REPUBLIC OF SOUTH AFRICA

THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

REPORTABLE
Case number: 502/04

In the matter between:

SIMON PROPHET Appellant

and

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS Respondent

CORAM: **MPATI DP, STREICHER, MTHIYANE, CLOETE and PONNAN JJA**
HEARD: **19 MAY 2005**
DELIVERED: **29 SEPTEMBER 2005**

Summary: Search and seizure – Forfeiture order in terms of Chapter 6 of Prevention of Organised Crime Act 121 of 1998 – application for forfeiture order – whether property instrumentality of an offence – proportionality analyses not part of first of two-stage enquiry – standard of disproportionality to be applied at second stage of enquiry – significant disproportionality required.

JUDGMENT

MPATI DP:

[1] The issue in this appeal is whether the appellant's fixed property consisting of a dwelling house on Erf 14241, Cape Town (the property) should be forfeited to the State under Chapter 6 of the Prevention of Organised Crime Act 121 of 1998 (the Act). Section 50(1)(a) of the Act enjoins a High Court, upon application by the National Director of Public Prosecutions (s 48(1)), to make an order forfeiting to the State property which it finds on a balance of probabilities to have been 'an instrumentality of an offence' referred to in Schedule 1. (Such an order is subject to the provisions of s 52, which are not relevant for present purposes.) 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 its commencement, 'whether committed within the Republic or elsewhere'.

[2] On 28 June 2001 and as a prelude to the forfeiture proceedings the National Director of Public Prosecutions (NDPP) applied *ex parte* for, and obtained, a preservation of property order over the property in terms of s 38 of the Act. That section obliges a High Court to make 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 if there are reasonable

grounds to believe that the property concerned 'is an instrumentality of an offence referred to in Schedule 1; . . .'. Mr Ivan Malcolm Ross was appointed as *curator bonis* to assume control over the property (s 42).

[3] In support of the application for the preservation of property order the NDPP alleged that the appellant's house (the property) 'was used as an instrumentality of an offence as set out in Schedule 1 of [the Act] to wit a contravention of sections 3 and 5 of the [Drugs and Drug Trafficking] Act 140 of 1992' (the Drugs Act). On 27 July 2001 the appellant gave notice of his intention to oppose the making of a forfeiture order (s 39(3)). The Cape High Court (NC Erasmus J) subsequently granted a forfeiture order upon application by the NDPP (s 48(1)) despite opposition from the appellant (s 48(4)). Leave to appeal against that order was refused by the Cape High Court and the appellant is before us with leave of this court.

[4] It is not in dispute that during December 2000 Johan Smit, a detective captain in the South African Police Service (SAPS) and attached to the South African Narcotics Bureau, received information about the importation into South Africa of phenylacetic acid, a substance listed in Part II of Schedule 1 to the Drugs Act. Phenylacetic acid is one of a number of substances listed under Schedule 1 to the Drugs Act as 'substances useful for the manufacture

of drugs'. After he had conducted some investigations Smit, accompanied by, amongst others, Detective Captain Heinrich Stephan Cockrill and Casper Hendrik Venter, a forensic analyst in the SAPS and attached to the Forensic Science Laboratory, entered and searched the property on the strength of a search warrant. It is common cause that upon entering the property the search party found two persons inside, the appellant and one Nicola Daniels. Various chemical substances, laboratory equipment and documents recording chemical processes were found and seized. A vacuum sealer, an electronic scale, a large amount of cold drink straws and books containing chemical literature were also found, as well as specialised glassware and measuring jugs usually associated with a laboratory. In the bathroom a broken glass containing a 'yellow/brown' liquid was retrieved from the toilet bowl. The appellant alleges in his opposing papers that Smit and his crew 'broke into the house inter alia kicking down doors, smashing windows and causing general mayhem'. He admits that the broken glass and liquid were found in the toilet bowl but states that he had dropped a glass apparatus when he heard the loud banging on the door (by the police).

[5] Amongst the chemical substances found on the property were phenylacetic acid in two plastic containers that had not as yet been opened and five bottles containing methylamine. Venter later analysed the

'yellow/brown' liquid sample taken from the toilet bowl and discovered that it contained 1-phenyl-2-propanone, a substance listed in Part I of Schedule 1 to the Drugs Act, and a by-product. The appellant denies that 1-phenyl-2-propanone was found on the property, but alleges that if it was, 'the amount is so nominal that when applying a proportionality test, it cannot possibly justify a forfeiture order of the whole property'. He denies that by dropping the glass into the toilet bowl he was attempting to dispose of its contents.

[6] The court *a quo* found that the liquid indeed contained 1-phenyl-2-propanone. That finding was not challenged in this court, and wisely so, in my view.

[7] In his supporting affidavit (in the forfeiture application) Cockrill states that after the forensic team had commenced with their search on the property, Smit asked him to guard Nicola Daniels, who was seated in the kitchen. He searched around in the kitchen and found a glass container filled with 'transparent' liquid in the freezing compartment of a big refrigerator. He called Smit and Venter and showed it to them. Smit and Venter left the kitchen again, having undertaken that they would return after they had completed the search of the property. Cockrill then heard a knock on the door and went to answer it. While there talking to members of the press (they had knocked on

the door) he sensed a strong odour coming from the kitchen. On investigation he found Nicola Daniels at the kitchen sink with the glass container in her hand. It appeared to be empty. He called Smit and Venter and told them what had transpired. Venter confirms Cockrill's version pertaining to him and avers further that he found a small quantity of the chemical that was in the glass container (he refers to the glass container as an Erlenmeyer flask) and later established that it was chilled methylamine.

[8] The appellant denies that an Erlenmeyer flask containing chilled methylamine was found as alleged by Cockrill and Venter and refers to the affidavit of Nicola Daniels. However, Nicola Daniels does not deal with any of the allegations in her affidavit and simply elected to exercise her right to remain silent. It must accordingly be accepted that the flask indeed contained chilled methylamine.

[9] It is common cause that following the search of the property both Nicola Daniels and the appellant were arrested and later charged with contravening sections 3 and 5 of the Drugs Act. One Allen Dominic Hiebner, who, it is common cause, had ordered phenylacetic acid and methylamine for the appellant under a false name, was arrested later and joined as an accused.

Instrumentality of an offence

[10] As has been mentioned above (para [1]) the Act defines 'instrumentality of an offence' as 'any property which is concerned in the commission or suspected commission of an offence . . .'. Counsel for the appellant contended that in answering the question whether property was an instrumentality of an offence a court should consider the following three issues: (1) rationality: there must be a rational relationship between the means employed (ie deprivation of the property) and the end sought to be achieved (ie the purpose of the forfeiture (s 50 of the Act)); (2) proportionality: forfeiture of the property concerned must not be disproportionate when measured against the gravity of the offence; and (3) close connection: there must be a proven offence and there must be 'something special' connecting the property to the commission of the offence. All these issues, counsel argued, are part and parcel of the enquiry into whether property sought to be forfeited was an instrumentality of an offence.

[11] In *National Director of Public Prosecutions v R O Cook Properties*[1] this court held that where a forfeiture order is sought the court undertakes a two-stage enquiry. First, it ascertains whether the property in issue was an instrumentality of an offence. At this stage the owner's culpability is not relevant. The only question is whether a functional relation between property

[1] 2004 (8) BCLR 844 (SCA)

and crime has been established[2]. Once that has been confirmed the property is liable to forfeiture and the court then proceeds to the second stage of the enquiry, viz, whether certain interests in the property should be excluded from the operation of the forfeiture order (s 52). 'Interests' include ownership. An owner is, therefore, not precluded from applying that his/her full interest in the property be exempted.[3] The statute requires persons with an interest in the property, when opposing forfeiture or applying for an exclusion of an interest, to state that they acquired the property concerned legally and that they:

'(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 this Act taken all reasonable steps to prevent the use of the property concerned as an instrumentality of an offence referred to in Schedule 1.' (S 52(2A).)

(As will emerge later in this judgment the appellant relies on neither (a) nor (b) above.) It is at this second stage of the enquiry that a proportionality analysis 'may . . . in addition be appropriate'[4]. So also the owner's culpability.[5]

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[2] Para 21
[3] Section 48(3); *Cook Properties*, supra n 1 para 22
[4] *Cook Properties* supra n 1 para 30
[5] *Cook Properties* supra n 1 para 21

[12] The procedures adopted in *Cook Properties* seem to be in line, though not entirely, with those of the United States courts. In *United States v Chandler,* 36 F 3d 358 (1998) the United States Court of Appeals for the Fourth Circuit had occasion to consider whether civil forfeiture of a 33 acre farm due to its involvement in violations of federal drug laws constituted an 'excessive fine' under the Eight Amendment.[6] The relevant provision (of the federal laws) prescribes, inter alia, that a court, in imposing sentence on a person convicted of an offence in violation of it (the relevant provision), 'shall order that the person forfeit' any property involved in such offence. In determining the excessiveness of '*in rem forfeitures*' generally the Court of Appeals introduced a three-part instrumentality test: (1) the nexus between the offence and the property and the extent of the property's role in the offence; (2) the role and culpability of the owner; and (3) the possibility of separating offending property that can readily be separated from the remainder.

[13] Unlike the test introduced by the Court of Appeals, however, the culpability of the owner of the property is not relevant in the enquiry whether property was an instrumentality of an offence under s 50 of the Act: it becomes relevant only at the second stage of the enquiry. The distinction lies

[6] Which provides: 'Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual

therein that under the United States legislation the property sought to be forfeited must have been involved in an offence *for which a person has been convicted*. Under Chapter 6 of the Act, however, a criminal conviction is not a condition precedent to forfeiture; property may be forfeited even where no charge is pending.[7]

[14] In *Chandler* the Court of Appeals, while mindful that other courts in the United States had also considered and adopted a proportionality test in addition to the instrumentality test in determining excessiveness of forfeitures, reasoned that traditionally the principle of proportionality in the Eighth Amendment had been 'associated with the Cruel and Unusual Punishment Clause, rather than the Excessive Fines Clause'. It accordingly concluded that the proportionality analysis did not apply to the latter clause. In *United States v Bajakajian* 524 US 321 (1998), a case where the State sought the forfeiture of the sum of USD 357.144 which the possessor had attempted to take out of the country without having reported it to the relevant authorities in violation of the federal laws, the United States Supreme Court held (by a majority) that the forfeiture was punitive and that 'the test for the excessiveness of a punitive forfeiture involves solely a proportionality

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punishment inflicted.'

[7] *Cook Properties* supra n 1 para 20

determination'. It held further that the 'touchstone of the constitutional enquiry under the Excessive Fines Clause is the principle of proportionality'. The amount of the forfeiture, the court said, must bear some relationship to the gravity of the offence.[8]

[15] In their heads of argument, however, counsel for the appellant distinguish (though they concede the inter-relatedness) between the proportionality analysis to which I have just referred and a proportionality evaluation (analysis) aimed at establishing sufficient reason for the means employed (the deprivation) to achieve the end (the purpose of the deprivation). It is so that in *First National Bank of SA v Commissioner, SARS*[9] (FNB case) the Constitutional Court (per Ackerman J), dealing with the meaning of 'arbitrary' in s 25 of the Constitution, concluded that 'a deprivation of property is "arbitrary" as meant by s 25 when the "law" referred to in s 25(1)[10] "does not provide sufficient reason" for such deprivation'. Sufficient reason, the court said, may, in certain circumstances, be established by no more than a mere rational relationship between means and ends, depending on the interplay between variable means and ends. In other circumstances sufficient reason might be established by a proportionality evaluation close to

[8] See also *Austin v United States* 509 US 602 (1993)
[9] 2002 (4) SA 768 (CC) para 100
[10] Which provides that: 'No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.'

that required by

s 36(1)[11] of the Constitution. Relying on this approach counsel for the appellant submitted that the present case calls for the application of the more onerous 'reasonable test', ie whether the deprivation would be reasonable and justifiable in the circumstances.

[16] As the court itself acknowledged, the *FNB* case did not deal with the forfeiture of property in the hands of a person who had committed an offence. It dealt with the recovery of a customs debt. (What was in issue was the constitutionality of s 114 of the Customs and Excise Act 91 of 1964, which provides for the securing and enforcement of a customs debt by a lien and sale of goods in a customs and excise warehouse.) The instant case is about the forfeiture of property alleged to have been 'concerned in the commission or suspected commission of an offence' (the definition of an 'instrumentality of an offence'). As was pointed out in the minority judgment in *Bajakajian* '(t)he point of the instrumentality theory is to distinguish goods having a "close enough relationship to the offence" from those incidentally related to it'. I can find no reason to depart from the procedure enunciated in *Cook Properties*[12], viz that in forfeitures under chapter 6 of the Act a proportionality analysis

[11] Section on Limitation of Rights in the Bill of Rights, requiring such limitation to be 'reasonable and justifiable in a open and democratic society . . .'.
[12] Supra n 1 para 30

would be appropriate only at the second of the two-stage enquiry.

[17] With regard to rationality, this court accepted in *Cook Properties* that 'the means chapter 6 employs (forfeiture of instrumentalities of crime . . .) must at the very least be rationally related to its purpose', for forfeitures that do not rationally advance the interrelated purposes of the chapter are unconstitutional. Deprivations that go 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' the court said, are not contemplated by or permitted by the Act.[13] It was in recognition of this constitutional and other (contextual) indicators that this court (in *Cook Properties*) applied a restrictive interpretation to the words 'concerned in the commission of an offence' and held that for property to qualify as an 'instrumentality of an offence' there must be a reasonably direct link between it and the crime committed and that the 'employment of the property must be functional to the commission of the crime'; ie the property 'must play a reasonably direct role in the commission of the offence' and in 'a real or substantial sense the property must facilitate or make possible the commission of the offence'.[14]

[13] Supra n 1 para 29
[14] *Cook Properties* supra n 1 para 31

The Schedule 1 offence(s)

[18] Section 50(1)(a) of the Act provides for the forfeiture of an instrumentality of an offence referred to in Schedule 1. Among the offences referred to in Schedule 1 is 'any offence referred to in Section 13 of [the Drugs Act]'. The respondent alleges that the appellant contravened s 3 of the Drugs Act by manufacturing 1-phenyl-2-propanone, a 'scheduled substance' as defined in s 1(1) and listed in Part 1 of Schedule 1 as a substance useful for the manufacture of drugs. It is alleged that the appellant manufactured the 'scheduled substance' knowing that it was to be used for the unlawful manufacture of methamphetamine, a drug as defined in s 1(1) and listed in Part III of Schedule 3 as an undesirable dependence-producing substance. Section 3 of the Drugs Act prohibits the manufacture, by any person, of any scheduled substance, or the supply of it to any other person, knowing or suspecting that any such scheduled substance was to be used in or for the unlawful manufacture of any drug.

[19] The respondent alleges further that the appellant also contravened s 5(b) of the Drugs Act by manufacturing methamphetamine. Section 5(b) prohibits any person from dealing in any dependence-producing substance or any undesirable dependence-producing substance unless he/she qualifies in

terms of s 5(b)(i)-(iv). A contravention of either of sections 3 or 5 of the Drugs Act is an offence.[15]

[20] I have already mentioned (para [6] above) that the finding of the court *a quo* that the liquid in the glass admittedly dropped into the toilet bowl by the appellant contained 1-phenyl-2-propanone, was not challenged in this court. In an affidavit deposed to on 4 April 2001 in terms of sections 212(4)(a) and 212(8)(a) of the Criminal Procedure Act 51 of 1977 (the s 212 affidavit) Venter lists the substances necessary for the manufacture of 1-phenyl-2-propanone as phenylacetic acid, acetic anhydride, pyridine, benzene and sodium hydroxide. Except for the acetic anhydride, all these substances were found on the property. Venter attaches to his said affidavit copies of receipts of purchases made by or on behalf of the appellant, one of which shows a purchase of 2.5 litres of acetic anhydride made on 10 March 1999. In his affidavit in support of the forfeiture application Venter suggests that the appellant was interrupted by the arrival of the police while in the process of manufacturing methamphetamine. He explains that one of the ways in which methamphetamine is manufactured is to combine 1-phenyl-2-propanone with chilled methylamine, which was also found on the property (para [8] above). The 1-phenyl-2-propanone, says Venter, still had to be purified by a process

involving benzene and diluted sodium hydroxide. The latter substance was also found on the property. He then concludes:

'Based on my expert knowledge and experience, combination of these two substances (1-phenyl-2-propanone and chilled methylamine) excludes the possibility of any other resultant substance but methamphetamine.'

In his s 212 affidavit Venter lists two other substances necessary for the manufacture of methamphetamine, namely formic acid and hydrochloric acid. These were also on the premises. So also the equipment required for the process, viz a hot plate (electric stove) for heating purposes, a pot and foil paper.

[21] According to Venter, 'recipes' to synthesize various drugs were found on the premises, including a handwritten document 'with an alternative method to synthesize methamphetamine'. A vacuum sealer and cold drink straws (also found on the premises) are routinely used to package methamphetamine and an electronic scale (also found) is used to accurately measure quantities of chemicals.

[22] The appellant denies that he intended to manufacture illegal drugs. He admits that he ordered phenylacetic acid and methylamine through Hiebner but disavows any knowledge that Hiebner was using a false name to

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[15] Per s 13 of the Drugs Act

purchase the chemicals. He also denies that the handwritten document, or any of the books or recipes found on the property, detail any process to manufacture methamphetamine. The appellant fails, however, to give an acceptable or adequate explanation for the presence of the chemicals on the property. In his affidavit annexed to his notice of intention to oppose the making of a forfeiture order in terms of s 39(3) of the Act, the appellant states that he intended to obtain an expert opinion on the chemicals found on the property as well as on Venter's s 212 affidavit. Once he had obtained such expert opinion, he says, he would be in a better position 'to further expand' on the basis of his defence. However, despite offers by Venter to make the results of his analyses of the chemicals and the exhibits (chemicals) available the appellant failed to produce such expert opinion. He states in his answering affidavit, instead, that he enjoys chemistry 'as an amateur' and considers it a hobby and that most of the books and other chemistry equipment found on the property had been left there by his deceased brother, who had had an interest in chemistry and had experimented with several different chemicals. The electronic scale, the hot plate and a magnetic stirrer were also left by his deceased brother, he says. He states that the vacuum sealer was used for sealing various items and that there was nothing sinister in having it in that most households have sealers.

[23] The appellant completely fails to explain what he was doing on the day in question. He merely states the following in his answering affidavit:

'148. I believe that what I am about to say might open me up to ridicule but I have to deal with it as ridiculous as it may seem.

149. I have had an interest in "Radionics", "changing reality", "alcehmie" scientology and other unconventional studies for years. I am fascinated by these theories and believe in exploring ideas. This is part and parcel of my life philosophy and what I enjoy doing. I also experimented with chemicals to incorporate with radionics. I have experimented to change the growth pattern of plants and colour changes in plants and soil stimulation. History has shown that many unorthodox studies have resulted in chance discoveries.

150. I have never experimented for an illegal purpose and considered it my right to do so. I am not a drug dealer or manufacturer.'

Significantly, the appellant does not say what idea he was busy exploring when the police arrived. In my view, he offers nothing but a bald denial to the allegations made on behalf of the respondent. I agree, therefore, with counsel for the respondent that there is simply no version proffered by the appellant to counter the respondent's case. It follows that the court *a quo* correctly concluded that a scheduled substance, namely 1-phenyl-2-propanone was manufactured on the property for use in the unlawful manufacture of an undesirable dependence-producing substance, namely methamphetamine. In

other words, the appellant manufactured 1-phenyl-2-propanone, a scheduled substance, knowing that it was to be used (by himself) in or for the unlawful manufacture of a drug, methamphetamine, in contravention of s 3 read with s 13(b) of the Drugs Act.

[24] Counsel for the respondent contended that the appellant also contravened s 5(b) of the Drugs Act by manufacturing methamphetamine (see para [19] above). Section 1(1) of the Drugs Act defines 'deal in', in relation to a drug, to include, inter alia, 'manufacture'. But no methamphetamine was found on the property. The appellant had not as yet obtained the end result of the process. Counsel for the appellant accordingly submitted that the appellant could only be found to have contravened s 3 of the Drugs Act by manufacturing a scheduled substance knowing that it was to be used for the unlawful manufacture of a drug. But on the accepted evidence of Venter, the appellant was in the process of manufacturing methamphetamine when he was interrupted by the police. 'Manufacture' is defined in s 1(1) of the Drugs Act as including 'preparing of the substance'. At best for the appellant a court might find, in these circumstances and if he was not manufacturing, that he attempted to manufacture methamphetamine unlawfully, which in itself is 'an offence referred to in Schedule 1' to the Act (s 50(1)(a)), under item 34.

[25] There are other *indiciae* pointing to knowledge of the unlawfulness of the activities on the property when the police arrived, eg the dropping of the glass containing 1-phenyl-2-propanone by the appellant into the toilet bowl and the emptying, by Nicola Daniels, of the chilled methylamine into the kitchen sink. Further consideration of these facts is, however, unnecessary, as is the value of the chemicals and equipment (the appellant puts it at R12 000-R13 000, and says he spent approximately R4 000, a sizeable amount to spend on 'amateurish and unplanned' experiments, as he alleges).

Was the property an instrumentality?

[26] In *Cook Properties*[16] this court held that to constitute an instrumentality of an offence the property sought to be forfeited must in a 'real or substantial sense facilitate or make possible the commission of the offence' and that it 'must be instrumental in, and not merely incidental to, the commission of the offence'. As to immovable property the court held that the mere fact that an offence was committed at a particular place did not by itself make the premises concerned an instrumentality of the offence and that some closer connection than mere presence on the property would ordinarily be required.[17] Further, that either 'in its nature or through the manner of its utilisation, the

[16] Supra n 1 para 31

[17] At para 33: Quoting with approval *NDPP re Application for Forfeiture of Property in terms of ss 48 and 53 of the Prevention of Organised Crime Act, 1998,* unreported case no 2000/12886 (WLD) at para 12 and quoted and followed in *NDPP v Patterson* 2001 (2) SACR 665 (C) 667.

property must have been employed in some way to make possible or to facilitate the commission of the offence'. Where premises are used to manufacture, package or distribute drugs, or where any part of the premises has been adapted or equipped to facilitate drug-dealing (which in terms of s 1(1) of the Drugs Act includes 'manufacturing') they will in all probability constitute an instrumentality of an offence committed on them.[18]

[27] The following factors (not necessarily all of them) suggested by the Court of Appeals in *Chandler* as useful in measuring the strength and extent of the nexus between the property sought to be forfeited and the offence, are of assistance in the enquiry into whether property was an instrumentality of an offence: (1) whether the use of the property in the offence was deliberate and planned or merely incidental and fortuitous; (2) whether the property was important to the success of the illegal activity; (3) the time duration which the property was illegally used and the spatial extent of its use; (4) whether its illegal use was an isolated event or had been repeated; and (5) whether the purpose of acquiring, maintaining or using the property was to carry out the offence. As the Court of Appeals observed, no one factor is dispositive. A court must be able to conclude, after considering the totality of the circumstances, that the property was 'a substantial and meaningful

[18] Compare *Cook Properties* supra n 1 para 49

instrumentality' in the commission of the offence(s).

[28] The appellant's house on the property consists of a kitchen (where chilled methylamine was found in the refrigerator), two bedrooms next to each other, the first being adjacent to the kitchen, a room with a sink in it and which Venter refers to as 'opwaskamer' and a small room behind it. The small room adjoins both the second bedroom and 'opwaskamer'. At the far end from the kitchen, next to the 'opwaskamer' is the bathroom and toilet. The small room is fitted with an industrial quality extractor fan, the purpose of which, states Venter, is to expel the noxious and harmful gasses and smells caused by chemical reaction. Some laboratory equipment, benzene, the magnetic stirrer, hot plate and foil paper were found in this small room, which Venter characterizes as a 'clandestine laboratory' (defined, according to Venter, 'as any place where any controlled substances are synthesized, processed, tabulated or capsulated without the necessary authority'). Other chemicals, specialised glassware normally used in a laboratory, the electronic scale and the handwritten document were found in the 'opwaskamer'. There were more chemicals in the second bedroom and in the garage. Also found in the garage was a number of books on chemicals and chemical reaction.

[29] It is manifest, in my view, that the property, although used by the

appellant as his home, was adapted and equipped (by the fitting of an extractor fan and other laboratory paraphernalia) to unlawfully manufacture drugs from chemical substances. Its use was deliberate and planned and important to the success of the illegal activities, which could not be conducted openly. So far as the spatial use of the house is concerned, almost the entire house was used either to store chemicals and equipment necessary for the manufacturing process or to manufacture scheduled substances and drugs, particularly methamphetamine. Counsel for the respondent referred us to a number of judgments of Courts in the United States where properties involved in drug related offences were held to have been instrumentalities of such offences. I consider it unnecessary to refer to them. In my view, the respondent has shown, on a balance of probabilities, that the property was indeed an instrumentality of the offence of manufacturing 1-phenyl-2-propanone, a scheduled substance, which the appellant knew was to be used in or for the unlawful manufacture of a drug, in contravention of s 3, read with s 13, of the Drugs Act and also of s 5(b), read with s 13, in that he dealt in (by manufacturing), or attempted to deal in (by attempting to manufacture) methamphetamine as provided in items 22 and 34 respectively, of Schedule 1 to the Act.

Should a forfeiture order follow?

[30] In terms of the Act the property, being an instrumentality of an offence, is liable to forfeiture. Counsel for the appellant correctly argued, however, that a constitutional application of chapter 6 requires an element of proportionality between the crime committed and the property to be forfeited. In *National Director of Public Prosecutions v Cole and others*[19] Willis J reasoned that 'any proportionality analysis would have to weigh the impact of the forfeiture on a respondent, not only against the severity of his crime but also against the public interest in the prevention of crime, since the public interest 'is considered to be a legitimate objective that forfeiture is designed to serve'. I agree. And the court *a quo* considered it critical that a balance is struck 'between the public interest in effective crime fighting and the interests of private property owners affected by forfeiture laws'.

[31] It was contended on behalf of the appellant that there is neither a rational nor a reasonable connection between the purpose of chapter 6 of the Act and the forfeiture of the property in this matter. The provisions of chapter 6, counsel submitted, are draconian and operate very harshly to address a very specific 'mischief': They target complex and large criminal enterprises. Although he concedes that the definition of 'enterprise' includes an 'individual' counsel argued that the appellant does not fall into the category envisaged by

[19] [2004] 3 All SA 745 (W) para 13

the Act, in that he has never been convicted of a drug related offence; that there was no supporting evidence from anyone else that he dealt in drugs; no prohibited substances were found on the property; he is not a member of a gang and has no links with gangs; he neither possesses nor owns unexplained money or assets; and he is not wealthy. Further, counsel submitted that a similar search of the property a year ago yielded no proof of drug manufacturing. In all the circumstances, said counsel, a forfeiture of the property will amount to a punitive measure against an individual, with no wider impact, but duplicating the punishment of the alleged crime, which could have been actuated in the usual way in criminal proceedings. There is accordingly no rational connection between the aims of chapter 6 and the alleged 'mischief' in the present matter and there are no additional remedial aims which will be achieved, so the argument continued. There is thus no sufficient reason to deprive the appellant of the property and the application of the Act in these circumstances amounts to an unconstitutional and arbitrary deprivation of property.

[32] It is well to mention that we were informed from the bar that the appellant was acquitted of the charge(s) preferred against him, albeit on a technicality. I mention this merely because counsel argued that it would have been sufficient for the state to proceed against the appellant by way of

criminal action. But the acquittal of the appellant on a technicality indicates the difficulties the state has to contend with in its endeavours to combat drug-related crimes. And a prosecution, followed by a conviction and sentence is no bar to the invocation of chapter 6. Counsel accepted that organised crime has become a growing international problem and that societies in transition (like South Africa) are susceptible to organised crime groups, and that ordinary criminal law measures are ineffective in targeting these criminal organizations, thus necessitating extra-ordinary measures such as civil forfeiture in terms of chapter 6 of the Act.

[33] An argument that the Act was never intended to apply to single individual transgressors was rejected by this court in *Cook Properties*. It was held that the statute 'is designed to reach far beyond organised crime, money laundering and criminal gang activities'.[20]

[34] The inter-related purposes of chapter 6 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, and (d) advancing the ends of justice by depriving those involved in crime of the property concerned.[21] In my view, counsel

[20] Supra n 1 paras 64-65
[21] *Cook Properties*, supra n 1 para 18

minimises the appellant's culpability in this matter and the extent of his operations. Counsel submitted that the forfeiture sought can only be based on the assertion that the property was an instrument in the production of 1-phenyl-2-propanone, which was manufactured with the intention of synthesizing methamphetamine. It is true that the quantity of 1-phenyl-2-propanone actually manufactured by the appellant is unknown and that no methamphetamine was found on the property. Those are in my view not the only considerations. It is common cause that the appellant had ordered phenylacetic acid through Hiebner on two previous occasions: on 26 August 1999 and again on 27 October 2000. It is also common cause that the pheylacetic acid found on the property on 31 January 2001 (the day of the search), and which had also been obtained through Hiebner, had not as yet been used. There were also not insubstantial quantities of other chemical substances necessary for synthesizing drugs on the property as well as recipes for that purpose and a handwritten document with an alternative method to synthesize methamphetamine. I agree with counsel for the respondent that all indications are that the house was illegally used for some time before 31 January 2001.

[35] I have already found (para [28] above) that the house on the property was adapted and equipped to unlawfully manufacture drugs and that the

appellant was in the process of manufacturing methamphetamine when he was interrupted by the police. Against this background the fact that only a small quantity of 1-phenyl-2-propanone may have been found on the property becomes almost insignificant in considering the question whether sufficient reason exists to deprive the appellant of the property. There is in my view no substance in the contention that there is no rational relationship between the means employed (forfeiture of the property) and the end sought to be achieved (purpose of chapter 6 of the Act).

[36] Because of the conclusions to which it arrived in the three cases in *Cook Properties* this court was not called upon to determine what standard of proportionality applies in the assessment of the relationship between the nature and value of the property subject to forfeiture and the gravity of the crime involved and the role it played in its commission. In *Bajakajian* (supra) the minority (there was a narrow majority of 5-4) agreed with the majority that a 'defendant' would have to prove 'gross disproportion' before a court will strike down a fine (forfeiture) as excessive under the Eighth Amendment. The majority had held that the amount of the forfeiture must bear some relationship to the gravity of the offence 'that it is designed to punish'. The basis for the court ordaining the standard of 'gross disproportion' was (1) that reviewing courts 'should grant substantial deference to the broad authority

that legislatures possess in determining the types and limits of punishment for crimes' and (2) that any judicial determination regarding the gravity of a particular criminal offence will be inherently imprecise. In *NDPP v Cole*[22] Willis J expressed the view that proportionality 'in cases such as this' cannot be measured with fine legal callipers. In that case the respondents had established a secret laboratory on their property (which was ultimately forfeited) in which they manufactured drugs. Unlike the instant case, however, drugs were found on the respondents' property. There were also text books on the manufacture of drugs on the premises. The court was satisfied in that case that the forfeiture 'will not result in "a sledgehammer being used to swat a gnat"'. But importantly the court also observed that 'judicial discomfort with a consequence is insufficient to render (the forfeiture) disproportional to the extent that the relief sought may be refused'. In the instant matter the court *a quo* did not venture into this assessment process.

[37] The introduction of the forfeiture procedures by the Act was brought about because of the realisation, by the Legislature, that there was rapid growth, both nationally and internationally, of organised criminal activity and the desire to combat these criminal activities by, inter alia, depriving those who use property for the commission of an offence of such property. The

[22] Supra n 16 para 15

consequences may be harsh, but as Willis J said in *NDPP v Cole*[23] forfeiture may play an important role in the prevention and punishment of drug offences. In my view, courts should thus guard against the danger of frustrating the law-maker's purpose for introducing the forfeiture procedure in the Act. A mere sense of disproportionality should not lead to a refusal of the order sought. To ensure that the purpose of the law is not undermined, a standard of 'significant disproportionality' ought to be applied for a court to hold that a deprivation of property is 'arbitrary' and thus unconstitutional, and consequently refuse to grant a forfeiture order. And it is for the owner to place the necessary material for a proportionality analysis before the court.[24]

[38] I have already stated that consideration of the offence involved in this matter (for which a maximum penalty of 15 years plus a fine is provided) goes beyond the fact that only a small quantity of 1-phenyl-2-propanone may have been found on the property. Although only a small room in the house was converted into a 'mini-laboratory', virtually the entire house and garage were used to store or keep chemicals and other equipment. According to Venter the quantity of chemicals found on the property was sufficient to synthesize 400 to 600 grams of methamphetamine. Detective Captain Johan Smit estimates the street value of such a quantity of methamphetamine at

[23] Supra n 16 para 14

approximately R250 000. Whether the appellant was manufacturing drugs for sale or for personal use is unknown. But drug trafficking and drug abuse are a scourge in any society and are viewed in a very serious light. The penalties provided for drug offences in the Drugs Act are testimony to this.

[39] The appellant alleges (as at 14 January 2002 when he deposed to his answering affidavit) that he purchased the property for R155 000 in April 1996. A bond is registered over it in favour of First National Bank in the sum of R106 229.44. The 'current value' of the property, he says, cannot be more than R200 000. As Willis J observed in *NDPP v Cole*, forfeiture orders will almost always visit hardship upon those against whom they are made.[25] But that is precisely what is envisaged by the provisions of chapter 6 of the Act. In the instant case the appellant will be deprived of his home if the forfeiture order is not set aside, but those will be the consequences of his own choice: to use his home in the commission of a very serious criminal transgression. And to conduct such criminal activities in a residential area I consider to be a factor in aggravation.

[40] Though unemployed the appellant receives income of between R6 000 and R12 000 per month from rental earned on immovable property that was

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[24] *United States v Bajakajian* 524 US 321 (1998)
[25] Supra n 16 para 15

owned by his late father and situated in Bloemfontein. Clearly a forfeiture of the property would not leave the appellant destitute.

[41] In my view, no disproportionality justifying the refusal of a forfeiture order has been shown to exist. In the result I make the following order:

> The appeal is dismissed with costs, such costs to include those consequent upon the employment of two counsel.

L MPATI DP

CONCUR:

STREICHER JA)

MTHIYANE JA

CLOETE JA)

PONNAN JA

[42] I have had the benefit of reading the judgment of Mpati DP. The yardstick ‘significant disproportionality’ has been postulated by the learned Deputy President as the benchmark for holding that a deprivation of property is arbitrary and therefore unconstitutional. I feel constrained to disagree. That in my view is too strict an evaluative norm. As I understand the judgment, the property owner is burdened, in addition to placing the necessary material for a proportionality analysis before the court, with having to establish that the disproportionality is significant, before it can be held that the deprivation is arbitrary. If significant disproportionality had been the standard intended by the legislature it ought to have said so. The imposition of requirements that the Act has not ordained is, in my view, the very antithesis of judicial deference to broad legislative authority.

[43] Mpati DP looks to American jurisprudence for guidance. It is indeed so that *Bajakajian* adopted ‘gross disproportionality’ as the standard for determining whether a punitive forfeiture is constitutionally excessive. The

analogy with that case, however, in my respectful view, is less than perfect. The statute in *Bajakajian* directed a court to order forfeiture as an additional sanction when imposing sentence on a person convicted of a wilful violation of a reporting requirement. The forfeiture there did not apply to potentially innocent owners of property but was imposed at the culmination of a criminal trial upon a person who had been convicted of a felony. The enquiry in *Bajakajian* was whether the forfeiture in question violated the excessive fines clause enshrined in the Eighth Amendment. The Eighth Amendment provides: 'Excessive bail shall not be required nor excessive fines imposed, nor cruel and unusual punishments inflicted.' Against the benchmark 'excessive' stipulated in the Eighth Amendment, the standard 'grossly disproportional' may well be constitutionally defensible. It bears noting that unlike the legislation under consideration in *Bajakajian,* a criminal conviction is not a condition precedent to forfeiture in terms of our Act. Given the distinguishing features to which I have alluded, the reliance sought to be placed on that case, in my view, is not legally meaningful.

[44] In *National Director of Public Prosecutions v Rautenbach* 2005 (4) SA 603 at para 56 Nugent JA stated: '[W]here there is good reason to believe that the value of the property that is sought to be placed under restraint materially exceeds the amount in which an anticipated confiscation order might be

granted, then clearly a court properly exercising its discretion will limit the scope of the restraint (if it grants an order at all), for otherwise the apparent absence of an appropriate connection between the interference with property rights and the purpose that is sought to be achieved – the absence of an "appropriate relationship between means and ends, between the sacrifice the individual is asked to make and the public purpose that [it] is intended to serve" – will render the interference arbitrary and in conflict with the Bill of Rights'. Although speaking of a preservation order the principle enunciated by the learned Judge that there must be an appropriate connection between the interference with property rights and the purpose that is sought to be achieved applies with equal force to a forfeiture order.

[45] I shrink from prescribing a rigid and inflexible standard. Determining the gravity of a particular criminal endeavour is at best an inherently imprecise exercise. The scales cannot be calibrated with fine accuracy. It is for a court, in the exercise of its discretion, against the backdrop of the full factual matrix of the case, to determine whether there is an appropriate relationship between means and end. The imposition of a higher minimum threshold tips the scales in favour of the former, unduly fetters the discretion of the court that has to undertake the enquiry and disturbs the equilibrium sought to be achieved by the exercise. Courts should be vigilant to ensure that the statutory provisions

in question are not used *in terrorem* and that there has been no overreaching and abuse. On the other hand to insist on a precise correlation between means and ends would be misplaced. (See *Rautenbach* paras 87 and 88.) The NDPP, it bears noting, as an applicant for a forfeiture order is not required by s 50 of the Act to do more than establish on a balance of probabilities that the property in question is the instrumentality of an offence or the proceeds of unlawful activities. Why, it must be asked, must a property owner who complains of an arbitrary deprivation be confronted with a different and yet more onerous burden?

[46] The envisaged enquiry is not entirely unknown to our law. The application of s3 of the Conventional Penalties Act 15 of 1962 may afford a useful analogy from which helpful comparisons can be drawn. In *Western Credit Bank Ltd v Kajee* 1967 (4) SA 386 (N) 391 Caney AJP stated: 'The words "out of proportion" do not postulate that the penalty must be outrageously excessive in relation to the prejudice for the courts to intervene. …What is contemplated, it seems to me, is that the penalty is to be reduced if it has no relation to the prejudice, if it is markedly, not infinitesimally, beyond the prejudice, if the excess is such that it would be unfair to the debtor not to reduce the penalty; but otherwise, if the amount of the penalty approximates that of the prejudice, the penalty should be awarded'. Subject to the

reservation as to the suitability of the expression 'not infinitesimally' (see *Van Staden v Central SA Lands and Mines* 1969 (4) SA 349 (W) 352B) the judgment of Caney AJP has been generally accepted as an accurate statement of the approach adopted by our courts (RH Christie *The Law of Contract* 4 ed p652).

[47] The Act makes serious inroads into the common law rights of property ownership. Albeit less onerous than the standard ‘gross’ which has found favour in *Bajakajian*, I see no warrant for the introduction of the yardstick ‘significant’ or the imposition of any other rigid and inflexible qualifier. The draconian effect of the Act would be exacerbated, it seems to me, were the elevated benchmark ‘significantly disproportionate’ to be applied. That approach, coupled with the postulation that it is for the property owner to place the necessary material for a proportionality analysis before the court, can hardly be constitutionally defensible.

[48] For the rest I agree with Mpati DP.

V M PONNAN
JUDGE OF APPEAL