REPUBLIC OF SOUTH AFRICA

IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

REPORTABLE
Cases 260/03, 666/02 and 111/03

In the matters between:

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS Appellant

and

R O COOK PROPERTIES (PTY) LTD Respondent

AND

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS
Appellant

and

37 GILLESPIE STREET DURBAN (PTY) LTD 1st
Respondent
BOULLE SAAD NOMINEES (PTY) LTD 2nd
Respondent

AND

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS
Appellant

and

MOTHIELLALL SEEVNARAYAN Respondent

BEFORE: **MPATI DP, SCOTT, CAMERON, NUGENT and LEWIS JJA**
HEARD: **24 FEBRUARY 2004**
DELIVERED: **13 MAY 2004**

Assets forfeiture – Prevention of Organised Crime Act 121 of 1998 – 'instrumentality of an offence' – 'proceeds of unlawful activities' – approach to construction of statute – meaning and application of definitions

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JUDGMENT

MPATI DP & CAMERON JA:

[1] The issue in each of these appeals is whether certain property should be forfeited to the State under chapter 6 of the Prevention of Organised Crime Act 121 of 1998 (the Act). That depends in two of the appeals on whether

the property in question was an 'instrumentality of an offence'[1] scheduled in the Act,[2] and in the third also on whether it was the 'proceeds of unlawful activities'.[3] The National Director of Public Prosecutions (NDPP) alleged in each case that the property should be forfeited, and applied *ex*

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1 Section 1 of the Act defines 'instrumentality of an offence' 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'.

2 The offences are those in Schedule 1: '1. murder; 2. rape; 3. kidnapping; 4. arson; 5. public violence; 6. robbery; 7. assault with intent to do grievous bodily harm; 8. indecent assault; 9. the statutory offence of- (a) unlawful carnal intercourse with a girl under a specified age; (b) committing an immoral or indecent act with a girl or a boy under a specified age; (c) soliciting or enticing such girl or boy to the commission of an immoral or indecent act; 10. any offence under any legislation dealing with gambling, gaming or lotteries; 11. contravention of section 20 (1) of the Sexual Offences Act, 1957 (Act 23 of 1957); 12. any offence contemplated in section 1 (1) of the Corruption Act, 1992 (Act 94 of 1992); 13. extortion; 14. childstealing; 15. breaking or entering any premises whether under the common law or a statutory provision, with intent to commit an offence; 16. malicious injury to property; 17. theft, whether under the common law or a statutory provision; 18. any offence under section 36 or 37 of the General Law Amendment Act, 1955 (Act 62 of 1955); 19. fraud; 20. forgery or uttering a forged document knowing it to have been forged; 21. offences relating to the coinage; 22. any offence referred to in section 13 of the Drugs and Drug Trafficking Act, 1992 (Act 140 of 1992); 23. any offence relating to the dealing in or smuggling of ammunition, firearms, explosives or armament and the unlawful possession of such firearms, explosives or armament; 24. any offence in contravention of section 36 of the Arms and Ammunition Act, 1969 (Act 75 of 1969); 25. dealing in, being in possession of or conveying endangered, scarce and protected game or plants or parts or remains thereof in contravention of a statute or provincial ordinance; 26. any offence relating to exchange control; 27. any offence under any law relating to the illicit dealing in or possession of precious metals or precious stones; 28. any offence contemplated in sections 1 (1) and 1A (1) of the Intimidation Act, 1982 (Act 72 of 1982); 29. defeating or obstructing the course of justice; 30. perjury; 31. subornation of perjury; 32. any offence referred to in Chapter 3 or 4 of this Act; 33. any offence the punishment wherefor may be a period of imprisonment exceeding one year without the option of a fine; 34. any conspiracy, incitement or attempt to commit any offence referred to in this Schedule.

3 Section 1 defines 'proceeds of unlawful activities' as 'any property or any service, advantage, benefit or reward which was derived, received or retained, directly or indirectly, in the Republic or elsewhere, at any time before or after the commencement of this Act, in connection with or as a result of any unlawful activity carried on by any person, and includes any property representing property so derived'.
'Property' in the Act means 'money or any other movable, immovable, corporeal or incorporeal thing and includes any rights, privileges, claims, securities and any related interest therein and all proceeds thereof'.
'Unlawful activity' means 'any conduct which constitutes a crime or which contravenes any law whether such conduct occurred before or after the commencement of this Act and whether such conduct occurred in the Republic or elsewhere.'

parte for, and obtained, an interim preservation order in respect of it[4] as a prelude to forfeiture proceedings.[5] But in each case the High Court later dismissed the NDPP's application for forfeiture.[6] With the leave of the respective first-instance courts he appeals against their findings. Two of the appeals were argued on the same day and the third two days later. Because the same statutory provisions are at issue, it has been convenient to deal with them together.

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4 Section 38 of the Act provides for 'preservation of property orders':
'(1) The National Director [of Public Prosecutions] 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; or
(b) is the proceeds of unlawful 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.'
5 Section 48 permits the NDPP to apply for a forfeiture order if a preservation order has been granted:
'If a preservation order is in force the National Director may apply to a High Court for an order forfeiting to the State all or any of the property that is subject to the preservation of property order.'
6 In terms of s 50(1) of the Act:
'The High Court shall, subject to section 52, make an order applied for under section 48 (1) if the Court finds on a balance of probabilities that the property concerned-
(a) is an instrumentality of an offence referred to in Schedule 1; or
(b) is the proceeds of unlawful activities.'
Section 52 provides for exclusion of certain interests in property which is subject to forfeiture.

[2] *NDPP v RO Cook Properties (Pty) Ltd* ('Cook Properties') concerns a suburban house in Randburg, Gauteng ('the property'). The owner (a private family company) let it under a written lease as 'a guest house'. The NDPP alleged that the lessees used it as a brothel 'in contravention of s 20(1) of the Sexual Offences Act 31 of 1957'; and that persons kidnapped by one Michael Zinqi and his cohorts were assaulted and held hostage on the property. The owner opposed the application. In the Johannesburg High Court, Willis J found that it had not been proved that the property was an instrumentality of an offence and dismissed the NDPP's application.

[3] In *NDPP v 37 Gillespie Street Durban (Pty) Ltd* ('37 Gillespie Street') the NDPP alleged that drug and prostitution offences were committed on the property, which was operated as a hotel known as 'the Blenheim' at 37

Gillespie Street in the Point area ('the hotel'). The respondents – a property-owning company the sole asset of which is the hotel, and the bond-holder – anticipated protracted proceedings and so the owner applied for legal expenses to enable it to resist the forfeiture application.[7] When this application came before Magid J in the Durban High Court, he insisted that the instrumentality question be argued first, since he thought that might dispose of the litigation. It did. He found that the NDPP had not discharged the onus of proving that the hotel was an instrumentality of an offence. He set aside the preservation order and dismissed the forfeiture application with costs. But because the instrumentality point made the legal expenses application unnecessary, he made no order as to its costs.

7 Section 44(1) of the Act makes provision for expenses:
'(1) A preservation of property order may make provision as the High Court deems fit for –
(a) reasonable living expenses of a person holding an interest in property subject to a preservation of property order and his or her family or household; and
(b) reasonable legal expenses of such a person in connection with any proceedings instituted against him or her in terms of this Act or any other related criminal proceedings.'

[4] *NDPP v Seevnarayan* concerns investments totalling R4 115 738.58 that a taxpayer had made under false names with a life insurance company (Sanlam). His purpose was to conceal the moneys and their proceeds so as to evade income tax. The scheme came apart at the end of 1999 when, fearing millennial problems, he tried with the help of his attorney to withdraw the investments and Sanlam demanded authentic proof of identity. The conduct of the attorney, Mr Yusuf Mohammed Essack of Durban, was referred to the Law Society for investigation,[8] while the NDPP sought forfeiture of the investments and the interest on them as instrumentalities of offences and proceeds of unlawful activities. Griesel J in the Cape High Court dismissed the application,[9] holding that the money was not the means by which the frauds and tax evasion were

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8 At the appeal hearing counsel appeared to be under the impression that the Law Society of KwaZulu-Natal had not yet acted on the complaint, which a Judge of the Cape High Court referred to it on 14 August 2001.
9 2003 (2) SA 178 (C).

committed, and that the NDPP had not shown that either the capital amounts or the interest earned were 'proceeds of unlawful activities'.

[5] The Notice of Appeal in Cook Properties was filed more than two months late and the NDPP applied for condonation.[10] The explanation was that the file went missing from the registrar's office in the Pretoria High Court. The NDPP's deponent states that he personally searched for the file in the registrar's office. Mr Subel for Cook Properties pointed out that the NDPP's attorneys could have tried to reconstruct the court file and so could have avoided much of the delay. But he recorded that he opposed condonation chiefly to highlight the unsatisfactory explanation advanced and because 'condonation is not there merely for the asking'. This was a proper approach. Mr Kuper for the NDPP submitted that this was not a case where the interests of justice would be served by dismissing the

application. We agree. Although the period of non-compliance could have been reduced had the NDPP's legal representative been more diligent, this is not a case of gross dereliction of duty, and condonation should be granted.

'Instrumentality of an offence'

[6] The Cook Properties and 37 Gillespie Street appeals turn on the meaning of 'instrumentality of an offence' in the Act; Seevnarayan in addition concerns the meaning of 'proceeds of unlawful activities', which we consider later. The meaning of both phrases must be determined in the light of the overall purpose of the Act. In *National Director of Public Prosecutions v Mohamed NO*[11] (*Mohamed (1)*), the Constitutional Court considered the Act's purpose, as gathered from its long title and preamble,

10 Rule 8 of the rules of this Court.

and then assessed its structure and effect, in particular chapter 6.[12] The provisions of chapter 6 it described as 'complex and tightly intertwined, both as a matter of process and substance'.[13] Although formally *Mohamed (1)* concerned only the narrow issue of the constitutionality of the *ex parte* preservation procedure under s 38,[14] Ackermann J's full exposition is in point. He first sketched the need for the legislation against the background of the inadequacy of conventional criminal penalties (para 15):

> 'Various international instruments deal with the problem of international crime in this regard and it is now widely accepted in the international community that criminals should be stripped of the proceeds of their crimes, the purpose being to remove the incentive for crime, not to punish them. This approach has similarly been adopted by our Legislature.'

[7] Observing that the Act (and especially chapters 5 and 6) represents 'the culmination of a protracted process of law reform' that has sought 'to give

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11 2002 (4) SA 843 (CC).
12 The proper construction of s 38 was determined in *National Director of Public Prosecutions and another v Mohamed NO and others* 2003 (4) SA 1 (CC) (*Mohamed (2)*).
13 2002 (4) SA 843 (CC) para 22.

effect to South Africa's international obligation to ensure that criminals do not benefit from their crimes', Ackermann J explained the two chapters' forfeiture mechanisms (para 16):

> 'Chapter 5 provides for the forfeiture of the benefits derived from crime but its confiscation machinery may only be invoked when the "defendant" is convicted of an offence. Chapter 6 provides for forfeiture of the proceeds of and instrumentalities used in crime, but is not conviction-based; it may be invoked even when there is no prosecution.'

[8] As we indicated earlier, the forfeiture process starts when the National Director applies *ex parte* in terms of s 38 for a preservation order. Section 38(2) of the Act provides that the High Court shall make such an order –

> 'if there are reasonable grounds to believe that the property concerned -
> (a) is an instrumentality of an offence referred to in Schedule 1; or
> (b) is the proceeds of unlawful activities'.[15]

[9] If a preservation order is granted, notice must be given to 'all persons known to the National Director to have an interest in the property'; and notice of it must be published in the Gazette in terms of s 39(1).

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14 2002 (4) SA 843 (CC) para 23.
15 The scheduled offences are set out in footnote 2 above.

Thereafter, an affected party may within fourteen days enter an appearance to oppose the order. The National Director must then within 90 days of the grant of the preservation order apply for the forfeiture of the property. At that stage, Ackermann J pointed out (para 19), affected parties are entitled to a full hearing to determine whether the property should be forfeited or not.

[10] The Constitutional Court described s 38's preservation procedure as 'part of a complex, two-stage procedure' by which property that is the instrumentality of an offence or the proceeds of unlawful activities is forfeited (para 17). Chapter 6 provides for forfeiture where it is established on a balance of probabilities that property has been used to commit an offence or is the proceeds of unlawful activities, even when no criminal proceedings are pending. In this respect, the court said, chapter 6 stands

in contradistinction to chapter 5, with the important interpretative consequence that chapter 6 is (para 17) –

> ‘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] Ackermann J then set out what he described as ‘the innocent owner defence’, available at the second stage of chapter 6’s procedures (para 18):

> ‘There is, however, a defence at the second stage of the proceedings when forfeiture is being sought by the State. An owner can at that stage claim that he or she obtained the property legally and for value, and that he or she neither knew nor had reasonable grounds to suspect that the property constituted the proceeds of crime or had been an instrumentality in an offence ('the innocent owner' defence).’

He went on to set out the other opportunities that chapter 6 provides to affected parties to have preservation orders set aside or varied (para 20).

[12] This is the background against which we seek to interpret 'instrumentality of an offence', which, as we indicated earlier, the Act defines as meaning 'any property which is concerned in the commission or suspected commission of an offence at any time before or after the commencement of this Act, whether committed within the Republic or elsewhere'. It is clear that in adopting this definition the legislature sought to give the phrase a very wide meaning. Far from confining the property subject to forfeiture to that 'directly involved in' or 'essential to' or 'employed for' a scheduled offence, the definition embraces all property 'which is concerned in the commission or suspected commission' of such an offence.[16] On a literal interpretation – of which all three sets of counsel gave us telling instances – this could lead to forfeiture of property whose

16 See *DPP (NSW) v King* [2000] NSWSC 394 para 14, where the New South Wales Supreme Court per O'Keefe J held that the phrase 'used in connection with the commission of' an offence in the NSW Confiscation of Proceeds of Crime Act, 1989 has a wider connotation than 'used in the commission' of an offence.

role in or utility to a crime is entirely incidental to its commission, such as a public vehicle on which a passenger steals an item from another, or a building in whose recesses a fleeing criminal finds refuge, or a flat rented by a thief who stores loot under a mattress. One meaning of 'concerned' is 'to be in a relation of practical connection with; to have to do with; to have a part or share in; to be engaged in, with'.[17] In this very wide sense the vehicle, building and flat in the examples could be said to be property 'concerned in' the commission of an offence.

[13] But plainly such unbounded literalism is not appropriate. This court has observed of the words 'in connection with' that even though literally they may have 'a very wide connotation', 'it is probably seldom that they are used in legislation in their wide, literal sense'.[18] The same applies to

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17 Oxford English Dictionary, quoted in *Lothlorien (Pty) Ltd v Ikin* 1993 (2) SA 676 (C) 679F per Rose Innes J.
18 *Lipschitz NO v UDC Bank Ltd* 1979 (1) SA 789 (A) 804C-G, per Miller JA, elaborating on *Rabinowitz and another v De Beers Consolidated Mines Ltd and others* 1958 (3) SA 619 (A) at 631.

'concerned in'.

[14] We say this for two reasons. First, the purport of the statute itself suggests some restriction. The purpose of chapter 6's forfeiture provisions is signalled in the part of the Act's Preamble that states that 'no person should benefit from the fruits of unlawful activities, nor is any person entitled to use property for the commission of an offence'. The 'use' of property 'for' the commission of crime denotes a relationship of direct functionality between what is used and what is achieved.[19] In the sense the Preamble suggests the vehicle, building and flat posited in the examples earlier could not be said to have been 'used for' the commission of the offences. It is true that the definition goes considerably further. But in setting bounds to a field of statutory meaning that was plainly not intended to be unbounded, 'used for' is a valuable pointer.

[15] The second reason for limiting the provisions is that they must be construed consistently with the Constitution.[20] The Bill of Rights provides that 'no law may permit arbitrary deprivation of property'.[21] And a literal application of the provisions could well lead to arbitrary deprivation. The Constitutional Court has held that a deprivation of property is arbitrary when the statute in question does not provide sufficient reason for the deprivation or is procedurally unfair. What 'sufficient reason' is may vary from statute to statute. 'Arbitrary' deprivations are not limited to those that are non-rational: the constitutional prohibition 'refers to a wider concept and a broader controlling principle that is more demanding than an enquiry into mere rationality'. But the court held that non-arbitrariness at any event requires a rational relationship between the deprivation and the

19 The Constitutional Court's synopsis in *Mohammed (1)* 2002 (4) SA 843 (CC) para 17 echoes this sense ('property that has been used to commit an offence').

20 Section 39(2) requires a court when interpreting any legislation to 'promote the spirit, purport and objects of the Bill of Rights'. See *Mohammed (1)* 2002 (4) SA 843 (CC) para 33 and the authorities cited there.

legislative ends sought to be attained through it.[22] And in applying that standard, it is apposite to bear in mind in the context of the forfeiture legislation that the aim of the property clause 'is not merely to protect private property but also to advance the public interest in relation to property'.[23]

[16] This entails that the means chapter 6 employs (forfeiture of instrumentalities of crime and proceeds of unlawful activities) must at the very least be rationally related to its purposes. Those purposes seem to us to be not only complex but inter-related, and to number more than one – a fact that has interpretative implications. We were urged to characterise chapter 6 as 'penal' and for this reason to construe its provisions restrictively. The NDPP, by contrast, urged us to affirm the

21 Bill of Rights s 25(1): 'No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property'.
22 *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and another* 2002 (4) SA 768 (CC) paras 61-66, 97-100.

remedial objectives of the legislation and for this reason to interpret its definitions amply. Neither contention by itself seems to us to offer an adequate guide.

[17] We agree that chapter 6 has remedial objectives. But these cannot disguise the fact that forfeiture, once exacted, operates as a punishment. The United States Supreme Court in a not dissimilar context has observed that the notion of punishment cuts across the division between civil and criminal law. Civil proceedings may advance punitive as well as remedial goals, and sanctions frequently serve more than one purpose. Hence the fact that a civil statute is remedial does not mean that it may not also have a punitive dimension.[24] That certainly applies to chapter 6. The legislature has expressly ordained that proceedings under the

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23 *First National Bank* 2002 (4) SA 768 (CC) paras 50, 52, 64.
24 *Austin v United States* 509 US 602 (1993) 609-610 per Blackmun J for the Court, holding that post-conviction civil forfeiture provisions are subject to the United States Constitution's Excessive Fines Clause.

chapter are ‘civil … not criminal’ (s 37(1)), and its provisions are clearly remedial. Yet none of this diminishes the fact that the provisions have some penal element. At the same time, the chapter’s punitive dimension does not mean that its sole or even predominant aim is to punish those implicated. As pointed out in *Mohammed (1)*, the primary objective of provisions of this sort is ‘to remove the incentive for crime, not to punish’ criminals.[25]

[18] The inter-related purposes of chapter 6 therefore seem to us to include: (a) removing incentives for crime; (b) deterring persons from using or allowing their property to be used in crime, (c) eliminating or incapacitating some of the means by which crime may be committed (‘neutralising’, as counsel put it, property that has been used and may again be used in crime); and, we would add, (d) advancing the ends of justice by depriving

those involved in crime of the property concerned. At least (b) and (d) embody a palpably penal aspect; but the statutory objectives transcend the merely penal. We accordingly agree the provisions must be restrictively interpreted, though not for the narrow reasons counsel advanced.

[19] In giving the provisions a constitutional construction, the fact that the chapter's two stages are 'tightly intertwined'[26] in both process and substance must be borne mind. Such intertwining does not, however, mean that the property owner's guilt or innocence plays a role in determining the meaning of 'instrumentality of an offence'. The judges in both Cook Properties and 37 Gillespie Street took the opposite view. They considered that the owner's culpability was relevant to determining whether the properties were instrumentalities. In Cook Properties, Willis

25 *Mohammed (1)* 2002 (4) SA 843 (CC) para 15.

J read the definition of 'instrumentality of an offence' in tandem with sections 48, 50 and 52 –

> 'as requiring that a person may not be deprived of property unless the person owning that property had a guilty state of mind in connection with the particular offence.'

Magid J in 37 Gillespie Street considered relevant to the application of the phrase that there was no suggestion on the papers –

> 'that the respondents condone, are associated with or in any way participated in any illegal activities which may occur on the property'.

[20] This approach is not in our view correct. *Mohamed (1)* pointed out that chapter 6's primary focus is not on wrongdoers, 'but on property that has been used to commit an offence' or which constitutes the proceeds of crime. A criminal conviction is not a condition precedent to forfeiture, and property may be forfeited even where no charge is pending. In consequence (at least in the first phase of the chapter's two-stage procedure), the guilt or wrongdoing of owners or possessors of property

is 'not primarily relevant to the proceedings'.[27]

[21] This approach to chapter 6 has the interpretative consequence that in giving meaning to 'instrumentality of an offence' the focus is not on the state of mind of the owner, but on the role the property plays in the commission of the crime. The phrase must be interpreted independently of the guilt or innocence of the property-owner. Where a forfeiture order is sought the court thus undertakes a two-stage enquiry. In the first, it ascertains whether the property in issue was an 'instrumentality of an offence'. At this stage the owner's guilt or wrongdoing, knowledge or lack of it, are not the focus. The question is whether a functional relation between property and crime has been established. Only at the second stage, when (after finding that the property was an instrumentality) the court considers whether certain interests should be excluded from

26 2002 (4) SA 843 (CC) para 22.

forfeiture, does the owner's state of mind come into play. Approached from a different perspective, the contextual and constitutional indicators pointing to a restrictive interpretation of 'instrumentality' make it unnecessary to intrude the owner's culpability into the first stage.

[22] The existence of the second stage is nevertheless relevant to understanding the first. As explained earlier, an owner is entitled to intervene to avoid forfeiture: indeed, a forfeiture order in terms of s 50 may be made only 'subject to s 52', which permits those with 'an interest in the property'[28] to intervene in the forfeiture application. Such persons may either (a) oppose the making of a forfeiture order, or (b) apply for an order excluding their interest in the property (s 48(4)). Section 52 empowers a court making a forfeiture order to exclude from its operation 'certain

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27 *Mohammed (1)* 2002 (4) SA 843 (CC) para 17.

28 Section 52(1)(a) of the Act refers to 's 48(3)', but this is a drafting slip: the allusion must be to s 48(4), which in turn refers to s 39(3), which refers to persons with 'an interest in the property'.

interests in property' that is subject to forfeiture (s 52(1)). Seeking to accentuate the draconian effect of the chapter, counsel for Cook Properties argued that only 'interests in property' less than full ownership can benefit from an exclusionary order, and that an owner has no recourse to the exclusionary provisions. This contention seems wrong. The Act defines 'interest' very widely as including 'any right'.[29] There can be no reason to exclude ownership – the most encompassing right of property – from that definition, nor to prevent owners from applying to exempt their full interest from forfeiture.

[23] The extent of the burden the statute places on owners and other interest-holders at the second stage also suggests a more narrowly defined, rather than a wider, understanding of 'instrumentality of an offence'. It is evident that the provisions make significant inroads into the

common law rights of ownership since property is liable to forfeiture even where the owner was not involved in any crime at all. In the Cook Properties and 37 Gillespie Street matters, for instance, neither the corporate property-owners nor their human embodiments were alleged to have been involved in committing any offence. Despite such lack of implication, the statute requires the owner when opposing forfeiture or in applying for exclusion of an interest to state that he or she acquired the property concerned legally and –

> '(a) neither knew nor had reasonable grounds to suspect that the property in which the interest is held is an instrumentality of an offence referred to in Schedule 1; or
> (b) where the offence concerned had occurred before the commencement of this Act the applicant has since the commencement of the Act taken reasonable steps to prevent the use of the property concerned as an instrumentality of an offence referred to in Schedule 1'. (s 52(2A))

(The events in all the appeals are alleged to have occurred after the Act took effect, making sub-para (b) inapplicable.)

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29 Act 121 of 1998 s 1 sv 'interest'.

[24] This section burdens the owner with an onus to prove certain facts on balance of probabilities before the court can make an exclusionary order. Although the Constitutional Court referred to this loosely as creating an 'innocent owner' defence,[30] a literal reading of s 52(2A)(a) would suggest that innocence is not enough. In the case of post-statute offences, if the owner fails to prove absence of knowledge or absence of reasonable grounds for suspicion, on such a reading the property stands to be forfeited even if he or she was unable to do anything about the scheduled offence or its continuation.

[25] Again, examples of the untoward results a literal reading could produce proliferated in argument. If, for example, an owner knows or reasonably suspects that property is an instrumentality, and for this reason reports the matter to the police, seeking their intervention against the criminals, this

on a literal reading will not avail against forfeiture. Once the owner knows or reasonably suspects, liability to forfeiture follows, despite innocence of involvement, implication or even acquiescence. The 'reasonable steps to prevent' defence (s 52(2A)(b)) avails only for pre-statute offences. On such a reading the statute does not provide an 'innocent owner defence' but only (as counsel for 37 Gillespie Street suggested) an 'ignorant owner defence'.

[26] We emphasise that none of the owners in the appeals before us invoked the second stage of the chapter's procedures: in the course each case took, they staked their fortunes rather on a narrow reading of 'instrumentality of an offence'. As a result these cases do not require us to give a determinative reading of the second-stage provisions. Nor is the constitutionality of the reverse onus resting upon owners facing forfeiture

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30 2002 (4) SA 843 (CC) para 18.

before us. It may be that s 52(2A)(a) should be read, applying the common law maxim that the law does not demand the impossible,[31] so as to avoid forfeiture when the owner has done 'all that reasonably could be expected' to prevent the unlawful use of the property,[32] and that this can properly be done despite the contrasting proximity of sub-paragraph (b). We need not decide that now. Nor do the appeals require us to confront the serious constitutional question whether forfeiture is permissible when the owner has committed no wrong of any sort, whether intentional or negligent, active or acquiescent.[33]

[27] We therefore express no final views on the interpretation of s 52. The present relevance of the second stage is to emphasize that, even on any likely constitutional interpretation, the forfeiture provisions place

31 *Montsisi v Minister van Polisie* 1984 (1) SA 619 (A) 635-638, 635A (a person's failure to perform an obligation, including a statutory obligation, which it is impossible for him to fulfil cannot be reckoned to his detriment).
32 Compare *Austin v United States* 509 US 602 (1993) 616 per Blackmun J for the Court.
33 Compare *Austin v United States* 509 US 602 (1993) 629 per Kennedy J, concurring in part and concurring in the

substantial burdens on owners and that these likewise point to a narrow reading of 'instrumentality of an offence'.

[28] Mr Kuper for the NDPP in Cook Properties and 37 Gillespie Street argued that the chapter is intended 'to recruit property owners into an active role' as guardians of their property against crime. We agree that property owners cannot be supine. In particular, we endorse the notion that the State is constitutionally permitted to use forfeiture, in addition to the criminal law, to induce members of the public to act vigilantly in relation to goods they own or possess so as to inhibit crime. In a constitutional state law-abiding property-owners and possessors must, where reasonably possible, take steps to discourage criminal conduct and to refrain from implicating themselves or their possessions in its ambit. And the State is entitled to use criminal sanctions and civil forfeitures to

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outcome.

encourage this. Here constitutional principle recognises individual moral agency and encourages citizens to embrace the responsibilities that flow from it.[34]

[29] We therefore agree that the Act requires property owners to exercise responsibility for their property and to account for their stewardship of it in relation to its possible criminal utilisation. But the pursuit of those statutory objectives cannot exceed what is constitutionally permissible. Forfeitures that do not rationally advance the inter-related purposes of chapter 6 are unconstitutional. Deprivations going beyond those that remove incentives, deter the use of property in crime, eliminate or incapacitate the means by which crime may be committed and at the same time advance the ends of justice are in our view not contemplated by or permitted under the Act.

[30] Mr Breitenbach, who argued this aspect on behalf of the NDPP in

Seevnarayan, is therefore in our view correct in submitting that the relationship between the purpose of the forfeiture and the property to be forfeited must be close, that the purpose of the forfeiture must be compelling and that a proportionality analysis – in which the nature and value of the property subject to forfeiture is assessed in relation to the crime involved and the role it played in its commission – may at the final stage in addition be appropriate.[35]

[31] As will appear when we discuss the individual cases, it is not necessary for us to determine comprehensively what standard applies, nor (because of their outcome) to apply a proportionality analysis to the appeals before us. For now it is enough to say that the words 'concerned in the

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34 See *S v Manamela and another (Director-General of Justice intervening)* 2000 (3) SA 1 (CC) per O'Regan J and Cameron AJ (dissenting) at paras 60-61, 82, 89, 96-97, 99-100.
35 *First National Bank* 2002 (4) SA 768 (CC) para 71: 'There is broad support in other jurisdictions for an approach based on some concept of proportionality when dealing with deprivation of property'. See *Austin v United States* 509 US 602 (1993); *United States v Bajakajian* 524 US 321 (1998) (in post-conviction forfeitures, the touchstone of constitutional inquiry is the principle of proportionality: the amount forfeited must be compared to gravity of the offence; if the amount is grossly disproportional to the gravity of the offence, it is unconstitutional).

commission of an offence' must in our view be interpreted so that the link between the crime committed and the property is reasonably direct, and that the employment of the property must be functional to the commission of the crime. By this we mean that the property must play a reasonably direct role in the commission of the offence. In a real or substantial sense the property must facilitate or make possible the commission of the offence. As the term 'instrumentality' itself suggests (albeit that it is defined to extend beyond its ordinary meaning), the property must be instrumental in, and not merely incidental to, the commission of the offence. For otherwise there is no rational connection between the deprivation of property and the objective of the Act: the deprivation will constitute merely an additional penalty in relation to the crime, but without the constitutional safeguards that are a prerequisite for the imposition of

criminal penalties.

[32] It follows that we endorse broadly the conclusion in those cases, following the first-instance decision in *NDPP v Carolus and others*,[36] where a narrow rather than a wide interpretation of the definition of 'instrumentality' was held appropriate. Here, despite its different (and pre-constitutional) context, we find practical assistance in *S v Bissessue*,[37] where a magistrate declared forfeit a motor vehicle and fishing rods used in fishing without a licence under an ordinance that, in addition to a criminal penalty, required the court to declare any article used 'in, for the purpose of, or in connection with the commission of the offence' forfeit. On appeal the forfeiture of the fishing rods was upheld, but that of the vehicle

36 1999 (2) SACR 27 (C) [affirmed by this Court on the retrospectivity point: 2000 (1) SA 1127] at 39f-g per Blignault J (property qualifies as an instrumentality where it 'has been used as a means or instrument' in the commission of the offence or in addition 'where it is otherwise involved in the commission of the offence'), followed by Foxcroft J in *National Director of Public Prosecutions v Patterson and another* 2001 (2) SACR 665 (C) at 667 and by Griesel J in *Seevnarayan* 2003 (2) SACR 178 (C) paras 33-36 and referred to by NC Erasmus J in *National Director of Public Prosecutions v Prophet* 2003 (2) SACR 287 (C) paras 20ff.
37 1980 (1) SA 228 (N) per Kumleben J, James JP concurring.

was set aside. The Court held that 'to qualify for forfeiture the thing must play a part, in a reasonably direct sense, in those acts which constitute the *actual commission* of the offence in question'. The same in our view applies to 'instrumentality of an offence'. As suggested in *NDPP v Prophet*,[38] the determining question is whether there is a sufficiently close link between the property and its criminal use, and whether the property has a close enough relationship to the actual commission of the offence to render it an instrumentality. Every case will of course have to be decided on its own facts.

We turn now to apply these principles to the three cases before us.

COOK PROPERTIES

[33] Earlier we set out the facts in brief (para 2). The fact that kidnapped

persons were held hostage and assaulted at the house does not make the property an 'instrumentality of an offence'. The property was the place where the crimes were committed. But the location was purely incidental to their commission. We agree with the approach Stegmann J adopted in *National Director of Public Prosecutions re Application for Forfeiture of Property in terms of ss 48 and 53 of the Prevention of Organised Crime Act, 1998*:[39]

> 'The mere fact that a particular offence was committed on a particular property would not necessarily entail the consequence that the property was "concerned in the commission" of the offence or that the property had become an "instrumentality of an offence". It seems to me 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 an offence.

He added:

> 'Every [scheduled] offence must be committed on some piece of property. But it would be absurd to infer that the legislature had intended every property on which such an offence had been committed to be liable to forfeiture to the State. A closer connection must be shown than mere presence. It must be established that the property was 'concerned' in the commission of the offence, and not merely that the offence was committed on the property.'

[34] We agree. The fact that a crime is committed at a certain location does

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38 2003 (2) SACR 257 (C) para 26 per NC Erasmus J.

not by itself entail that the venue is 'concerned in the commission' of the offence. An illuminating discussion of the Australian forfeiture cases (where property 'used in, or in connection with, the commission of' certain serious offences is subject to forfeiture) by the New South Wales Supreme Court shows that something more than mere location is essential.[40] We consider that the same applies to our legislation. Either in its nature or through the manner of its utilisation, the property must have been employed in some way to make possible or to facilitate the commission of the offence. Examples include the cultivation of land for the production of drug crops; the appointment, arrangement, organisation, construction or furnishing of premises to enable or facilitate the commission of a crime;[41]

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39 Unreported, case no 2000/12886 (WLD) at para 12, page 8 of the typescript. The first passage was quoted and followed in *Patterson* 2001 (2) SACR 665 (C) 667.

40 See *DPP (NSW) v King* [2000] NSWSC 394 paras 14-36.

41 As appears to have been the case in *National Director of Public Prosecutions v Prophet* 2003 (2) SACR 287 (C), which involved drugs offences. We note that a somewhat stricter approach seems to be applied in the United States of America to property used to commit or facilitate drug trafficking: see *United States v Chandler* 36 F 3d 358, 1994 US App Lexis 27049 (farm a substantial and meaningful instrumentality of drug offences); *United States of America v Real Property Located at 9917 Amazona Drive, Huntersville, North Carolina* 1999 US Dist Lexis 5294 (houses

or the fact that the particular attributes of the location are used as a lure or enticement to the victims upon whom the crime is perpetrated (such as a houseboat whose particular attractions were used to lure minors into falling prey to sexual offences).[42]

[35] None of this applies to the kidnappings and assaults at the Cook Properties house. The evidence is solely that the victims were taken there and then detained and abused. The nature, location, attributes or appointment of the house itself played no distinctive role in the crimes, nor did any features of the house play a role in luring the victims there. It provided only the venue for the crimes. That is not enough to trigger the forfeiture provisions.

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used to facilitate drug trafficking); *United States v One Parcel of Real Property, etc* 900 F 2d 470, 1990 US App Lexis 5382 (real property used to store, conceal, possess, prepare and distribute cocaine – tools of drug trade including scale and cocaine cutting agent seized on premises); *United States of America v One Parcel Property Located at 427 and 429 Hall St, Montgomery County, Alabama* 74 F 3d 1165, 1996 US App Lexis 2196 (grocery store one-fifth of mile from junior high school used for cocaine sales); *United States of America v Bieri* 68 F 3d 232, US App Lexis 28257 (dairy farm used to provide cover, storage and a centre of distribution for trafficking offences over two-year period). See too *United States of America v 1181 Waldorf Drive, St Louis, Missouri* 900 F Supp 1167, 1995 US Dist Lexis 13979 (house used to store child pornography and serving as a 'warehouse' for 'veritable

[36] A second basis on which the NDPP sought forfeiture was that the lessees used the house in contravention of s 20(1) of the Sexual Offences Act. It is important to emphasise how the NDPP set out the case for forfeiture here. In the preservation application, the founding affidavit says that the house was 'utilised as a brothel in contravention of section 20(1) of the Sexual Offences Act'. The supporting affidavit similarly alleges a 'contravention of section 20(1)'. Ms Rabaji, the head of the NDPP's asset forfeiture unit, deposing later to the founding affidavit in the forfeiture application, again asserts that the property was 'utilised as a brothel in contravention of s 20(1) of the Sexual Offences Act'. The NDPP stated in summary that its case for forfeiture was that the property –

> 'is an instrumentality of offences referred to in items 3 [kidnapping], 7 [assault with intent to commit grievous bodily harm] and 11 [contravention of s 20(1) of the Sexual Offences Act] of Schedule 1 of the Act.'

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cesspool' of materials).

42 An unreported case from the Victorian County Court cited in *DPP (NSW) v King* [2000] NSWSC 394 para 22.

[37] In regard to sexual acts the forfeiture case thus rested expressly and exclusively on the basis of a contravention of s 20. But s 20 does not prohibit brothel-keeping, or mention it at all. Instead, it provides that –

> '(1) Any person who –
> (a) knowingly lives wholly or in part on the earning of prostitution; or
> (aA) has unlawful carnal intercourse, or commits an act of indecency, with any other person for reward; or
> (b) in public commits any act of indecency with another person; or
> (c) in public or in private in any way assists in bringing about, or receives any consideration for, the commission by any person of any act of indecency with another person,
> shall be guilty of an offence.'

So although the NDPP stated that the property was being used as a brothel, the case set out in the affidavits committed him to proving a contravention of one of the sub-paragraphs of s 20.

[38] The evidence relied on was that of sergeant Maher and superintendent Neethling of the South African Police Services. Maher states that he visited the premises of 'Club 247', which operated on the property. There he spoke to an employee named Priscilla. She advised him that the

entrance fee was R100. Apart from entry, this included drinks and food plus 'live sex shows'. Priscilla also told him that women cost R350 per hour. When he enquired what was included she responded: 'Anything goes, full house or anything'. She explained that this included oral sex and that there were seven girls available. Maher then took a tour of the premises on the pretext that he would bring prospective clients. It is on the basis of his observations regarding the lay-out that Rabaji asserted that the property was 'utilised as a brothel in contravention of s 20(1) of the Sexual Offences Act'.

[39] In our view, there is no evidence establishing that either the lessees of the property or the owners of 'Club 247' contravened s 20(1)(a) by knowingly living wholly or in part on the earnings of prostitution. Counsel relied on the affidavit of superintendent Neethling, who visited the property

some sixteen months before Maher. He states:

> ‘Ek is sedert 3 Mei 2000 by the Gesinsgeweld, Kinderbeskerming en Seksuele Misdrywe Ondersoekeenheid. Gedurende Julie 2000 het ek ‘n program geloods om die styging in kinderprostitusie aan te spreek. Uit hoofde van die program besoek ek gereeld plekke wat as bordele gebruik word. Die waarneming wat ek [in Februarie 2000] gedoen het by Northumberlandlaan 247 is tipies wat ek sien in bordele wat ek besoek het.
> Die dames te Klub 247 het later aan my erken dat hulle op die perseel as prostitute werk. Hulle het my verder meegedeel dat hulle ‘n fooi betaal aan die eienaars van die Klub en alles wat hulle verder maak aan hulself toekom …’

That is all there is. Of course those allegedly living off the earnings of prostitution gave no direct evidence for the NDPP. Nor did the women allegedly employed to provide the earnings. Neethling’s averments are therefore hearsay, as inadmissible against the property owners as against the lessees, and Mr Kuper advanced no basis on which it should be admitted under any exception to the hearsay rule.

[40] The same considerations apply to the other alleged contraventions of s 20(1). There was no direct evidence that ‘unlawful carnal intercourse’ took place for reward (s 20(1)(aA)), nor that any ‘act of indecency with

another person' took place on the property (s 20(1)(aA), (b) and (c)), nor that the lessees or club owners assisted in bringing about any such act, or received any consideration for it (sub-para (c)). Its absence spares us the task of trying to decide what 'act of indecency' might mean today; and this entails that the NDPP cannot establish any of the scheduled statutory contraventions upon which he seeks to rely.

[41] Belatedly, in his reply to the argument before us, Mr Kuper as a last resort argued that the affidavits established that the house had been used as a brothel in contravention of s 2 of the Sexual Offences Act. He pointed to evidence regarding pamphlets and other paraphernalia found on the premises, advertisements in a Gauteng daily newspaper explicitly offering sexual services at 'Club 247', as well as the way in which the premises were structured and the rooms equipped. He submitted that this

was sufficient to establish that the house was used as a brothel. Perhaps. We do not need to decide that. Willis J did consider that 'the property quite obviously has been used as a brothel'. We are content to endorse that finding. But Willis J rightly went on to hold that the NDPP's case 'rests on subsection 20(1)(a) of the Sexual Offences Act 3 of 1957', and that insofar as it rests on that provision it 'must fail'.

[42] We agree with his conclusion. The NDPP pinned this part of the forfeiture case to section 20(1) of the Sexual Offences Act. And keeping a brothel is made an offence not by s 20(1), but by s 2. The Act's Schedule does not specifically mention s 2. That is a scheduled offence only through the oblique route of item 33 ('any offence the punishment wherefor may be a period of imprisonment exceeding one year without the option of a fine'). Punishment for contravening s 2 is imprisonment for a

period not exceeding three years with or without a fine not exceeding R6 000 in addition to such imprisonment. So on this basis keeping a brothel does fall within the Schedule.

[43] But nowhere do the NDPP's affidavits allude to either s 2 or to item 33. Though the deponents aver that the premises were 'utilised as a brothel', they do so solely to emphasise and to illustrate the 'contravention of s 20(1) of the Sexual Offences Act'.

[44] We do not think that the NDPP can claim forfeiture of property by oblique invocation of statutory infractions, still less by mistaken allusion to them. If our approach seems technical, we think that this is rightly so. Assets forfeiture is a serious matter. Where an owner stands to lose property because the asset was 'concerned in the commission of an offence', the papers must set out clearly the case he or she is called to

answer.

[45] Certainly the property owner must be told clearly what scheduled offence or offences the NDPP relies on to establish forfeiture. The NDPP's papers in this case were clear only in that they confined the case for forfeiture to s 20 of the Sexual Offences Act, which the evidence did not establish. The allusions to keeping a brothel as a separate offence are at best ambiguous and misleading, and there is no reference at all to s 2 of the Sexual Offences Act or to item 33 of the Schedule. It is not idle to speculate that if the misleading and erroneous references to s 20(1) had been replaced with a clear invocation of s 2 of the Sexual Offences Act, falling under item 33 of the Schedule, the property owner might have been moved to produce quite different defensive evidence. So any approach that is less 'technical' would engender grave unfairness. In our view the

NDPP failed to prove that the property was an instrumentality of any of the offences on which he relied.

37 GILLESPIE STREET

[46] The NDPP's founding deponent relies on the supporting affidavit of captain Michelle Frazer of the South African Police Services to aver that the hotel is an instrumentality of an offence. (The founding affidavit also avers that the hotel is the 'proceeds of unlawful activity'. But the NDPP did not persist in this.) Capt Frazer, in turn, relies on an affidavit deposed to by inspector Von Bargen of the Durban Metropolitan Police Service.

[47] According to Von Bargen during 2000 he noticed 'a high incidence of crime in the immediate area and inside' the hotel, which is situated in the Point area, notorious for prostitution, theft by snatching, robbery and the

possession of or dealing in drugs. While attending to complaints at the hotel, Von Bargen noticed that the premises were dilapidated. He consequently wrote a letter to the manager informing him about illegal activities that occurred on the premises and of the by-laws that were being transgressed. He called on the owner 'to take reasonable steps to rectify the situation'. At the end of 2000 Von Bargen sent another letter to the management giving names of persons residing there who had been arrested for various offences.

[48] During a subsequent raid in 2001 various narcotic substances and drug paraphernalia were found at the hotel. Arrests were also made. Von Bargen states that he noticed that the hotel 'had not sufficiently improved since drug dealing and prostitution were still occurring on the premises'. He later had a meeting with the manager and a trustee of the property.

There he suggested that all small holes in the walls and floors be blocked as he ‘had noticed during the course of several searches conducted on the premises that drugs were often hidden in these inconspicuous places’. He states that during one particular search he removed ‘a substantial quantity of dagga’ hidden beneath a bath basin in a second floor bathroom. He also suggested that unused rooms be locked to prevent persons from using them to sell drugs or engage in prostitution, and that the owner should hire a security guard ‘to prevent loitering in the building and to control access in and out of the building’. Yet on a subsequent raid Von Bargen found that his advice had not been heeded. Drugs were yet again discovered.

[49] Mr Kuper for the NDPP submitted that taken cumulatively these facts establish that the hotel was a drug shop used for storing and secreting

drugs. The founding papers do establish that on each of the raids at the hotel drugs were discovered and suspected offenders arrested. But the fact was that anyone could rent a room or rooms for any length of time. It is situated in an area where on the NDPP's own evidence drug offences are rife. Because of this (and possibly because of the rates offered), the hotel is likely to attract persons who may possess drugs. The mere fact that drug dealers may frequent the hotel does not make it 'a drug shop'. There is no evidence that the persons arrested in the various raids and searches were the same people. There is no suggestion that rooms were rented out or equipped for the purpose of drug dealing. Nor is there any evidence that the premises themselves were used to manufacture, package or distribute drugs, or that any part of the premises was adapted or equipped to facilitate drug dealing. Certainly the facts alleged do not

approach the cases abroad where property has been forfeited on this basis.[43]

[50] The hotel was merely the place where drug offences were committed. It was an enterprise whose business it was to rent out rooms to the public. That it so happens that some, or even most, of the tenants were drug dealers is on the facts before us incidental to the offences alleged to have taken place on its premises. In our view, the NDPP likewise failed to prove that the hotel was an instrumentality of an offence.

SEEVNARAYAN

[51] The two questions in this appeal are whether the investments were an 'instrumentality of an offence' and whether they, or the interest earned

43 See para 34 above, and the cases set out in the preceding footnote, including *United States v Chandler* 36 F 3d 358, 1994 US App Lexis 27049, where the overwhelming evidence presented by the government showed that a 33-acre farm was both a substantial and meaningful instrumentality of drug offences in that marijuana, cocaine and quaaludes had been distributed, packaged, sold and purchased on the farm under the direction of the owner, who had

upon them, were 'proceeds of unlawful activities' under the Act. The factual details are set out in the judgment of Griesel J in the Cape High Court.[44] Since his judgment is reported, there is no need to repeat them. In brief, between July 1994 and September 1999, Seevnarayan, through his brother-in-law (a broker for Sanlam), made a number of investments eventually totalling R4 115 738.85. They were all made in names other than that of the investor, mostly false, the culminating destinations being in the fictitious names of one 'Pat Oliver', supposedly from Transkei, and one 'Aboobaker Paruk', supposedly from Lesotho.

[52] Counsel for Seevnarayan conceded in this court and the court below[45] that the purpose of employing fictitious names was to conceal the origin of the funds and the interest earned upon them so that Seevnarayan could

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paid his employees in cocaine and marijuana. The farm was held forfeit.
44 2003 (2) SA 178 (C) paras 10-20.
45 2003 (2) SA 178 (C) para 24.

evade payment of income tax. As mentioned earlier (para 4 above), the scheme went awry when in trepidation at the onset of 2000 Seevnarayan, abetted by his attorney, tried to withdraw the moneys, but the fictitious payees could not be substantiated.

[53] To establish 'instrumentality' there must be a scheduled offence. Here the investments were made under false names. In the Cape High Court Griesel J, despite some apparent doubt,[46] accepted without finding in favour of the NDPP that Seevnarayan's conduct in relation to Sanlam amounted to fraud. In our view that conclusion is not subject to doubt. It was not disputed that Seevnarayan induced Sanlam to believe that actual persons were making the investments in their authentic names, and that in this belief it recorded the investments in the names given. It was also not disputed that Sanlam is under a statutory duty to furnish proper and

accurate returns to the South African Revenue Services (SARS) of both dividends paid and of taxable interest. Nor was it disputed that cloaking an investment under a false name impedes the performance of that duty, to the detriment or potential detriment of Sanlam. This is fraud.

[54] More generally stated, the proposition is that one who under a false name entrusts money to another for investment and accrual of interest commits a fraud on the other if the false representation of identity prejudices or potentially prejudices the other in its accounting and reporting obligations, whether statutory or otherwise. We think this proposition sound.

[55] As Griesel J found,[47] Seevnarayan's conduct was also a fraud on the revenue services. His purpose in making the investments under false names was to evade payment of income tax on the sums so secreted and

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46 2003 (2) SA 178 (C) para 30.

on the returns they yielded. Counsel for Seevnarayan initially argued that a fraud on the SARS can be committed only by submitting false income tax returns, and that since no such returns had been adduced in evidence, the NDPP's case was speculative. But this line was rightly abandoned. The revenue services produced Seevnarayan's returns for the tax years 1993 to 1998. These showed that the investments had been untruthfully secreted. That too was fraud.

[56] Griesel J rightly found[48] that Seevnarayan's conduct was also a contravention of s 104(1) of the Income Tax Act, 58 of 1962. This provision makes it an offence – with punishment falling within item 33 of the Schedule to the Act – to render a false return with intent to evade assessment or taxation, or in doing so to make 'use of any fraud, art or contrivance whatsoever'. Doubtless because of the super-abundance of

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47 2003 (2) SA 178 (C) para 26.

averments establishing fraud, which also covered s 104, Rabaji's founding affidavit does not expressly mention the statutory tax offence. In his answering affidavit, Seevnarayan himself raised the question whether s 104 had been contravened. He erroneously denied that it constituted a scheduled offence – a contention he later abandoned, but with which the NDPP in reply joined issue. In these circumstances the absence of express allusion to s 104 in the founding affidavit caused no prejudice. The parties' affidavits fully canvassed all the evidence relating to both offences. Two scheduled offences were therefore established.

[57] Given that in relation to both the revenue services and Sanlam Seevnarayan placed himself within the Act's Schedule by investing the funds under false names, the question is whether the funds themselves are an 'instrumentality of an offence'. Griesel J held that to describe the

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48 2003 (2) SA 178 (C) para 26.

investments as the means by which the fraud was committed would be 'straining the language of the Act unduly' and contrary to its purpose: 'After all, fraud is not committed *by means of* money or other property, but by means of intentional misrepresentations'.[49]

[58] In our view, this states the issue too narrowly. As we showed earlier, the Act's definition of 'instrumentality' goes deliberately wider than the 'means' by which an offence is committed. It embraces property 'concerned in' the offence. The question is thus not whether the fraud was committed 'by means of' the investments, but whether the money invested was 'concerned in the commission' of the fraud on either Sanlam or the revenue services within the intendment of the statute.

[59] Even applying the broader approach we have outlined, however, we come to the same conclusion as Griesel J. As we found earlier (para 32),

the property must play a part, in a reasonably direct sense, in the acts that constitute the *actual commission* of the offence. Mr Seligson for the NDPP contended that the investments did play the direct role required in the acts constituting the commission of the frauds. We cannot agree. It seems to us to invite confusion to say that Seevnarayan committed the offences by investing money in false names, for that combines what were in truth two separate acts. It was not by investing money that Seevnarayan committed a fraud on Sanlam: it was by proffering false names that he did so. Similarly, the fraud on the revenue services was committed by proffering false income tax returns. In both instances, the offence consisted in proffering false information.

[60] To constitute an 'instrumentality', the money must stand in a close relationship to the actual offence. The Sanlam investments were not

49 2003 (2) SA 178 (C) para 37.

themselves prohibited, and the offence did not consist in making them. They were perfectly lawful. The crime consisted in falsifying the identity of the person making the investments.

[61] It is true that Seevnarayan's act in making the investment was coordinate with his false representation as to the investors' identity, and that the act of so investing simultaneously brought about the fraud. It is also true that Seevnarayan would not have proffered false information to Sanlam if he had not had money to invest – just as a person might not forge a motor vehicle licence unless he has a vehicle to which to attach it. But it does not follow that the money is instrumental in the commission of the offence. In both cases, the use to which the offender wishes to put the property provides the reason to commit the offence, but the property is nevertheless not instrumental in its commission.

[62] The point is that a relation of indispensable causality between property and offence does not, by itself, constitute the measure of involvement necessary for making property an 'instrumentality' of the offence. This conclusion derives support from the decision of the United States Supreme Court in *United States v Bajakajian*,[50] where the offence consisted in attempting to leave the United States without reporting the transport of more than $10 000 in currency. Bajakajian was caught trying to leave with $357 144 in cash, and the government sought to seize it under legislation requiring forfeiture of any property 'involved in such offence'. The majority of the Supreme Court held that the forfeiture of the entire amount was unconstitutional as an excessive fine. But the majority additionally concluded that the actual cash was in any event not an 'instrumentality' of the offence of non-reporting. The Supreme Court held

that though the existence of the cash was a precondition to the offence, it did not make it an instrumentality, since the cash was not 'the actual means by which the criminal act is committed': 'the currency is merely the subject of the crime of failure to report'.[51]

[63] Counsel for the NDPP sought to distinguish this reasoning. But we find it applicable. *Bajakajian* is in fact a stronger case than the present, since there (as the dissenting minority vigorously pointed out)[52] the act constituting the offence was the failure to report the very cash that was being transported. In the present case making the investments did not by itself constitute fraud, nor did making the investments in itself constitute tax evasion. We conclude that the cash involved was not an instrumentality of an offence.

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50 524 US 321 (1998).
51 524 US 321 (1998) footnote 9, per Thomas J, Stevens, Souter, Ginsburg and Breyer JJ concurring.
52 Per Kennedy J, Rehnquist CJ, O'Connor and Scalia JJ concurring.

'Proceeds of unlawful activities'

[64] The statute defines 'proceeds of unlawful activities' as meaning –

> 'any property or any service, advantage, benefit or reward which was derived, received or retained, directly or indirectly, in the Republic or elsewhere, at any time before or after the commencement of this Act, in connection with or as a result of any unlawful activity carried on by any person, and includes any property representing property so derived'.

The definition in essence requires that the property in question be 'derived, received or retained' 'in connection with or as a result of' unlawful activities. Griesel J considered that a literal application of the definition would lead to absurd and grossly inequitable results, and that a restrictive interpretation was therefore imperative. For this approach he relied on the Act's short title ('prevention of organised crime'), and noted that its long title suggested that it was intended to 'combat organised crime, money laundering and criminal gang activities'. From this and the preamble he

concluded that evasion of personal income tax by a single individual could not be considered 'organised crime' and that 'the Act was never intended to be applied in situations such as the present'. For these and other reasons he applied a restrictive approach.[53]

[65] We cannot agree with this construction, which radically truncates the scope of the Act. It leaves out portions of the long title, as well as the ninth paragraph of the preamble. These show that the statute is designed to reach far beyond 'organised crime, money laundering and criminal gang activities'. The Act clearly applies to cases of individual wrong-doing.

[66] It is evident that the definition of 'proceeds of unlawful activities' is cast extremely wide, and the interpretative caution Miller JA expressed regarding 'in connection with' in *Lipschitz NO v UDC Bank Ltd*[54] (para 13 above) applies. But with that adjustment made, we consider that the

amplitude of the definition should be approached somewhat differently from that in the case of 'instrumentality of an offence'. This is because the risk of unconstitutional application is smaller.

[67] As we showed earlier, the forfeiture of a good deal of property that could literally be said to be 'concerned in' an offence would run unconstitutionally counter to the Act's objectives of removing incentives, deterring the use of property in crime, eliminating or incapacitating the means by which crime may be committed and at the same time advancing the ends of justice. In our view it is less likely that forfeiture of benefits derived, received or retained 'in connection with or as a result of any unlawful activity' would fail rationally to advance those objectives. We therefore approach the definition on the basis that, subject to necessary attenuation of the linguistic scope of 'in connection with', it should be given

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53 2003 (2) SA 178 (C) paras 58-63.

its full ambit.

'Proceeds of unlawful activities' – capital invested

[68] The NDPP made two submissions regarding the capital. The first was that the whole sum invested represented the proceeds of unlawful activities. The argument was based on inference. The NDPP did not at any stage claim in the papers that the funds originated in unlawful activities by Seevnarayan or any other person. But Seevnarayan's financial advisor tendered a detailed accounting of the origin of the funds that, starting in 1994, made up the amounts eventually invested in the names of Paruk and Oliver. Counsel for the NDPP pointed out that this accounting did not wholly explain the origin of the funds. It is also true, as counsel stressed, that the legitimacy of the funds was a matter peculiarly

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54 1979 (1) SA 789 (A) 804C-G.

within Seevnarayan's knowledge. We nevertheless consider that the NDPP's contention that those funds must by probable inference be inferred to derive from unlawful activities unduly stretches the case. This was at no stage the case that Seevnarayan was called to meet, and if his explanation lacks particularity we do not consider that in the circumstances of this case it provides a satisfactory basis for the inference that they originated in unlawful activities.[55]

[69] In the alternative, the NDPP contended that the entire capital amount was 'retained' in connection with or as a result of unlawful activities. This argument also cannot succeed. It entails that the sum invested somehow changed its character in the course of the scheme so as to taint it with the fraud Seevnarayan perpetrated by investing under false names. We do not think that can be said to have occurred.

'Proceeds of unlawful activities' – interest earned

[70] The NDPP argued further that the interest Seevnarayan earned on the investments represented the 'proceeds of unlawful activities'. The question is whether the interest was earned 'in connection with or as a result' of his unlawful activity in making false representations to Sanlam and to the revenue services. We think it clear that Seevnarayan did not derive, receive or retain the interest 'as a result of' his unlawful conduct in making false representations to Sanlam and to the revenue services. The interest was the direct result of his investment, and not his false statements.

[71] But can it be said that Seevnarayan derived, received or retained the interest 'in connection with' his unlawful scheme? We think not. Even

55 See the remarks of Griesel J at 2003 (2) SA 178 (C) para 41.

though it is clear that the words ‘in connection with’ are intended to broaden the scope of the definition, we consider that, merely as a matter of language, to fall within the definition the accrual of property must flow in some way (direct or indirect) from unlawful activity.

[72] Bearing in mind that the objective of the Act is to render forfeit the returns that might accrue from unlawful activity, we consider that the ‘connection’ the definition envisages requires some form of consequential relation between the return and the unlawful activity. In other words, the proceeds must in some way be the consequence of unlawful activity.

[73] In our view, even viewing the definition broadly, there is no such connection between the interest earned and any of the offences Seevnarayan committed. The interest did not accrue to him in consequence of his conduct in proffering false information to Sanlam, but

from his conduct in making the investments. Nor did the interest accrue to him in consequence of his conduct in proffering false income tax returns. It might be said that the interest accrued to him in consequence of his intention to commit fraud on the revenue services by submitting false returns in the future. But it was still not an accrual that flowed from the commission of that offence. On the contrary, the offence was committed in consequence of the accrual of the interest. It is true that the offence was committed with the object of evading liability for the income tax payable on the interest earned, but that is not to say that Seevnarayan 'retained' (or attempted to retain) any part of the interest 'in connection with or as a result of the offence'.

[74] This conclusion makes it strictly unnecessary to deal with Griesel J's finding that s 50(1) of the Act leaves a Court with no discretion regarding

the extent of the forfeiture ordered.[56] However, we consider it as well to spell out that our earlier conclusion that a proportionality analysis may be constitutionally required when forfeiture is ordered (paras 30-31 above) is incompatible with the rigidity the High Court imputed to the statute. Section 50(1) must in any event be read in tandem with s 48(1). This means that 'the property' in respect of which s 50(1) empowers the court to order forfeiture is the same property referred to in s 48, encompassing 'all or any' of it. If the words 'all or any' are imported from s 48 to s 50 in this way – and we see nothing to impede this – the difficulty is resolved. It is well established that legislation is not readily construed so as to oust the court's jurisdiction,[57] and we find no indication in the Act that courts are not entitled to give the NDPP a lesser measure of forfeiture than he might choose to seek.

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56 2003 (2) SA 178 (C) paras 42, 49, 54, 65-66.

The following orders are made:

The R O Cook appeal:

1. The application for condonation is granted. The appellant is to pay the costs of the application.
2. The appeal is dismissed with costs, including the costs of two counsel.
3. The preservation of property order issued by Van Oosten J on 22 June 2001 is set aside.

The 37 Gillespie Street appeal:

The appeal is dismissed with costs.

The Seevnarayan appeal:

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57 *Welkom Village Management Board v Leteno* 1958 (1) SA 490 (A) 502G-H.

The appeal is dismissed with costs, including the costs of two counsel.

L MPATI DP
E CAMERON JA

SCOTT JA	**)**	
NUGENT JA	**)**	**CONCUR**
LEWIS JA	**)**	