the Republic of South Africa. The applicant's principal place of business is located at 123 Westlake Avenue, Weavind, Silverton, Pretoria, Gauteng Province. I pause to remind the applicant and the legal practitioners in general that it is incorrect to refer to the Supreme Constitution as Act 103 of 1996. The Constitution is not on the same par as other national legislations which are referred to as Acts of Parliament because it is the supreme law of the country. It has in the past been pointed out that it must be referred to simply as the 1996 Constitution of the Republic of South Africa. The words "Act No. 103" are therefore not appropriate to use.

- [3] The applicant's deponent is advocate Richard James Chinner. He is a deputy director of Public Prosecutions

appointed in terms of section 15 of the National Prosecuting Authority Act, No. 32 of 1998. He is a functionary in the office of the applicant. But more importantly, he is the Regional Head of the Asset Forfeiture Unit which is under the control of the applicant in Pretoria.

[4] The respondent is Mr. Peter Mlambo an adult male and a businessman who resides at 63 Ras van Niekerk Street, Kroonstad in the Free State Province. He is a person whose proprietary interests are adversely affected by the relief sought.

[5] This application concerns a certain property that was seized by the members of the national investigating team of the applicant in Welkom on 22 May 2006. The property consists of money in the sum of R70 000,00 cash. The property is currently in Klerksdorp. It is under the control of Superintendent Madito, a member of the South African Police stationed at Klerksdorp and attached to the Precious Metals and Diamond Unit. He is the commanding officer of the unit. The applicant suspects the property to be the

proceeds of unlawful activities which was why the property was seized.

[6] Although the property is currently held outside the jurisdiction of this court, this court has jurisdiction to entertain the current application. In the first place, the property was seized in Welkom, which place is to be found within the Free State Province. In the second place, the preservation order in respect of the property was granted in this court. In the third place, the forfeiture order sought in these proceedings flows from the preservation order granted in the previous proceedings in this selfsame court. Therefore, this court is best placed to exercise effective jurisdiction in the current matter and also represents the jurisdiction most convenient to deal with the dispute.

[7] It seems to me convenient to make a few comments about the papers relevant for the adjudication of this dispute. The case of the applicant is not limited to the founding affidavit made in support of the current application for the order of the forfeiture of property. In addition to this, the applicant relies on the founding affidavit, supporting affidavit and annexures

thereto, which were filed in respect of the first preservation order that was heard by Cillié J on 30 November 2006. In that case the founding affidavit was made and signed by Clive Pillay. The rest of the documents are specified in an index filed by the applicant on 25 June 2007.

- [8] The applicant also relies on the founding affidavit, supporting affidavit and annexures thereto, which were filed in respect of the first forfeiture of property application of 16 March 2006. Since the first preservation order expired on 15 March 2007, 90 days after it was published in terms of section 40, the effort of the applicant to obtain an order for the forfeiture of property by virtue of a belated application of 16 March 2007, were abortive. However, on 28 June 2007 Wright J granted a fresh preservation order of property on the same papers as before. It is the applicant's request that all its affidavits filed in support of the first preservation application, the abortive forfeiture application and the second preservation application, be incorporated in the current forfeiture application and that the current founding affidavit be read as so amplified.

[9] In this current forfeiture application before me, the respondent has filed a brief answering affidavit in which he made no attempt to deal with the issues. In stead, like the applicant, the respondent relies on the affidavits and annexures he made in support of his previous opposition to the first preservation application, the abortive forfeiture application and the second preservation application. His answering affidavit in support of his resistance to the current forfeiture application must also be amplified by incorporating his previous affidavits. It will be readily appreciated, therefore, that the allegations of facts on both sides are scattered over a wide range of affidavits and annexures. It is to this vast field that I now turn.

[10] The matter has to be considered against the following backdrop, which is common cause or undisputed. The police suspected that the respondent was involved in gold smuggling. A day before he was arrested, they embarked upon a prior surveillance of his activities. They monitored his movements. They targeted certain specific premises which the respondent apparently frequented. On 22 May 2006 they received a surveillance report about the respondent's

whereabouts. They then made their move on three fronts. They carried out police raids at 15256 Khabanyane Street, Oppenheimer Park, Welkom, at 3 Donalbain Street, Bedelia, Welkom and at 63 Ras van Niekerk Street, Kroonstad. They were armed with search warrants.

[11] At 13h10 they raided Khabanyane Street. Here the National Investigation Team was led by Captain Hendrik Frans Flynn. Mr. George Hattingh took down the notes. The police team searched the house and the shack. Nothing of interest was found on the premises. Next to this house, but in the street the respondent's motor vehicle, a Mazda Etude sedan with registration number FLB 640 NW was parked. They searched the motor vehicle and found a utility bill in the name of B. Michalakis.

[12] At 13h10 they secured Donalbain Street. Captain Sensile Jacob Galane led the second team of National Investigators to the premises. The premises were secured. Inspector Hendrik Stephanus van Dyk took down the notes. The police team found a lady called Alet Pitso and a child on the

premises. Captain Galane explained the purpose of the police visit to her.

[13] At 14h40 Captain Flynn's team of National Investigators arrived at Donalbain Street. The team was accompanied by the respondent. This residential property had an electronic gate and its garage an electronic door. The police team then searched the main house and found a total cash in the amount of R70 000,00. Besides the main house, the police team also searched the cottage and the backyard outside. As to what was found or not found in the cottage and in the backyard, is generally not a matter of common cause. Besides the money, a municipal utility bill in the name of the respondent was found in the main house. While the police were searching the backyard, the respondent attempted to flee but he was recaptured.

[14] Ras van Niekerk Street: At 15h30 the premises were secured by the third National Investigation Team. Here the raid was led by Captain Gideon Petrus Greyling. During the third raid Captain Greyling took down the notes. Among others, Captain Moletsane Johannes Mokoena was with him.

The police team found a certain Ms Mxala on the premises. Here the investigation team found and seized a firearm, bank statements and certain documents. There is one more item, a certain piece of paper, about which there is a dispute.

[15] According to Sergeant A.D.O. van Blerk, the investigating officer, all the exhibits seized during the police raids of the aforesaid three residential places, were handed to him and they are currently under his control at the SAP 13 exhibit store of the Precious Metals and Diamond Unit at Klerksdorp in Northwest.

[16] On the strength of what the police considered incriminating exhibits seized during the raids, the respondent was arrested in Welkom on the same day, 22 May 2006. He was apparently charged with the smuggling of gold or unlawful dealing in unwrought gold. The relevant police reference is Welkom CAS 475/05/2006. At the time the current application was initiated on 8 October 2007, the respondent's trial was due to commence in the Welkom Regional Court on 19 November 2007.

[17] The version of the applicant is set out in the founding affidavit by the deputy director, the supporting affidavit by the investigating officer together with 18 annexures thereto, which include several affidavits by the members of the three national investigating teams. The collective summary of all this is that besides the money found at Donalbain Street, certain incriminating articles were found, such as pieces of unwrought gold, a certain E-11T scale, a blowtorch, gas bottles, regulator pipes, borax and a number of used crucibles. Some of the equipment was connected and set up while others were buried in the soil in the backyard. These articles are ordinarily used during the processing of unwrought gold. In addition to these articles, the police investigators also found a municipal utility bill issued in the name of the respondent in respect of this residential property.

[18] Subsequent to 22 May 2006, further investigation was carried out by the police. Among others, the police obtained more information about the ownership of the Donalbain Street property, where the money was found and seized. On the strength of all the information gathered on 22 May 2006,

prior thereto and subsequent thereto, the applicant's case is that the respondent was the owner of the property where the money and the incriminating articles were found and that there were reasonable grounds to suspect that the applicant was involved in gold smuggling and that the property seized and preserved, constituted proceeds of an unlawful criminal activity.

- [19] The respondent disputes the applicant's case in every respect where it differs from his version. Although he admits that, the property seized and preserved, is his money he specifically denies that he is the owner of Donalbain Street, the residential property where the money was found and seized. He also specifically denies that he was involved in gold smuggling and that the cash seized from the aforesaid property formed proceeds of any criminal activity in which he was involved. His contention is that he derived the money from and during the course of ordinary lawful business transactions; that there was no real connection between the money and any incriminating article found at Donalbain Street and he averred the house belonged to his late friend, Steven Sithole, on whose behalf he purchased the property.

[20] Section 38 of POCA provides:

“38 Preservation of property orders

(1) The National Director may by way of an ex parte application apply to a High Court for an order prohibiting any person, subject to such conditions and exceptions as may be specified in the order, from dealing in any manner with any property.

(2) The High Court shall make an order referred to in subsection (1) if there are reasonable grounds to believe that the property concerned-

- (a) is an instrumentality of an offence referred to in Schedule 1;
- (b) is the proceeds of unlawful activities; or
- (c) is property associated with terrorist and related activities.

(3) A High Court making a preservation of property order shall at the same time make an order authorising the seizure of the property concerned by a police official, and any other ancillary orders that the court considers appropriate for the proper, fair and effective execution of the order.

(4) Property seized under subsection (3) shall be dealt with in accordance with the directions of the High Court which made the relevant preservation of property order.”

[21] The preservation of property order granted by Wright J on 29 June 2007, reads as follows:

“IT IS ORDERED THAT:

1. Leave is granted in terms of Rule 6(6) of the Rules of Court for applicant to renew the application for a preservation order in terms of the prevention of Organised Crime Act 121 of 1998 on the same papers as previously filed in this application.
2. A preservation order is granted in the same terms as previously granted (and which has since expired on the 30th November 2006) with the exception of paragraph 9 thereof.
3. The applicant must pay the respondent’s wasted costs of today’s proceedings.”

[22] The original preservation order which was granted on 30 November 2006 by Cillié J and referred to in paragraph 2 of the preservation order by Wright J reads as follows:

“IT IS ORDERED THAT:

The Property

1. This order related to R70 000-00 (seventy thousand rand) in cash (“the property”).

Prohibition against dealing in any manner with the property

2. In terms of section 38(2) of the Prevention of Organised Crime Act No 121 of 1998 (“the Act”) all persons with knowledge of this order, are, other than as required and permitted by this order, prohibited from:
 - 2.1 removing, taking possession of or control over, dissipating, interfering with, diminishing the value of, pledging or otherwise hypothecating, attaching or dealing in any other manner with any of the movable property to which this order relates.
3. The property shall remain under the effective control of Superintendent Madito of the South African Police Service’s Precious Metals and Diamond Unit, Klerksdorp.

Living and legal expenses

4. If any respondent or any other person holding an interest in the property satisfies the Court that:
 - 4.1 he or she is unable to meet his or her reasonable living expenses or those of his or her family or household,
 - 4.2 he or she is unable to meet his or her reasonable legal expenses in connection with any proceedings instituted against him or her in terms of the Act or any other related criminal proceedings,

- 4.3 he or she cannot meet the expenses concerned out of his or her property that is not subject to this order.

The Court may, after the granting of this order, make appropriate provision for the payment of such expenses as in the Court's determination are reasonable, out of the property subject to this order, provided further that no such provision for the payment of expenses may be made unless the person concerned has disclosed under oath all his or her interest in the property and has provided to the Court a full and sworn written statement of his or her assets and liabilities.

Service and publication

5. The applicant shall in terms of section 39 of the Act:
- 5.1 cause notice of this order, in the form set out in annexure B hereto, together with documents supporting the application, to be served by the sheriff on:
- 5.1.1 Peter Mlambo of 3 Donalbain Street,
Bedelia, Welkom.
- 5.2 cause notice of this order, in the form set out in annexure B hereto, to be published in the Government Gazette as soon as practicable after the order is granted.

Entry of appearance to oppose forfeiture order

6. Any person who has an interest in the property and who intends:

6.1 opposing the application for an order forfeiting the property to the State,

6.2 applying for an order excluding his or her interest from a forfeiture order in respect of the property.

must enter an appearance giving notice of such intention in terms of section 39(3) of the Act.

7. Such notice shall be delivered to the applicant:

7.1 in the case of any person specifically identified for service in terms of this order, within 14 calendar days after such service,

7.2 in the case of any other person, 14 calendar days after the date upon which a notice of the order was published in the Government Gazette.

8. A notice in terms of section 39 must contain full particulars of the chosen address for the delivery of documents concerning further proceedings in this matter and must be accompanied by an affidavit setting out:

8.1 full particulars of the identity of the person giving the notice,

- 8.2 the nature and extent of his or her interest in the property concerned,
 - 8.3 whether he or she intends opposing the making of the forfeiture order, or whether he or she intends applying for an order excluding his or her interest in that property from the operation of the order,
 - 8.4 whether he or she admits or denies 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 and the basis for such defence,
 - 8.5 if he or she intends applying for the exclusion of his or her interest from the operation of the forfeiture order, the basis for such application.
9. Any person who is affected by the order may on good cause shown, apply for reconsideration thereof. Such application shall be made upon 72 hours notice (or such shorter period as the Court may determine on good cause shown) to the applicant and all other persons identified in this order as being persons who may have an interest in the property, and must be made not later than 8 days after the person applying for reconsideration becomes aware of the existence of the order, or within such further period as the Court may consider

reasonable, bearing in mind the underlying objectives of Chapter 6 of the Act.”

[23] The new preservation order by Wright J was served on the respondent’s attorneys. It was also published in the Government Gazette on 7 September 2007 as would more fully appear from annexure “RJC2” attached to the founding affidavit by R.J. Chinner. It was duly published in accordance with the preservation order.

[24] In terms of section 40 of POCA a preservation order expires 90 days after the date on which it was published in the Government Gazette. This means that the requisite forfeiture application based on a preservation order has to be filed within a period of 90 days. The 90 day period in the instant case was due to expire on 7 December 2007. However, the forfeiture application was filed on 8 October 2007. Therefore section 40 was duly complied with. When the forfeiture order was served on the respondent’s attorney, does not appear. However, the answering affidavit was signed in Welkom on 13 November 2007 by the respondent. It follows, therefore, that service upon the respondent’s

attorney must have been effected before the 13th November 2007. As I have already said the applicant relied on the same papers that had previously been filed. The ground of the application is that the property in question constituted proceeds of an unlawful activity and thus capable of seizure, preservation and forfeiture.

[25] The respondent indicated, in terms of section 39, that he intends opposing the forfeiture application and he relied on his affidavit, as previously filed. The respondent's resistance was grounded on the denial that the property in question constituted proceeds of unlawful activities, as the applicant claimed.

[26] The character of the procedure created in Chapter 6 of POCA has some peculiar features:

“POCA provides for a unique procedure in terms of which a person who wishes to oppose a forfeiture application has to enter an appearance to defend before forfeiture application had been launched, namely: within 14 days after the preservation order came to the person's knowledge. It also requires such an appearance to be set out under oath, *inter alia*, stating the basis of the defence.”

The **NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS**
v CHARLTON THUSO MATJEKE 2004 TPD 17051 at par. 8
 per Motata JA. This is the unreported decision delivered on
 20 June 2007.

- [27] After a suspected property has been seized, an application in terms of Chapter 6 of POCA follows two stages: the preservation of property in terms of section 38 is the first stage of the process. The forfeiture of property in terms of section 50 is the second stage of the process. Both the preservation stage and the forfeiture stage are civil in nature. The rules of evidence applicable to civil proceedings apply to both the preservation process and the forfeiture process as set out in this chapter. Though separate both processes are intertwined and interconnected. **MOHAMED NO v**
NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS,
 2002 (4) SA 843 (CC). In that case Ackerman J observed that section 38 forms part of a complex two stage procedure whereby property, which is the instrumentality of a criminal offence, is forfeited to the State or the proceeds of the crime are so forfeited. These complex provisions are tightly

interconnected both as a matter of process and substance as Ackerman J correctly remarked.

[28] The forfeiture proceedings as outlined in section 50 are civil and not criminal in nature. The process is governed by the rules of evidence applicable in civil proceedings. The rules of evidence or constructions applicable only in criminal proceedings, do not apply in forfeiture proceedings (section 37).

[29] Forfeiture applications, such as the one before me, may be launched even if there is no prosecution against anyone. It follows therefore that the outcome of criminal proceedings against any individual is irrelevant in such cases (section 50(4)). They are recognised defences that can be raised by a party likely to be adversely affected by the forfeiture order sought in forfeiture application. The most obvious defence may be that the property was acquired legally, in other words, that it was not derived from any unlawful activity. An interested party may, also, oppose the grant of the forfeiture order sought, on the ground that he neither knew nor had reasonable grounds to suspect that the property formed the

proceeds of an unlawful activity or that the property was an instrumentality of an offence (section 52).

[30] The court has no discretion when it comes to making a forfeiture order. If the court finds on a balance of probabilities that the property in question was an instrumentality of an offence or the proceeds of unlawful activities, the court must grant the forfeiture order. I hasten to mention that the only discretion the court has, is to exclude the interest of parties that have shown that they acquired interests in the property concerned legally. But even in such a case the court has no absolute discretion, since the court must consider proportionality which provides it with a discretion. This, however, is much less of an issue in proceeds cases.

[31] The issue to be determined is, therefore, whether on a balance of probabilities the court can find that the property seized and preserved, constituted proceeds of unlawful activities or instrumentalities of an offence.

[32] It has been held that the instrumentality test entails three enquiries. The first dimension is the nexus between the offence and the property and the extent of the property's role in the offence. The second dimension is the role and culpability of the property owner. The third dimension is the possibility of separating offending properties that can be readily be separated from the remainder. 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).

[33] In measuring the strength and extent of the nexus between the properties sought to be forfeited and the offence, the following factors were identified as useful. The first factor is whether the use of the property in the offence was deliberate and planned or merely incidental and fortuitous. The second factor is whether the property was important to the success of the illegal activity. The third factor is the duration in which the property was legally used and the special extent of its

use. The fourth factor is whether its illegal use was an isolated event or had been repeated and the fifth factor is whether the purpose of acquiring, maintaining or using the property was to carry out the offence. See **UNITED STATES v CHANDLER 36 F 3d 358** (1998) which was quoted with approval in **NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS v R O COOK PROPERTIES (PTY) LTD;** and two other cases, *supra*, and in **PROPHET v NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS** 2006 (1) SA 38 (SCA). It was further pointed out that none of the factors was individually decisive and that the court must be able to conclude after considering the totality of the circumstances that the property was a substantial and meaningful instrumentality in the commission of the offence.

- [34] The purpose of an application for the forfeiture of property was described as follows in **NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS v R O COOK PROPERTIES (PTY) LTD;** and two other cases, *supra*, firstly, the removing of the incentives of crime; secondly, the deterring of persons from using or allowing their property to be used in crime; thirdly, the eliminating or incapacitating of some of the

means by which crime may be committed and fourthly, the advancing of the ends of justice by depriving those involved in crime of the property concerned.

[35] The court made the point that although certain of the purposes of forfeiture under Chapter 6 had penal elements, the objectives of the Chapter were not underpinned by penal considerations. In the case of **MOHAMED**, *supra*, the Constitutional Court held that the primary objective of provisions of this sort, is to remove the incentive of crime not to punish criminals. In other words, any proportionality analysis would have to weigh the impact of the forfeiture on the respondent, not only against the severity of his crime but also against the backdrop of public interest in the prevention of crime, because both are legitimate objectives that forfeiture is designed to serve.

[36] Section 1 of POCA provides that

“.... proceeds of unlawful activities means any property
which was derived, received or retained in connection
with or as a result of any unlawful activity carried on by any

person and includes any property representing property so derived.”

This definition was considered in the **NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS v R O COOK PROPERTIES (PTY) LTD**; and two other cases, *supra*, [2004] 8 BCLR (SCA) 844 at par. 67 – 72. The court examined all the factors bearing on its interpretation and concluded that for a property to constitute proceeds of unlawful activity, the connection the definition envisages, requires some form of consequential relation between the property and the unlawful activity. In other words the proceeds must, in some way or other, be the consequences of the unlawful activity.

[37] I now turn to examine the factual allegations in support of the two conflicting versions in the instant case. The cash, in other words, the preserved property was found at 3 Donalbain Street, Bedelia in Welkom. On the one hand, it is the applicant’s contention that the place where the money was found is the respondent’s house. On the other hand, it is the respondent’s contention that the place where the money was found is a friend’s house and not his. On behalf

of the applicant it was submitted that the cash constituted proceeds of unlawful activities in the form of illegal dealings in unwrought gold. On behalf of the respondent it was submitted that there were no reasonable grounds to sustain the applicant's suspicion.

- [38] The respondent alleged that the house in question was purchased and owned by his late friend, a certain Steve Sithole, a Zimbabwean national, who at one stage worked at No. 5 shaft of President Brand Gold Mine in Welkom. He stated in his opposing answering affidavit that after his death, Sithole was buried in Zimbabwe. It is his case that the deceased Sithole's heir or heiress is now the legitimate owner of the residential property in question. The explanation is riddled with vagueness. The respondent does not say where and when Sithole died or why Sithole could not purchase the property in his name. Moreover, and this is very important, it appears that he does not even know Sithole's next of kin in Zimbabwe or their address. He apparently made no efforts through Sithole's last employer to trace Sithole's relatives in Zimbabwe and to inform them

about a major asset in the deceased estate of the late Steve Sithole.

[39] At the time the cash was seized, a certain lady, Ms Alet Pitso, was found in occupation of the residential property concerned. She was placed in occupation of the property by the respondent and not his late friend. According to the respondent the lady was his girlfriend. According to the investigator the lady was the respondent's wife. Whether the lady was the respondent's girlfriend, as he alleges, or his wife, as the applicant alleges, is immaterial. What is important is that she was in one way or the other related to the respondent and not to the alleged friend.

[40] The respondent's version as relates to the ownership of 3 Donalbain Street, fails to impress me. As at 16 October 2006 the property was still registered in the name of a certain Barbara Michalakis. Subsequent to the seizure of the property on 22 May 2006 further investigation revealed that Barbara Michalakis married a certain gentleman by the surname Giannakopoulos approximately nine years before the police raided this particular property. The

Giannakopoulos couple sold the property to the respondent. The sale transaction took place about a decade ago, in May 1997 to be precise. (Van Blerk's affidavit paragraphs 20, 21 and 31 and the annexure thereto) According to Mr. Giannakopoulos the property was sold to the respondent and, in his affidavit, no mention is made to the effect that the respondent purchased the property for and on behalf of someone else.

[41] To this day the respondent still pays the municipal utility bill in respect of 3 Donalbain Street. (Van Blerk's affidavit paragraph 22) The municipal water and electricity account is held in the name of P. Mlambo of 3 Donalbain Street, Bedelia, Welkom. The document was obtained from the First National Bank during further investigation that followed the raid of 22 May 2006. The averment is admitted by the respondent. See Mlambo's answering affidavit par. 50.6.

[42] Besides the sedan, a Mazda Etude with registration number FLB 640 NW which the respondent was driving on his arrival at Khabanyane Street in 22 May 2006, another motor vehicle belonging to the respondent was found in the garage at 3

Donalbain Street. (Flynn's affidavit paragraphs 19 and 20)

The property situated at 3 Donalbain Street had an electronic gate and an electronic garage door. The interesting thing about this is that the respondent denies the allegation that the gate and the garage doors were opened by means of remote controls that were found in his Mazda Etude. According to him the gate was already open on Flynn's arrival on the scene. But he does not deny that he possessed remote controls for the electronic gate and the electronic garage doors. See Blerk's affidavit paragraph 10 and the annexures thereto which include Flynn's affidavit.

- [43] Perhaps the most telling documentary evidence against the respondent is that he furnished Matjhabeng Local Municipality with building plans for the approval of certain extensions which he and nobody else wanted to effect to 3 Donalbain Street. Now, if this residential property was an asset in the deceased estate of his late friend on whose behalf he had purchased it from the Giannakopoulos couple, on what basis did the respondent decide to effect certain alterations to the fixed property without the consent of the

heir or the heiress or the executor of the deceased estate of his late friend. (Flynn's affidavit paragraph 22)

[44] In the light of the foregoing factors I have come to the conclusion that on a balance of probabilities the version of the applicant is far more probable than the version of the respondent as to the ownership of 3 Donalbain Street. The version of the respondent that he purchased the property for and on behalf of his late friend is riddled with improbabilities. His conduct leaves much to be desired. The way he had dealt with 3 Donalbain Street for an inordinately long period of about ten years at the time the property was raided by the police, strongly militates against his own version. It is my finding, therefore, that 3 Donalbain Street was at all times, material to this matter, owned by the respondent and no-one else, notwithstanding the fact that he never officially and legally took transfer thereof from the Giannakopoulos. It seems to me that his decision not to take transfer of the property was not occasioned by any ignorance. I shall revert to this point later.

[45] It is the respondent's contention that he resided at Kroonstad and not in Welkom. But the fact remains that he had an intimate relationship with Ms Alet Pitso. According to the investigators the lady admitted that she resided on the property at 3 Donalbain Street. The respondent confirmed that the lady indeed resided there, although he disputed that he was also resident on the same property. According to the investigators who raided the 6 Ras van Niekerk property, they found a certain Ms Mxala. How she related to the respondent does not appear on the papers. But that is not all. Exactly who the respondent's wife is, also does not appear on the answering affidavit. If Ms Mxala was his wife the respondent would probably have said so.

[46] The impression I got upon my reading of the papers was that Ms Mxala was probably a housekeeper. She did not claim the respondent to be her husband. Now, consideration of all these factors, gives credence to the investigators' allegation that Ms Alet Pitso claimed the respondent to be her husband. That claim is more probable than not. If that is so then the applicant's contention that the respondent also resided at 3 Donalbain Street, among others, appears persuasive.

[47] I now turn to the raid of 3 Donalbain Street on 22 May 2006.

The raid took place against the backdrop of observations done by the police regarding the respondent's suspicious activities. As a result of such observations the police came to suspect that the respondent was involved in gold smuggling activities. It was precisely this suspicion which led to the raids of 22 May 2006. At 3 Donalbain Street they found the following incriminating articles in a cupboard in the outside cottage: two pieces of unwrought gold. In the backyard on the premises and buried in the soil used they found crucibles with traces of unwrought gold. Again in the backyard but this time on the ground under a tree they found one piece of unwrought gold. See Van Blerk's supporting affidavit paragraphs 14, 15, 16 and 19 and annexures referred to.

[48] Besides gold itself, the following articles were also found:

Inside the house an E-11T scale; in the outside cottage gold processing equipment consisting of two gas bottles, regulators, pipes and a blowtorch. All this pieces of equipment had been connected and set up. In the backyard, buried in the soil, borax, a chemical used in the processing of

unwrought gold was found. Van Blerk's supporting affidavit paragraphs 13 and 15 together with the annexures thereto.

[49] When the police investigating team was busy searching the backyard the respondent made an abortive attempt to flee from the scene. He jumped over the fence and ran down the street. However, he was very swiftly apprehended. His explanation for this behaviour is that he wanted to run to a place where he could call his lawyer. I am of the view that this explanation is patently false. In the first place, on his own version, he did not know who the intruders were. He believed that the invaders or the raiders were robbers. How on earth would a lawyer have assisted or rescued his client from the robbers?

[50] If he honestly believed the raiders were robbers, he would have thought of contacting the police first and foremost. It seems to me more probable than not that the respondent knew that the raiders were members of the police. That knowledge, notwithstanding, he never asked the police to let him call his lawyer. His explanation is farfetched and false.

The reasons why the respondent ran away, is simple. The guilty are afraid.

[51] As I see it, the cumulative effect of all the foregoing incriminating articles, incriminating conduct of the respondent, his hopeless attempt to distance himself from the ownership of 3 Donalbain Street, the numerous false aspect of his explanation, has driven me to come to the conclusion that the respondent was indeed using 3 Donalbain Street as a smelthouse for the purpose of processing unwrought gold illegally. This explains why for almost a decade he purchased an immovable property but took no serious steps to have the transfer registered in his name. During the search unwrought gold found on the property in 3 Donalbain Street had the mass of 46,1732 grams with a value of R6 389,00 according to the assessment report by the forensic science laboratory.

[52] During the search of 3 Donalbain Street members of the police investigating team did not find evidence that the premises were inhabited by any other occupants. On the contrary documents belonging to the respondents were

found in almost all the rooms of the house during the search. (Flynn's affidavit paragraph 18) I reject the respondent's claim that besides his aforesaid girlfriend there were tenants living on the premises. What is striking about his explanation is that the respondent himself made no mention of one of the various tenants who inhabited the property at various times, at he alleged. There is no grain of truth in this explanation. Taking everything into consideration leads me to the conclusion that the respondent was not a mere frequent visitor to 3 Donalbain Street or a mere innocent resident, he was much more. He was a smuggler of unwrought gold with a relatively clean place of residence at Kroonstad and an unlawful smelthouse or workplace in Welkom. It is in the smelthouse where the cash was found.

[53] I turn now to the critical issue of the money. The R70 000,00 cash was found on the scene at 3 Donalbain Street where it was seized. On the strength of the ownership of the residential property as well as a number of incriminating articles that were found on the premises where the money was also found, the applicant contended that the cash constituted proceeds of an unlawful activity and therefore

was capable of been subject to the forfeiture order in terms of the legislation we are here dealing with. On the strength of his denial of ownership pertaining to the residential property in question, his ignorance of the incriminating objects which were found on the premises where his money was also found and the absence of forensic test results which positively indicated that his money was contaminated with any traces of gold, the respondent contended that the cash or the preserved property did not constitute the proceeds of unlawful activity and therefore was incapable of been subject to a forfeiture order as sought by the applicant.

[54] Ms Marais, counsel for the applicant, submitted that the respondent's financial statements and the supporting information thereof which he supplied to the South African Revenue Services showed that the respondent was not earning sufficient legitimate income to justify his possession of the R70 000,00 cash. (See Van Blerk's affidavit paragraphs 25 – 28.)

[55] Mr. Heymans, counsel for the respondent, disagreed. He submitted that the respondent was earning sufficient

legitimate income to justify his possession of a modest amount of R70 000,00. He submitted that the money originated from the respondent's lawful business activities.

[56] The respondent is a proprietor of a business enterprise called Gain Discounters CC. As at 22 May 2006 he was trading at Maokeng in Kroonstad. He was previously trading in the central business district of Kroonstad. The business had been in existence for about ten years at the time the cash was seized.

[57] Five annual financial statements were annexed to his answering affidavit. These indicated that as at 28 February 2002 the turnover was R833 018,00 and the net profit R45 591,00; as at 28 February 2003 turnover R504 847,00 net profit R39 949,00; as at 28 February 2004 turnover R393 617,00 net profit R47225,00; as at 28 February 2005 turnover R340 430,00 net profit R49 109,00; as at 28 February 2006 turnover R264 367,00 net profit R48 929,00.

[58] It was argued on behalf of the respondent that for a business man with that sort of a turnover an amount of R70 000,00

was not extraordinarily a large sum of money. The respondent stated that he always kept a certain amount of cash to cover unexpected business or private needs. The cash seized from him was partly his working capital and partly his savings. From time to time he used the funds to make loans to friends. The cash was money he earned through honourable business endeavours over a decade. Besides the Kroonstad business he started another business at Kutloanong in Odendaalsrus.

[59] In the light of the foregoing I am not persuaded by the applicant's contention that the respondent did not earn sufficient legitimate income to justify his possession of the cash we are here concerned with. It is not inconceivable for such a business man to have such an amount in his possession. But that is not all. The difficulty I have is that the cash was found in seven packs of R10 000,00 each. Each pack consisted of R100 notes only. If the money was earned during the course of ordinary business dealings one would have expected to find all sorts of banknotes including coins in the respondent's possession. This was not the case. This raises the suspicion that the money did not

emanate from the respondent's honourable business endeavours.

[60] It is common cause that the cash was found concealed in the roof at 3 Donalbain Street. This in itself created a great suspicion that there was something untoward about the cash. This is how the respondent explains the suspicious circumstances:

"I decided not to keep the money at my own place (6 Ras van Niekerk Street, Kroonstad) because as a business man I am exposed to robbery and my house is always a target."

(Bracketed words are mine.)

[61] The difficulty I have is that according to the respondent's version, he permanently lived at Kroonstad, but frequented 3 Donalbain Street, Bedelia in Welkom where his girlfriend lived. The business which generated his livelihood was at Kroonstad and not in Welkom. Yet, he kept the money which he used for emergency purposes for business as well as private not at Kroonstad where the business was but at Welkom far away from the business. His explanation that he did so because his house at Kroonstad was vulnerable to

robberies, fails to impress. Obviously carrying money up and down to Welkom and back to Kroonstad was equally risky. Besides, according to his own version, at 3 Donalbain Street his girlfriend was not staying alone. There were other faceless and dubious characters who occupied the same property and who were possibly involved in the smuggling of gold. Now if his permanent residence at Kroonstad was vulnerable, it seems to me that his girlfriend's residence in Welkom was equally vulnerable. The value added forms from the South African Revenue Services which the respondent attached to his answering affidavit, do not in my view take this case any further. They merely show that contrary to what the applicant had claimed, the respondent was officially registered as a vendor for the purposes of value-added tax.

[62] It is undisputed that the respondent bought the premises where the money was seized; that he was present at 3 Donalbain Street when the premises were raided; that cash was found hidden in the roof of the house; and that physical objects such as gas bottles, pipes, regulator, blowtorch, crucibles and borax were found on the premises. Although

the respondent denies ownership of the residential property and knowledge of these various physical objects which were found on the premises, his girlfriend occupies the premises permanently and the respondent frequently visits the place and stays with his girlfriend during such visits.

[63] It is crystally clear to me that the respondent attempts to distance himself from the residential property at 3 Donalbain Street, since unwrought gold and gold processing equipment, which articles were highly incriminating, were found there. I have already found that the residential property in question belonged to the respondent; that the unwrought gold belonged to him and that all the gold processing equipment also belonged to him.

[64] Among the incriminating tools used in the gold processing were crucibles. These crucibles had already been used. They were found buried in the soil in the backyard. The story they tell was that gold processing incidents had previously taken place on the premises. This evidence suggests that the cash was derived from an unlawful activity. The crucibles were hidden in the soil. The cash was hidden in

the roof. The respondent was responsible for hiding the cash. He probably was also responsible for concealing the crucibles.

[65] Besides the crucibles and the borax that were buried in the soil and the unwrought gold found on the premises, a number of tools used in the gold processing were also found on the premises. These tools were not loosely lying around. They were deliberately connected and set up and ready to be used, like the crucibles, the rest of these tools are ordinarily used in the industrial processing of gold. This evidence strongly suggests that whoever buried the crucibles in the soil in the backyard, was also responsible for the connecting and setting up the equipment found in the outside room. The state of readiness of the equipment, strongly suggests that cash found in the roof was to be utilised to continue with the unlawful activities in the future.

[66] I have no doubt that the cash was important to the success of the illegal activity of gold smuggling. In this sense one may say that the cash found in the smelthouse, if not the proceeds of unlawful activities, then it was an instrumentality

of further unlawful gold smuggling activities. It appears to me that the owner of the cash, as the owner of the unlawful smelthouse, was keeping the money as operating capital in order to pay the small runners, the poor desperate souls, who often project themselves as *bona fide* mineworkers, enter the shafts, and spend days in the dark tunnels of the mines stealing gold dust. As a judge I read about these trespassers time and time again in the criminal reviews that I do from the district courts. I have also seen a TV documentary about these small fries who sometimes even die underground.

- [67] On the facts I am persuaded that the use of the cash in the offence of gold smuggling was deliberate and planned and not merely incidental and fortuitous; that the use of the cash was important to the continued success of the illegal activity; that the cash was always kept as a revolving credit derived from gold smuggling and occasionally used and kept to pay suppliers in the future; that the illegal use of the cash was not an isolated event but rather kept to facilitate a prospective repeat(s) of an unlawful activity that had been done before as clearly evidenced by the ready to be used connected

equipment and the already used crucibles and that the purpose of acquiring and maintaining cash readily available or using the cash was to carry out the offence further.

[68] In the light of the foregoing I find that there was a positive nexus between the smuggling of gold on the one hand and the property together with its role in the offence on the other hand. The suspicious role and the culpability of the owner was clearly demonstrated through his acts of concealing and that separating the offending cash from the remaining untainted properties, was justified in the circumstances of this case since the primary aim was to take away the incentive of crime.

[69] For the reasons enumerated above I have come to the conclusion that the cash that was found hidden in the roof of the respondent's house, situated on the premises where a number of incriminating objects were also found, constituted the proceeds of the respondent's unlawful activities in the form of gold smuggling. I would, therefore, uphold the contention of the applicant and reject that of the respondent to the contrary.

[70] Although certain aspects of the applicant's version were disputed by the respondent, nothing significant tends on that dispute. To argue that such a dispute amounts to a serious factual dispute, is an argument which failed to impress me. In my view, there is no real, genuine and *bona fide* dispute that cannot be resolved on the papers. Therefore there is no need to have the matter referred to oral evidence. The version of the respondent was so patently farfetched that I do not hesitate to reject it outright as false.

[71] There is one more issue which I need to address. The respondent raised a point *in limine* that the affidavit of Clive Pillay in the preservation application, was not dated and that the town at which it was made was not stipulated.

[72] It is so that the attestation certificate was defective in those respects. However, the attestation certificate clearly shows that the affidavit was made and the oath taken at Braamfontein. Moreover, the affidavit was properly signed by the deponent. The relevant notice of motion in respect of the original preservation application was dated 23 November 2006. It was signed in Bloemfontein by Ms M.M. Naidoo, the

State Attorney. In the notice of motion reference was made to Clive Pillay's affidavit. It stands to reason, therefore, that by 23 November 2006 Clive Pillay had already signed the affidavit in dispute.

[73] Counsel for the applicant submitted that the provisions relating to the attestation of affidavits were directory and not peremptory. She argued that the affidavit substantially complies with the requirements for the attestation in all other respects. I am persuaded by her submission. It has been held that the provisions of Regulation 4(1) were directory. Failure to comply with them was condoned in a number of cases. **EX PARTE DU TOIT** 1962 (1) SA 45 (E); **SWART v SWART** 1950 (1) SA 263 (O) at 265 – 267; **S v MUNN** 1973 (3) SA 734 (NCD). In my view the point *in limine* was not well taken. Therefore, it cannot succeed.

[74] In conclusion, I hold the view that a proper case has been made out for the forfeiture order sought. Factually the suspicion was justified. Legally the requirements of section 50 have been duly complied with. I would, therefore, grant an order for the forfeiture of the property concerned.

[75] Accordingly I make the following order:

75.1 An order is granted in terms of the provisions of section 50 of the Prevention of Organised Crime Act, No. 121 of 1998 declaring forfeit to the State certain property namely: R70 000,00 in cash which property is presently subject to a preservation of property order granted by this Honourable Court under the above case number on the 30th of November 2006;

75.2 The appointment of a *curator bonis* is hereby dispensed with. The property shall vest in the State, and Superintendent Madito, of the Precious Metals and Diamond Unit Klerksdorp, of the South African Police Service or an officer of an equal or higher rank, is directed to deal with the property as follows:

75.2.1 Assume control of the property and take it into his custody;

75.2.2 To deposit the cash into the Criminal Asset Recovery Account established under section 63 of the Act, account number 80303056 held at the South African Reserve Bank, Pretoria.

- 75.3 The Registrar of this Honourable Court must publish a notice of this Order in the Government Gazette as soon as practical after the Order is made.
- 75.4 Any person affected by the forfeiture order, and who was entitled to receive of the application under section 48(2) but who did not receive such notice, may within 45 days after the publication of the notice of the forfeiture order in the Gazette, apply for an order under section 54 of the Act, excluding his or her interest in die property, or varying the operation of the order in respect of the property.
- 75.5 All the paragraphs of the order operate with immediate effect, except paragraphs 4, 5 and 6, which will only take effect on the day that a possible appeal is disposed of in terms of section 55, or on the day that an application for the exclusion of interests in forfeited property in terms of section 54 of the Act is disposed of, or after expiry of the period in which an appeal may be lodged or application be made in terms of section 54 of the Act.

75.6 The costs of this application are awarded to the applicant.

M.H. RAMPAL, J

On behalf of the applicant: Adv. Amanda Marais
Instructed by:
The State Attorney
BLOEMFONTEIN

On behalf of the respondent: Adv. P.J. Heymans
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