

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

CASE NO

5926/01

In the application of:

**THE NATIONAL DIRECTOR OF
PUBLIC PROSECUTIONS**

Applicant

and

SIMON PROPHET

Respondent

**IN RE: ERF 14241, CAPE TOWN, SITUATED AT 54
BALFOUR STREET, WOODSTOCK**

**THIS JUDGEMENT DELIVERED ON THIS 22nd DAY OF
MAY 2003**

N C ERASMUS, J:

[1] This is an application brought by the National Director of Public Prosecutions (NDPP) for civil forfeiture under section 48(1) of the Prevention of Organised Crime Act (POCA), 121 of 1998, (hereinafter called 'the Act')

which came into operation on the 21st January 1999. A preservation order in terms of section 38(2) of the Act was granted by Desai J on 28th June 2001 preserving the property situated at 54 Balfour Street, Woodstock ('the property'). In addition, a *curator bonis* was appointed to assume control of the aforementioned property.

[2] If a preservation order is in force, the NDPP may in terms of section 48 apply to the High Court for an order for the forfeiture of 'all or any of the property' concerned. In terms of section 50(1), the High Court 'shall' grant the forfeiture order applied for by the NDPP if it 'finds on a balance of probabilities that the property concerned is an instrumentality of an offence referred to in Schedule 1 or is the proceeds of unlawful activities.'

The Statute

[3] The Act as a whole is a response to a perceived growth in organised and related criminal activities¹. It was enacted in response to a belief that 'South African common law and statutory law had failed to deal effectively'² with such criminal activities. In this regard the Act is in line with international trends, as it encompasses not only criminal forfeiture but also the relatively new concept, to South Africa at least, of civil

¹MJ Cowling, Fighting organised Crime: comment on the Prevention of Organised Crime Bill 1998, (1998) 11 SACJ 350.

² See preamble to Prevention of Organised Crime Act, 121 of 1998.

forfeiture. The intent behind the inclusion of civil forfeiture appears to be twofold. To provide the means to forfeit the proceeds of crime and in the process remove the incentive for crime and to seize assets that are used to facilitate unlawful activities and thus remove these instrumentalities from criminal control.

[4] The present application involves Chapter 6 of the Act, which bears the heading “Civil recovery of property” and thus provides for civil forfeiture, as opposed to criminal forfeiture, which is regulated by Chapter 5. As the proceedings under Chapter 6 are deemed to be civil proceedings they are governed by the rules of evidence and procedure applicable to proceedings of that kind. Clearly the purpose of Chapter 6 is to target the asset bases of criminal enterprises, independent of criminal proceedings. In the words of Ackerman J, “Chapter 6 (comprising sections 37 to 62) provides for forfeiture of the proceeds of and instrumentalities used in crime, but it is not conviction based: it may be invoked even where there is no prosecution.”³ In fact the Act explicitly separates the criminal process from the civil forfeiture process. Therefore Chapter 6 is focused not on “wrongdoers, but on the property that has been used to commit an offence or which constitutes the proceeds of crime. The guilt or wrongdoing of the owner or possessors of the property is, therefore, not primarily relevant to the

³ *National Director of Public Prosecutions v Mohamed NO and others*, **Constitutional Court** 2002 (4) SA (CC) 843 at 851, para 16C-D.

proceedings.”⁴

[5] Section 37 of the Act entrenches the distinction between civil proceedings and criminal proceedings⁵. Section 50(4) of the Act expressly states that the validity of an order made in terms of s50(1), forfeiting to the state property that is subject to a preservation of property order made in terms of s39(2) is not affected by the outcome of any related criminal proceedings.⁶ This section sanctions the granting of an order for the forfeiture to the state of property that is an ‘instrumentality of an offence referred to in Schedule 1 to the Act’ before any criminal proceedings in respect of that offence are instituted or, if instituted, determined.

[6] To delay the determination of civil forfeiture proceedings until the finalisation of related criminal cases would have a dramatic impact on the purpose of an asset forfeiture programme. After all the “present Act (and particularly Chapters 5 and 6 thereof) represents the culmination of a protracted process of law reform which has sought to give effect to South Africa’s international

⁴ *National Director of Public Prosecutions v Mohamed*, supra at 851, para 17F-G

⁵ S37. **Proceedings are civil, not criminal** –(1) For the purpose of this Chapter all proceedings under this Chapter are civil proceedings, and are not criminal proceedings.

(2) The rules of evidence applicable in civil proceedings apply to proceedings under this Chapter.

(3) No rules of evidence applicable only in criminal proceedings shall apply to proceedings under this Chapter.

(4) No rule of construction applicable only in criminal proceedings shall apply to proceedings under this Chapter.

⁶ S50(4) provides; “the validity of an order under subs (1) is not affected by the outcome of criminal proceedings, or of an investigation with a view to institute such proceedings, in respect of an offence with which the property concerned is in some way associated.”

obligations and domestic interest, to ensure that criminals do not benefit from their crimes.”⁷ Moreover, such a delay would have an adverse effect on the various parties who have an interest in the proceedings:

- Those individuals who have an interest in the property and seek to have it excluded from the proposed forfeiture order, by taking advantage of the ‘innocent owner’ defence.
- Also the accused, who has an opportunity to show that the property is probably not an instrumentality or the proceeds of unlawful activities,
- And the state which is burdened with the cost of curatorship.

The “application for a stay of proceedings”

[7] The application by the respondent for a stay of the civil proceedings, pending the outcome of the criminal proceedings against him in the Cape Town Magistrates court was raised in a supplementary affidavit delivered out of time. There are three pertinent points that can be made in this regard.

[8] Firstly, there was no formal application for a stay and as such it is not a competent application. Mr Mihalik

⁷*National Director of Public Prosecutions v Mohamed NO and others*, **Constitutional Court** - 2002 (4) SA (CC) 843 at 851, para 16B-C.

admits in his supplementary heads of argument that there is no 'formal' application for a stay but asks the court to exercise a discretion in the matter.

[9] Secondly, the fact of the matter is that the respondent had already elected to file a comprehensive answering affidavit in which he deals with the facts asserted by the Applicant. Furthermore, at no stage in his affidavit in which the stay is sought does the respondent suggest that, in order to deal with the Applicant's supplementary affidavits he will be compelled to incriminate himself before the state has produced evidence in the criminal trial. In any event, an application for the stay of civil proceedings pending the determination of related criminal proceedings will only be granted in those cases where the accused is under a legal compulsion to give evidence in the civil proceedings. A legal compulsion must be distinguished from pressure to testify in civil proceedings in order to rebut incriminating evidence.⁸

[10] Even in cases where the accused is legally compelled to incriminate himself in civil proceedings before the state has produced its evidence in the related criminal proceedings, which is not the case in the present matter, the courts have not generally suspended the civil proceedings. Instead the criminal court could order that

⁸ *Nedcor Bank Ltd v Behardien* 2000 (1) SA 307 (C) at 311H-315A.

the relevant element of compulsion not be implemented.⁹ Should the accused believe he has suffered an infringement of his right against self-incrimination he can rely on section 35(5) of the Constitution in the criminal trial. It will be up to the trial court to ensure compliance with fair criminal standards, this may involve finding that any derivative evidence¹⁰ is excluded because it was found as a result of compelled testimony.¹¹

[10] The third point is that the respondent cannot be allowed to rely on the potential loss of an ill-defined 'tactical advantage' at criminal trial to escape responding to matters pertaining to the civil proceedings.¹² Thus, as was pointed out by Navsa J in the *Seapoint* case it is a matter not of compulsion but of choice, "hard as the choice may be, it is a legitimate one"¹³ which the respondent in this matter is called upon to make. In *Nedcor Bank v Behardien* 2000 (1) SA 307 (C), Cleaver J approved of the view expressed by Nugent J in the *Davis v*

⁹ *Davis v Tip NO and Others* 1996 (1) SA 1152 (W) at 1157E-H. See also *Seapoint Computer Bureau v Mcloughlin and De Wet NNO* 1997 (2) SA 636 at 648 where the court observed that "a court weighs all the facts and circumstances to determine whether prejudice might attach to the accused person if the civil proceedings were to continue. Once potential for prejudice is established, the court will stay proceedings or find a formula for preventing prejudice, such as, in appropriate cases, ruling that information obtained should not be subsequently disclosed, or barring the use of compelling or coercive measures."

¹⁰ *Mitchell & Another v Hodes No and Others*, CPD case no. 3584/02 1, at 51. Ultimately "it will be the duty of the trial judge to ensure a fair trial, if necessary by the exercise of his or her discretion, to exclude, in appropriate circumstances to some or all of such derivative evidence."

¹¹ *Mitchell*, supra at 55

¹² *Mitchell*, supra at 60-61, 67-68 where the court held that the civil proceedings were of such significance (an interrogation in terms of s417 of the Companies Act, 61 of 1973) that to grant the relief sought by the applicants would "effectively stultify the purpose which the statutory mechanism of the winding up enquiry is intended to achieve." The learned Judges went on to argue that s417 enquiries have "extremely important public policy objectives" and thus the applicants in the matter could not rely on the potential loss of an ill defined tactical advantage at their criminal trial.

¹³ *Seapoint Computer Bureau v Mcloughlin and De Wet NNO* 1997 (2) SA 636 at 647F-I and 649G-I

Tip case that,

“civil proceedings invariably create the potential for information damaging to the accused to be disclosed by the accused himself, not least so because it will often serve his interests in the civil proceedings to do so. The exposure of an accused person to those inevitable choices has never been considered in this country to conflict with his right to remain silent during the criminal proceedings.....the preservation of the applicants rights lies entirely in his own hands, and there is no such element of compulsion. What the applicant seeks to be protected against is the consequence of the choices he may be called upon to make.”¹⁴

[11] In principle then in every such case where civil and criminal proceedings are instituted by the same activity the respondent is called upon to make a tough choice. He must weigh up the consequences and resolve the ‘dilemma’ in which he finds himself.¹⁵ The respondent in this matter clearly made his choice by filing a comprehensive answering affidavit. Accordingly no good grounds have been made out for suspending the civil proceedings.

¹⁴ *Nedcor Bank Ltd v Behardien* 2000 (1) SA 307 (C) at 313G-314H.

¹⁵ *Equisec (Pty) Ltd v Rodriguez and Another* 1999 (3) SA 113 (WLD) at 115A-B

The Applicants' case

[12] The applicant in this matter seeks a forfeiture order against the respondent owner of a property, which the applicant contends has been used in several drug-related offences. The applicants allege that the respondent 'was using the property in an attempt to manufacture a Schedule 2 drug under the Drugs and Drug Trafficking Act No 140 of 1992, as well as for the possession of and dealing in prohibited substances.' The applicant argues that the property was 'instrumental in the commission of the following offences' -

- contravention of section 3 of the Drugs Act, Section 3. **Manufacture and supply of scheduled substances** - no person shall manufacture any scheduled substance or supply it to any other person, knowing or suspecting that any such scheduled substance is to be used in or for the unlawful manufacture of any drug. In that respondent manufactured 1-phenyl-2-propanone, a scheduled substance, (defined in Schedule 1 of the Drugs Act as one of the 'substances useful for the manufacture of drugs') with the intention to use it in the manufacture of a drug, namely methamphetamine.
- Contravention of section 4(b) of Act 140 of 1992, read with section 1(1) (xxvii), in that respondent

was found in possession of phenyl acetic acid, (defined in Schedule 1 of the Drugs Act as one of the 'substances useful for the manufacture of drugs'), 1-phenyl-2-propanone and methylamine. Section 4(b) prohibits the possession of any "undesirable dependence producing substance." Section 1(1)(xxvii) defines this as "any substance from which a substance can be manufactured included in Part III of Schedule 2 of the drugs and Drug Trafficking Act.

- Contravention of section 5(b), read with sections 1(1)(iii), 1(1)(xiii) and 1(1)(xxvii) of the said Act, in that respondent dealt in an undesirable dependence producing substance.

'Deal in' is defined in s1(1)(iii) as including "performing

any act...with the shipment, importation.....manufacture, supply.....of the drug." Section 1(1)(xiii) defines 'drug' as "any dependence producing substance or any undesirable dependence producing substance." As methamphetamine is listed in Part III of Schedule 2, by virtue of s1(1)(xxvii) phenyl ascetic acid and 1-phenyl-2-propanone are within the definition of "undesirable dependence producing substance." Accordingly both the importation of phenyl acetic acid and the manufacture of 1-phenyl-2-propanone puts respondent firmly within the definition of

having dealt in an undesirable dependence producing drug.”

[13] The applicant’s case was founded on the affidavits of Captain Smit, a narcotics investigating officer and Caspar Venter a forensic analyst with the South African Police Services with eleven years experience and at least a basic knowledge of ‘clandestine laboratories.’ Smit is the designated officer in the Western Cape area for the chemical monitoring programme of the South African Narcotics Bureau. This programme monitors the import and export of 24 chemical substances, identified as useful in the manufacturing of illicit drugs. Smit received information about the importation of phenyl acetic acid, without the necessary ‘end user declaration.’ Phenyl acetic acid is a substance listed in Part II of Schedule 2 of Act 40 of 1992 and can be used in the manufacture of methamphetamine. Smit and his colleagues observed the chemicals being handed over to the respondent at 20h30 on the 30 January 2001 and then they followed him to the property in Woodstock.

[14] The following day, 31st January 2001, the respondent was followed to Litechem Pharmacy where he purchased distilled water and caustic soda. According to Venter’s affidavit distilled caustic soda is needed in the final stages of manufacturing methamphetamine. Smit then obtained a search warrant to search the property. He and his

colleagues requested access to the property but were unsuccessful and they forced open the front and back doors. Upon entering the property Smit heard the sound of breaking glass at the back of the house. He discovered in a toilet bowl broken glass and a yellow brownish fluid. This was analysed by Venter who identified it as 1-phenyl-2-propanone, which is an ingredient that can be used in the manufacture of methamphetamine. The police discovered a small room adjacent to the kitchen fitted with an extractor fan, and containing other equipment such as a magnetic stirrer, hot plate and vacuum sealer, which it is alleged was being used as 'a clandestine laboratory' to manufacture methamphetamine. They also found a handwritten "recipe" detailing the process for purifying 1-phenyl-2-propanone. Venter found a flask containing a small quantity of what he later established was chilled methylamine in the kitchen, which apparently is combined with 1-phenyl-2-propanone to produce methamphetamine. They also found other items that could be defined as laboratory apparatus, as well as literature relating to chemical processes and chemicals in the 'mini laboratory' and also in the room connected to the 'laboratory', which Smit refers to as the 'old kitchen.'

The Respondents case

[15] Respondent's version of events is that he is an 'amateur chemist' and possesses a particular personal interest in conducting chemical experiments. He claims to

have inherited this interest in chemistry, along with all the laboratory equipment, literature and chemicals found at the property from his brother.

[16] He admits to ordering and collecting the phenylacetic acid and methylamine and taking it to the property, but denies knowing that it was purchased under an assumed name. He contends that he dropped the glass container in the toilet from the shock of the police forcibly entering the property. He denies that the substance in the toilet was 1-phenyl-2-propanone but states that if it was, it was too small an amount to make him an illegal drug manufacturer. He contends that the presence of this particular combination of chemicals *per se* on his property did not mean that he was manufacturing methamphetamine. He stated that the room adjacent to the 'old kitchen' was the place where he conducted his 'informal chemical experiments.' He denies knowledge of the hand-written recipe and denies that it was found on the table in the 'old kitchen'. He also rejects Venter statement that he found a flask containing methylamine in the kitchen fridge.

The expert evidence

[17] A point *in limine* raised by Mr Mihalik argues that Venter's evidence as a forensic expert cannot be received by the court, because Venter failed to qualify himself in relation to the techniques and measuring instrument he

used in his analyses. However, these proceedings are explicitly civil, indeed the Respondent concedes that the application is in nature a civil one. Consequently the criminal burden of proof does not apply. What does apply is the general approach by courts in civil proceedings to expert opinion evidence. This allows for more flexible criteria in determining whether the expert possesses the necessary skill, training and/or experience.¹⁶

[18] Venter attests to his position and qualifications and describes the techniques he applied and affirms their internationally accepted status. He states that he applied “n proses wat bedreweheid in skeikunde vereis” and describes the two techniques he used. No contrary facts or expert testimony is put up against which that of Venter is to be measured. There is no reason to doubt the veracity of Venter’s conclusions or the accuracy or reliability of his analyses or that of the measuring equipment used in the analytical process.

[19] Against this factual background it must be determined whether on a balance of probabilities the property concerned falls within the definition of an instrumentality of an offence.

An instrumentality of an offence

[20] A number of recent judgements have examined the term “instrumentality of an offence.”¹⁷ The dictionary

¹⁶ Joubert, *Law of South Africa* vol 9 (first re-issue) 1996 para 507, “it is not generally a sine qua non that an expert must have had theoretical training or practical experience: his qualifications must be measured against the evidence he has to give in order to determine whether they are sufficient to enable him to give relevant evidence.”

¹⁷ *The National Director of Public Prosecutions v Carolus and Others* 1999 (2) SACR 27 (CPD) at 39f-j; *National Director of Public Prosecutions v Patterson* [2001] 4 All SA 525 (C) at 529; *National Director of Public Prosecutions v Seevnarayan* 2003 (2) SA 178 (CPD) at 188 –190.

meaning of instrumentality is “a thing employed for a purpose or end; a means.”¹⁸ The term is defined in the Act as ‘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.” In the *Carolus* case Blignaut J focused on what he perceived was a lack of clarity in the use of the words “which is concerned in.” In the view of the learned Judge a restrictive interpretation was called for,

“a property would only qualify as an instrumentality where it has been used as a *means* or *an instrument* in the *commission* of the offence, or where it is otherwise involved in the commission of the offence”¹⁹

[21] In the unreported case of 2000/12886 *NDPP re Application for Forfeiture of property i.t.o. sections 48 and 53 of Act 121 of 1998*, Stegmann J remarked at para 12 that “evidence of some closer connection than mere presence on the property would ordinarily be required in order to establish that the property had been ‘concerned in the commission’ of the offence.” It is not sufficient for the offence merely to have been committed on the property.²⁰ The Oxford English Dictionary defines the word ‘concerned’ as ‘involved, interested’ suggesting the need for a direct connection to the offence.

¹⁸ See The New Shorter Oxford English Dictionary (2nd ed 1994) p1385.

¹⁹ *National Director of Public Prosecutions v Carolus and Others* 1999 (2) SACR 27 (C) at 39g-h.

¹⁹

²⁰ *National Director of Public Prosecutions v Patterson and Another* [2001] 4 All SA 525 (C).

[22] Civil forfeiture in South Africa is based largely on statutory provisions in the USA and New South Wales in Australia. The Australian approach in New South Wales provides for forfeiture orders for ‘tainted property’, used in, or in connection with the commission of a serious offence. This has been interpreted by the courts as meaning that “there must be a relationship between the commission of the offence and the property in question. That relationship need not be substantial or direct, but the need for a connection poses questions of proximity and degree....and this is essentially a question of fact.”²¹ It becomes more difficult where the property is merely the place where the offence was committed. Merely being the *locus in quo* and nothing more would not be sufficient. Ultimately, O’Keefe J in the King Case held that when it came to tainted property “some activity connected with the relevant crime must have involved the utilisation or employment of the property with the aim or purpose of committing or furthering the commission of the crime in question.”

[23] In the United States ‘forfeitures are designed primarily to confiscate property used in violation of the law, and to require disgorgement of the fruits of illegal conduct’ (*United States v Ursery*, 518 US 267 (1996.)) The US in particular has had extensive experience with civil

²¹ *Director of Public Prosecutions (NSW) v King* [2000] NSWSC 394 at para 14.

forfeiture. American case law may therefore be usefully studied comparatively. In rem forfeiture in the US has traditionally been based on the theory that the property is guilty of an offence. Consequently “it is the property which is proceeded against, and, by resort to a legal fiction, held guilty and condemned as though it were conscious instead of inanimate. (*Various Items of Personal Property v United States* 282 US 577, 581 (1931.)) This approach, however, could not justify the civil forfeiture of the instrumentalities or the proceeds of crime.

[24] Generally the US courts have adopted either the ‘instrumentality test’²² or the proportionality test or one that combines both of these. In terms of the instrumentality test the forfeited property must have a sufficiently close relationship to the illegal activity. In order to determine this the following factors must be examined:²³

- 1) the nexus between the offence and the property and the extent of the property’s role in the offence

²² As advocated by Justice Scalia in his concurring opinion in *United States v Austin*, 509 US at 628. Providing that a close enough relationship can be said to exist then neither the value of the property nor the culpability of the owner are of any significance.

²³ The court in the case of *United States v Chandler*, 36 F.3d 358 (4th Circuit 1994) accepted this property-offence nexus and expanded on it. In measuring the strength and extent of the nexus between the property and the offence, the court held that it may also take into account the following:

- 1) whether the use of the property in the offence was deliberate and planned
- 2) whether the property was important to the success of the illegal activity
- 3) the time during which the property was illegally used
- 4) whether its illegal use was an isolated event or had been repeated
- 5) whether the purpose of acquiring, maintaining or using the property was to carry out the offence.

- 2) the role and culpability of the owner
- 3) the possibility of separating offending property that can readily be separated from the remainder.

[25] However, the potentially harsh results of the instrumentality test when applied alone, have made some courts hesitant to accept it as the sole test and some have favoured the adoption of a proportionality test. There has been much debate in the US courts about the need to subject civil forfeiture to the requirements of the eighth amendment of the US Constitution dealing with excessive fines. Hence the decision to incorporate some aspect of proportionality in determining whether forfeiture of the property imposes upon the owner a penalty grossly disproportionate to his or her offence.

[26] It is clear that such tests have to be seen in the context of the differing statutory requirements and standards of proof that exist in the US. Unquestionably the law in this area is still fairly unsettled, with some American courts favouring one test over the other and others settling on a 'hybrid approach.' However, the American and Australian approaches do provide some guidance in the process of determining the type of relationship that needs to exist, between the property to be forfeited, and the crime in question. The essential element that emerges is the idea of a 'nexus' connecting the property to the unlawful use and consequently 'tainting' it. The

determining question is whether the confiscated property has a close enough relationship to the offence to render it an 'instrumentality.' The critical question to be addressed here is whether on the facts presented to this court the property situated at 54 Balfour Street, Woodstock can be categorised as an instrumentality?

[27] The facts of this matter dispose the court to believe that on a balance of probabilities the property in question was in fact an instrumentality of the offence.

- The respondent admits to ordering the phenylacetic acid and methylamine. This was done using a false name and through another party. It can be inferred from this action that this was an attempt to conceal the connection between the respondent and the chemicals. These chemicals were then transported to the property
- There was evidence through the forensic tests conducted by Venter that 1-phenyl-2-propanone had been manufactured on the premises and that methylamine was stored in the fridge. Clearly an attempt had been made to dispose of the glass container containing the 1-phenyl-2-propanone in the toilet and respondent failed to provide an adequate explanation for this event or for the existence of that particular chemical or to suggest an alternative substance that it could be.
- At no stage was the respondent prepared to confide to the court details of the innocuous chemical experiments

that he claims to have been conducting. His claim that he was experimenting with 'formulas that did not make sense' simply because it was 'stimulating, exciting and therapeutic' is unconvincing. Furthermore, it is highly improbable that someone would go to the trouble of ordering specific chemicals, such as phenylacetic acid and methylamine without having a clear idea of what they were going to be used for.

- It is clear that the following chemicals which were found on the property, phenylacetic acid, methylamine, 1-phenyl-2- propanone, piperidine, acetone and benzene are in fact pre-cursor chemicals used in the production of methamphetamine. Phenylacetic acid, piperidine and 1-phenyl-2-propanone are scheduled substances in terms of the Drugs Act (substances useful for the manufacture of drugs). On a balance of probabilities there is evidence that the property was being used to manufacture a scheduled substance in terms of s3 of the Drugs Act, namely 1-phenyl-2-propanone, with the intention that this would be used in the unlawful manufacture of an 'undesirable dependence producing substance' namely methamphetamine.
- At no stage was an adequate explanation or convincing evidence provided for the presence of the specific combination of chemicals found at the property or for the equipment set up in the 'mini laboratory' and the 'old ' kitchen.

- It is clear that in light of the evidence and on a balance of probabilities the property was 'concerned in' the commission of the offences. It was a place to store the chemicals, rooms on the property were being used to process, refrigerate and 'synthesise' these chemicals, into what on a balance of probabilities was methamphetamine. The property cannot be divorced from these acts, it was an integral part, an instrumentality.

Concluding remarks

[28] There is no doubt that civil forfeiture is a controversial mechanism but it has been accepted by many nations as a legitimate law enforcement tool to combat serious crime. Forfeiture both prevents further illicit use of the property and imposes an economic penalty, thereby rendering illegal behaviour unprofitable. It has been argued that South Africa has managed to avoid some of the worst of the US forfeiture laws by providing for an 'innocent owner' defence and recourse to appeal.²⁴ The Constitutional Court has referred to the "important public interest objectives of the Act." Various international instruments deal with the problem of international crime in this regard and it is now widely accepted by the international community that criminals should be stripped of the proceeds of their crimes²⁵, the

²⁴ Jean Redpath Forfeiting Rights? Assessing South Africa's asset forfeiture laws (2000) *African Security Review*, Vol9 No 5/6

²⁵ See the United Nations Convention Against Illegal Traffic in Narcotic Drugs and Psychotropic

purpose being to remove the incentive for crime. This approach has similarly been adopted by -our legislature.²⁶

[29] It is clearly essential that at no stage should the effects of civil forfeiture be treated in a “predetermined, mechanistic manner – the rationality, fairness and justifiability of each case should be judged on its own merits and treated accordingly.”²⁷ It is critical in this regard that a balance is struck “between the public interest in effective crime fighting and the interests of private property owners affected by forfeiture laws.”²⁸

[30] There is, however, a growing concern about the way major and minor drug-related crime continues to threaten and effect the every day lives of ordinary members of the community. The type of synthetic drug involved in this case gives particular cause for concern because it appears to be relatively easy to manufacture and thus is ideal for production in ‘clandestine laboratories’ in residential areas. All efforts must be made to deter illegal activities that contribute to neighbourhood deterioration. Ultimately, civil forfeiture seeks “to neutralise property that has been

Substances, adopted on the 19th December 1988 in Vienna; United Nations Convention Against Transnational Organised Crime, Palermo, December 2000.

²⁶ *National Director of Public Prosecutions v Mohammed* NO 2002 (4) SA 843 (CC) at 851A-B

²⁷ AJ Van der Walt *Civil Forfeiture of Instrumentalities and Proceeds of Crime and the Constitutional Property Clause* (2000) 16 *SAJHR* 1 at 45

²⁸ *Ibid*

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involved in the commission of offences. This provides sufficient reason for the deprivation of property, which is the purpose of a forfeiture order.”²⁹

[31] The applicant’s application for a forfeiture order of the property should be granted.

[32] In terms of section 50 of the Prevention of Organised Crime Act, no 121 of 1998 (the Act) it is ordered that:

1) the property being Erf no 14241m situated at 24 Balfour Street, Woodstock, Cape Town (the Property) and which is presently subject to the Preservation of Property Order granted by this Honourable Court on 28 June 2001, is forfeited to the State,

2) It is further directed that the property shall vest in the State upon the grant of the Forfeiture Order and that Ivan Malcolm Ross of Bill Rawson Countrywide who was appointed *curator bonis* in terms of section 42 of the Act does the following:

2.1 dispose of the immovable property situated at 54 Balfour Street, Woodstock, Cape Town by sale or other means and deposits the proceeds thereof into the Criminal Recovery Account subject to the following conditions:

a) the amount which is owed to the bondholder, First National Bank, shall be paid to them in full, or

²⁹ *Mohammed NO v National Director of Public Prosecutions* 2003 (1) SACR 286 at 306, para 57d-e.

- b) if the proceeds of the sale is less than the amount owed to the bondholder, then the bondholder will be paid the full proceeds of the sale.

[33] Respondent to pay the costs, which costs to include the costs of two Counsel where such were employed.

N C ERASMUS J