

IN THE HIGH COURT OF SOUTH AFRICA
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NO.: 6488/2007

In the matter between

**THE NATIONAL DIRECTOR OF
PUBLIC PROSECUTIONS**

Applicant

and

**MOGAMAT SADEKA MADATT
JOHANN HARTZENBERG**

First Respondent
Second Respondent

JUDGMENT DELIVERED ON 25 JANUARY 2008

SAMELA, AJ

INTRODUCTION

[1] This is an opposed application for an order in terms of section 38(1) of the Prevention of Organised Crime Act 121 of 1998 (the Act). The preservation order application is for two immovable properties situated at 12 and 43 Devon Street, Woodstock respectively. On 22 May 2007 this Court issued an order calling upon respondents to show cause why a preservation of property should not be granted. On 3 July 2007 respondents filed notice of their intention to anticipate the return day, and opposing affidavits. On 6 July 2007 the Court postponed the hearing of the matter to 20 November 2007. This is therefore the extended return day of the order granted on 22 May 2007. Mr G Budlender (assisted by Ms E Baartman) and Mr D T Charters appeared for the applicant and the respondents respectively.

[2] The ownership of property situated at 12 Devon Street, Woodstock was registered on 13 August 2003 in the name of the Second Respondent, Johann Hartzenberg. The ownership of property situated at 43 Devon Street, Woodstock was registered on 29 March 2003, in the name of Mark Robert Williams. Williams acted at the time on behalf of the First Respondent, who made bond payments. It was only on 21 July 2006 when the property was registered in the name of the First Respondent.

[3] Having complied with the 6 July 2007 order, relating to the Respondents filing supplementary affidavits, if any, by 14 August 2007, the Applicant filing answering affidavits, by not later than 18 September 2007, the Applicant filing heads of argument, by not later than 6 November 2007, the Respondents filing heads of argument, by not later than 13 November 2007 and costs to stand over. The Respondents raised the following points in limine:

- i) The ex parte procedure by the Applicant was improper;
- ii) There were improper attestations of affidavits used by the Applicant;
- iii) Some affidavits attached were not made for this case; and
- iv) Applicant relies on the annexures for evidence.

After having read the papers relating to the points in limine and also having heard the submissions, I was of the view that there was no substance to any of the points raised. In the result, I made an order dismissing all the points raised in limine and Respondents were jointly and severally ordered to pay Applicants' costs.

STATUTORY FRAMEWORK

[4] The application is brought in terms of sec 38 of the Act. The section provides for the civil preservation of property. As pointed out by the Constitutional Court in **National Director of Public Prosecutions v Mohamed N O and Others** 2002 (4) SA 843 (CC) at 85 par 17:

“section 38 forms part of a complex, two stage procedure, whereby property which is the instrumentality of a criminal offence or the proceeds of unlawful activities is forfeited”. In contrast to chapter 5 of the Act, which deals with confiscation of property following upon a conviction, *“the guilt or wrongdoing of the owners or possessors of property is, therefore, not primarily relevant to the proceedings”*.

PRESERVATION ORDERS

(First Stage)

[5] Proceedings under chapter 6 of the Act commence with an application for a preservation order. If the High Court is satisfied that there are reasonable grounds to believe that the property concerned is an instrumentality of an offence referred to in schedule 1, or the proceeds of unlawful activities –

- (i) it must make a preservation order which is a Court 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. This is an order prohibiting any person from dealing with the property in any manner. Notwithstanding the use of this peremptory word, the Court has a discretion in this regard, which is exercised through the application of the test of proportionality: **Mohunram and Another v NDPP (Law Review Project as Amicus Curiae)** 2007 (4) SA 222 (CC) at [121]. See also Section 38(1) of the Act.
- (ii) it must make a seizure order. This is an order authorising the seizure of the property by a police official. See Section 38(3) of the Act;
- iii) it may make such further ancillary order that it considers appropriate for the proper, fair and effective execution of the preservation and seizure orders.

[6] Once a preservation order has been made, the NDPP must give notice of the order to everybody known to have an interest in the property and publish the order in the Government Gazette. Anybody with an interest in the property may then enter an appearance to oppose an application for forfeiture of the property or to apply for the exclusion of their interest in the property from forfeiture. The NDPP must apply for a forfeiture order within 90 days after publication of the notice in the gazette. If the NDPP does not do so, the preservation order lapses.

FORFEITURE ORDER

(Second Stage)

[7] In terms of section 48(1) [where] a preservation order is in force, the NDPP may apply to the High Court for forfeiture of the property. Section 48(4) read with sections 39(3) and 49 provides that any person with an interest in the property who has entered an appearance, may oppose the application, or apply for its terms to be varied or their interest in the property to be excluded from it. The requirements for the making of a preservation order are outlined in section 38 which provides as follows:

“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 section (1) if there are reasonable grounds to believe that the property concerned is an instrumentality of an offence referred to in schedule 1 or is the proceeds of unlawful activities.”*

REASONABLE GROUNDS TO BELIEVE

[8] Before the Court can make a preservation order, it must satisfy itself that there are reasonable grounds to believe that the property concerned is an instrumentality of an offence referred to in Schedule 1, or the proceeds of unlawful activities. Once the above is established, the Court must make a preservation order. It is significant to take cognisance of the famous dissenting dictum of Lord Atkin in **Liversidge v Anderson** (1942) AC 206 (HL) at 244 where the learned Law Lord said:

“I view with apprehension the attitude of Judges who on a mere question of construction when face to face with claims involving the liberty of the subject show themselves more Executive minded than the Executive. Their function is to give words their natural meaning ...”

In **Hurley and Another v Minister of Law and Order** 1985 (4) SA 709 (D) the Court had to interpret the words “reason to believe” as they appeared in section 29(1) of the Internal Security Act 74 of 1982. The Court said:

“The vital inquiry in this case is, therefore, what is meant by the phrase “reason to believe”. In my opinion the ordinary grammatical meaning of “reason to believe” is a belief based upon reason. It does not mean “thinks he has reason to believe”. There must be a factual basis for the reason.” (ibid., pp 716-717). See also **Nakkuda Ali v Jayaratne** (1951) AC 66; **Secretary of State for Education and Science v Metropolitan Borough of Tameside** (1977) AC 1014 (HL); **R v Inland Revenue Commissions, ex parte Rossminster Ltd** (1980) 3 SA 212 (N); and **Minister of Law and Order v Hurley and Another** 1986 (3) 549 (A).

In an article in The Cambridge Law Journal (1986) 369 at 370 entitled “South African

Ouster Clauses – Meaning and Effect” by J M Hlophe, the learned writer took the argument further by saying:

“Hurley’s case supports the view that clauses such as “reason to believe” require certain preconditions to be fulfilled before a discretion can be exercised”.

In the present matter, for example, there has to be reasonable belief that the two properties concerned are indeed instrumentalities of offences referred in the Schedule I of the Act. Where the preconditions have not been met, the discretion would have been exercised illegally, that is the objective approach. The other approach which the learned author termed: “literal approach” meaning terms which the Courts are to accept as conclusive the opinion of the legislature that certain circumstances in question exist or that preconditions have been met (ibid. pp 370-371).

In **United Democratic Front and Another v Acting Chief Magistrate, Johannesburg** 1987(1) SA 413 (W) the Court dealt with the meaning of the words “reason to apprehend” in terms of the Internal Security Act 74 of 1982, and stated as follows:

“In my opinion the ordinary grammatical meaning of the words “has reason to apprehend” is a belief based upon reason. The words do not mean “thinks he has reason to apprehend”. His decision must be objectively determined on the facts. That means, in my opinion, not that there must be no doubt that upon the facts before the officer in question there necessarily must be a breach of the peace, but there is some reasonable foundation for the belief on the basis of the facts so placed before it”.

[9] “Reason to believe” was interpreted in **Vumba Intertrade CC v Geometric Intertrade CC** 2001 (2) SA 1068 (W) at para 8, 1071 as follows:

“Although the phrase ‘there is a reason to believe’ places a much lighter burden of proof on an applicant than, for instance, the court is satisfied,’ the ‘reason to believe’ must be constituted by facts giving rise to such belief ... In short, there must be facts before the court on which the court can conclude that there is reason to believe ... and the onus of adducing such facts rests on the applicant.”

Clearly the authorities point to the conclusion that “reason to believe” cannot be based on the subjective belief of a person. It must be based on facts adduced by the applicant which can be objectively ascertained. However, the Court need not be “satisfied” on a balance of probabilities that these “facts” are indeed established by the Applicant. The Applicant’s facts must have a rational and reasonable basis, and they must bear relation

to the relief sought.

INSTRUMENTALITY OF AN OFFENCE

[10] Section 1 of the Act defines the term ‘instrumentality of an offence’ as follows:

“means 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; Definition of instrumentality of an offence’, previously definition of ‘An instrumentality of an offence; substituted by s.3(b) of Act 24 of 1999 and by s.1(a) of Act 38 of 1999.”

Considering the meaning of ‘instrumentality of an offence’ in **National Director of Public Prosecutors v R O Cook Properties** 2004 (2) SACR 208 (SCA) at 221, the court held at para 6 that:

“The Cook Properties and 37 Gillespie Street appeals turn on the meaning of ‘instrumentality of an offence’ in the Act; which we consider later. The meaning of both phrases must be determined in the light of the overall purpose of the Act.”

At 223 a the court held further that:

“In this respect, the court said, ch 6 stands in contra-distinction to ch 5, with the important interpretative consequence that ch 6 is ‘focused, not on wrongdoers, but on property that had been used to commit an offence or which constitutes the proceeds of crime’.”

In this regard, the court observed:

“The guilt or wrongdoing of the owners or possessors of property is, therefore, not primarily relevant to the proceedings.”

[11] An instrumentality of an offence includes, but is not limited to, property used directly for the commission of the offence. An instrumentality is also property used to further the commission of the offence. If, however, the property’s involvement in an offence is incidental or fortuitous, it cannot be an instrumentality because its forfeiture would then be arbitrary, for example in my opinion where an offender hires a metered taxi in order to commit an offence but does not disclose the commission of the offence to

the taxi driver, it is doubtful whether the taxi driver can be regarded as an instrumentality of an offence.

In the **Cook Properties** case supra the court concluded that the definition embraces all property 'which is concerned in the commission or suspected commission' of such an offence. In the instant matter it is common cause that the properties at 43 Devon Street and 12 Devon Street, Woodstock are owned by the First and the Second Respondents respectively. Notices were served on both Respondents in 2003 informing them about the drug dealings which were conducted in their respective properties. In respect of the property situated at 12 Devon Street, Woodstock, between 27 March 2003 and 11 May 2007 the analysis of drug related arrests and seizures indicate 24 incidents. The police intelligence reports revealed that there is an ongoing drug sale at the property. Similarly, in respect of the property situated at 43 Devon Street, Woodstock, between 22 February 2003 and 11 May 2007, the arrests and seizures relating to drug analysis revealed 20 incidents. Again, police intelligence reports indicate that there is an ongoing drug sale at the property. Mr Budlender submitted that it was unavoidable that these two properties were drug houses. The two properties were used for storage, purchase and consumption of drugs. He further submitted that there was no evidence shown that the two properties are used for any other purpose. Lastly, Mr Budlender submitted that there are reasonable grounds to believe that the two properties are the instrumentalities of the offences.

Mr Charters argued that these two properties were only used for habitation purposes. Furthermore, he submitted that the Respondents could not be expected to control the activities in both properties, as the arrests and seizures were done sporadically. Mr Charters submitted that should the Court grant a Preservation Order, it should allow the Respondents to file affidavits as the two Respondents will be deprived of their properties. I am of the view that as per 6 July 2007 order, the Respondents were given an opportunity to file supplementary affidavits which they failed to do. I am not persuaded that Mr Charters is correct in his submissions. I hold the view that Mr Charters' submissions are untenable.

[12] I have been unable to find any justification for the opposition made against the granting of the order sought in this matter. Accordingly, there are no basis for not granting the Applicant the order sought. Taking all the above factors into consideration, I am satisfied that there are reasonable grounds to believe that the two properties concerned are instrumentalities of offences referred to in Schedule 1 of the Act.

ORDER

In the circumstances I make the following order which relates to the properties described as Erf 11639, Cape Town situated at 12 Devon Street, Woodstock and Erf 133692, Cape Town situated at 43 Devon Street, Woodstock the property or property representing such property ("the property"):

1. 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 disposing of, further encumbering, attaching or selling in execution, dissipating, diminishing the value of or dealing in any other manner with any of the immovable property to which this order relates.
2. Notwithstanding the provisions of this order, any person who has financial obligations in respect of any of the property is ordered to fulfil such obligations, including any obligations relating to rental, mortgage bonds, rates, taxes utilities such as water and electricity accounts, and all interest accruing in respect of such obligations pending the finalisation of the forfeiture proceedings.

CURATOR BONIS

3. In terms of section 42 of the Act, Calvin Isaacs of KPMG Administrators (Pty) Ltd, with telephone number 021 4087321, is appointed as *curator bonis* over the property ("the *curator bonis*"). The *curator bonis* shall have all such powers, duties and authority as provided for in the Act and in this Order and shall, in addition, be subject to the applicable provisions of the Administration of Estates Act 66 of 1965.
4. The *curator bonis* is authorised to assume control of the property; take care of the property; and administer the property and do anything necessary for the purpose of preserving such property while the Order is in force. In particular, the *curator bonis* is authorised to determine the lawful occupants of the property and, in the event that the property is occupied by persons other than the owner, to collect any rental due and payable to the owner in respect of any rental agreement in place.
5. The *curator bonis* may dispose of some or all of the property:

5.1 On 30 days notice to the Respondents if the obligations in respect of the property concerned are not being met; or

5.2 By agreement with all parties who have a legal interest in the property concerned in order to defray the costs of administering the property.

6. Notwithstanding the provisions set out above, and where appropriate, the *curator bonis* will be entitled to pay any expenses related to preserved property, which would ordinarily be carried by the owner, out of any income derived from such property.
7. The *curator bonis* is authorised to approach the Registrar of Deeds to endorse the Title Deeds of the property with the restriction that the property shall not, without the prior leave of this Honourable Court, be attached, sold in execution, further mortgaged or otherwise encumbered; provided that such endorsement shall not prevent a transfer of the property effected in accordance with paragraph 5 above.

REPORT BY CURATOR BONIS

8. The *curator bonis* shall file a report with the Registrar of this Honourable Court within 30 days of the granting of the final preservation order which shall contain an inventory of the property brought under his control in terms of this Order, and wherein he shall set out the steps that have been taken by him to give effect to this Order, and make such further recommendations as he may deem fit with regard to any other steps he might be required to take in order to give effect to this Order, and the *curator bonis* shall file supplementary reports containing additional relevant information as and when such reports become necessary.

FEEES AND EXPENDITURE OF CURATOR BONIS

9. The fees and expenditure of the *curator bonis* shall in terms of section 42(2) of

the Act be paid from the forfeited property and, in the event of no forfeiture order being granted, then such fees and expenditure shall be paid by the State: Provided further that interest on expenditure incurred by the *curator bonis* shall be paid by the State at the prime lending rate of the major financial institutions from the date of expenditure until the date of final payment.

LIVING AND LEGAL EXPENSES

10. If any Respondent or any other person holding an interest in the property satisfies the Court that:

10.1 He or she is unable to meet his or her reasonable living expenses or those of his or her family or household; or

10.2 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; and

10.3 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

11. The Applicant shall in terms of section 39 of the Act:

11.1 Cause notice of this Order to be served by the sheriff on:

11.1.1 First Respondent;

11.1.2 Second Respondent;

11.1.3 ABSA Bank Ltd;

11.1.4 First National Bank Ltd; and

11.1.5 The *curator bonis* appointed in terms of this Order.

11.2 Cause notice of the final preservation order to be published in the Government Gazette as soon as practicable.

ENTRY OF APPEARANCE TO OPPOSE FORFEITURE ORDER

12. Any person who has an interest in the property and who intends;

12.1 Opposing the application for an Order forfeiting the property to the State;
or

12.2 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.

13. Such notice shall be delivered to the Applicant:

13.1 In the case of any person specifically identified for service in terms of this order, within 14 calendar days of the granting of a final preservation order;
and

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

14. 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:-

14.1 Full particulars of the identity of the person giving the notice;

14.2 The nature and extent of his or her interest in the property concerned;

14.3 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;

14.4 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;

14.5 If he or she intends applying for the exclusion of his or her interests from the operation of the forfeiture order, the basis for such application.

15. Respondents are ordered to pay the costs of this application.

SAMELA, AJ