THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

REPORTABLE
CASE NO 160/07

In the matter between

THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS **Appellant**

and

FREDERIK HENDRIK GEYSER **First Respondent**
FAKKEL SCRAP DEALERS CC **Second Respondent**

CORAM: **HOWIE P, SCOTT, STREICHER, VAN HEERDEN JJA et MHLANTLA AJA**

Date Heard: **15 February 2008**

Delivered: **25 March 2008**

Summary: Immovable property an instrumentality of the offence of keeping a brothel in contravention of the Sexual Offences Act 23 of 1957 – property bought and renovated for sole purpose of that offence – forfeiture under the Prevention of Organised Crime Act 121 of 1998 not disproportionate to the Act's remedial purpose to inhibit crime undertaken as a business.

Neutral Citation: This judgment may be referred to as *National Director of Public Prosecutions v Geyser* (160/2007) [2008] ZASCA 15 (25 March 2008)

HOWIE P

HOWIE P

[1] In the year 2000 a close corporation, Fakkel Scrap Dealers CC, of which Mr Frederik Hendrik Geyser is the sole member, bought an immovable property in Church Street, Arcadia, Pretoria. The property comprised a single storey residence and grounds. The property was acquired to house the business that Mr Geyser and his domestic partner, Ms Irma Basson, opened there in September of that year. Up till the time of the proceedings with which this case is concerned the business traded as 'Ambassadors' and each of them had a half share in it.

[2] In June 2005 the National Director of Public Prosecutions (the NDPP), contending that 'Ambassadors' was a brothel operated in contravention of s 2 of the Sexual Offences Act[1], approached the High Court in Pretoria for a preservation of property order in terms of s 38(2) of the Prevention of Organised Crime Act (POCA)[2]. The order was granted. In due course application was made to that court under s 48(1) of POCA for an order in terms of s 50(1) that the property be forfeited to the State. The cited respondents were Mr Geyser and the close corporation.

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[1] Act 23 of 1957, as amended.
[2] Act 121 of 1998.

[3] The application came before Van Rooyen AJ and was resisted. Despite the opposition the learned Judge found that the business indeed constituted the keeping of a brothel in contravention of the Sexual Offences Act. However, because he also found that only the top floor was involved in the commission of this offence it was substantially only that portion of the property which, being an instrumentality of the offence within the meaning of POCA, fell to be forfeited. He accordingly ordered forfeiture of the top floor, its contents and a pro rata part of the unbuilt portion of the property. With leave of the court below the NDPP appeals and Mr Geyser, on his own behalf and for his close corporation, cross-appeals. The NDPP complains that there was not forfeiture of the entire property and Mr Geyser contends there should have been no forfeiture at all.

[3] Section 2 of the Sexual Offences Act makes it an offence to keep a brothel. This Act defines a brothel as including:

'any house or place kept or used for purposes of prostitution or for persons to visit for the purpose of having unlawful carnal intercourse ...'.[3]

In terms of s 3 certain persons are deemed to keep a brothel. They include:

'(a) ...

(b) any person who manages or assists in the management of any brothel;

[3] Section 1.

(c) any person who knowingly receives the whole or any share of any moneys taken in a brothel.'

[4] Section 20(1) of the Sexual Offences Act also penalises 'unlawful carnal intercourse ... with any other person for reward'.[4]

[5] 'Unlawful carnal intercourse' is defined as 'carnal intercourse otherwise than between husband and wife.'[5] However, it was held in *S v Jordan and others*[6] that this definition, if applied literally, would be unconstitutionally overbroad and that all the sections to which I have referred must be understood as regulating and criminalising only commercial sex.

[6] It must be so that where prostitution occurs in a brothel (as opposed to elsewhere) the brothel-keeper not only commits a s 2 offence but provides for, and so aids, commission not only of the s 20(1) offence committed by the prostitute but also the customer's simultaneous offence either of being an accessory at common law or of contravening s 18(2) of the Riotous Assemblies Act of 1956.[7]

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[4] Section 20(1)(aA), which provision became s 20(1A)(a) under the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, but only if committed by anyone 18 or older.
[5] Section 1.
[6] 2002 (6) SA 642 (CC) para 101.
[7] Jordan, the majority judgment, paras 11 and 14. Section 18(2) of the Riotous Assemblies Act states:
'Any person who –
(a) Conspires with any other person to aid or procure the commission of or to commit; or
(b) incites, instigates, commands or procures any other person to commit, an offence, whether at common law or against a statute or statutory regulation shall be guilty of an offence and liable on conviction to the punishment to which a person convicted of actually committing the offence would be liable'.

[7] Upon purchase of the property Mr Geyser, with the help of others, set about effecting a complete renovation of the building including the addition of a second storey. He also applied for a liquor licence for the business. In his application he said the business would be that of a guest house and sportsman's bar. Its name, he then claimed would be 'Elite Sportsmans Guesthouse'. The licence was granted.

[8] Nothing gives the lie more effectively to the allegation that the premises were intended to be, or were ever used as, a guest house than the layout and construction of the top floor. The liquor licence application included a sketch plan. Subject to irrelevant subsequent modifications, the top floor exists as shown on the plan. Of the fourteen rooms indicated as bedrooms, ten have an identical design. They contain no more than a shower, a double bed and a chair. There is no space for a cupboard, a handbasin, a toilet or any other accoutrements of the most basic or ordinary guest accommodation. Counsel for Mr Geyser conceded, understandably, that the premises had never been a guest house and that these ten identical rooms were, effectively, just cubicles for the purposes of prostitution.

[9] A police investigative operation conducted on 21 February 2003 revealed that the rooms in question each contained a supply of condoms and

were used by prostitutes for commercial sex. Consequent upon the operation Ms Basson paid an admission of guilt fine for keeping a brothel and two of the prostitutes[8] who offered their services at the premises each paid an admission of guilt fine.

[10] Mr Geyser was assisted by a loan of R600 000 from an acquaintance, Mr JDJ Hattingh, in purchasing the property and to secure the loan a bond in Mr Hattingh's favour was registered over the property. Mr Hattingh and Ms Basson made affidavits comprising portion of the evidence presented by the NDPP in the court below. Their affidavits provide detailed and convincing evidence that the business was conceived, begun and conducted ever since as a brothel. Its income is earned from liquor sales and from the hire of the first floor rooms each time a prostitute and a customer engage in commercial sex.

[11] In Mr Geyser's evidence in the court below he sought to deny that the property housed a brothel or, if it did, that he was party to its operation. His testimony consisted not only of affidavits. Curiously, the Judge permitted him to give oral evidence at one stage of the proceedings. However, it was limited to his evidence-in-chief and nothing turns on this procedural

[8] A synonym for 'prostitute' sometimes preferred is 'sex worker'. The Sexual Offences Act refers to 'prostitution' and 'prostitute' and I adhere to that word usage in this judgment.

eccentricity for it was subsequently agreed by the parties that the oral evidence could stand, in effect, as an affidavit. What is plain is that every part of his evidence that conflicts with the material aspects of the depositions of Mr Hattingh, Ms Basson and the police witnesses, or with the damning objective evidence to which I have referred, is so clearly untenable that it can properly be rejected merely on the papers. The balance of probabilities is so overwhelmingly against his protestations that even had he been cross-examined and adhered in all essential respects to his oral evidence-in-chief he could not have disturbed that balance.[9]

[12] Realistically, counsel for Mr Geyser did not seek to support his client's credibility. What he argued was that Mr Geyser was not keeping a brothel. All he was doing was letting the first floor rooms, and in doing so merely making them available for the practice of prostitution. Accordingly he was not, in effect, selling commercial sex.

[13] In this case the evidence points inescapably to the conclusion that Mr Geyser custom-built the building to operate as a brothel – albeit a brothel with a bar – and, but for minor intervals which are immaterial, operated it with Ms Basson until the NDPP's intervention. The drawing of that

[9] Cf *Administrator, Transvaal and others v Theletsane and others* 1991 (2) SA (A) at 197A-C.

conclusion is in no way hampered by evidence that some visitors to ‘Ambassadors’ came merely to socialise or that the business earned more from liquor sales than from prostitution or that the prostitutes were not employees but free agents. The fact remains that commercial sex was the drawcard and the focal activity.

[14] In any event brothel-keeping in contravention of the Sexual Offences Act does not have to involve, in counsel’s terms, personally selling commercial sex. If what Mr Geyser did was to let the upper rooms for the purposes of prostitution then, on the facts stated, clearly the building was a ‘house ... used for purposes of prostitution or for persons to visit for the purpose of having [commercial sex]’. In addition he is deemed to have kept a brothel because he knowingly received a share of the moneys of the business.

[15] As to the question whether the property or part of it was an instrumentality of Mr Geyser’s offence of brothel-keeping, the evidence shows that the ground floor housed the bar and provided convenient space and facilities for people to socialise. It was also the venue for performances of erotic dances and strip shows. It was the place where the prostitutes could be seen and chosen by their intending customers and where those visitors as

yet uncertain might, induced by liquor or the staged entertainment, or both, incline to customer status. More specifically it was where the customer, having decided on the prostitute of his choice, booked and paid for her services and for the use of an upstairs room. Those arrangements were made at the reception area on the ground floor where the management of 'Ambassadors' was conducted. The ground floor was therefore an essential component of the brothel. It follows that the court below erred in finding that only the top floor was involved.

[16] To be an instrumentality of an offence the property concerned must by definition in POCA, be 'concerned in the commission' of that offence. As the cases have interpreted that definition, the property must facilitate commission of the offence and be directly causally connected with it so that it is integral to commission of the offence.[10] The whole building satisfied that requirement. That was enough to make the entire property sufficiently linked to the offence to make it an instrumentality whatever insignificance the surrounding grounds had.

[17] Turning to the issue of forfeiture, POCA does not define organised crime. Species of what inevitably are organised crimes are described and

[10] *NDPP v Cook Properties* [2004] 2 All SA 491 (SCA) para 34; *NDPP v Mohunram* 2006 (1) SACR 544 (SCA) para 4*; Mohunram v NDPP* 2007 (4) SA 222 (CC) para 49.

provided for in the text.[11] For forfeiture to be ordered, the offence of which the property concerned is an instrumentality must be a Schedule 1 offence.[12] Schedule 1 contains an itemised list of common law and statutory offences. Item 11 is contravention of section 20(1) of the Sexual Offences Act. Item 33 is any offence, the punishment for which may be imprisonment exceeding one year without the option of a fine. The penalty prescribed for brothel-keeping is three years' imprisonment, with or without a fine of R6 000[13]. That is also the penalty for having commercial sex i.e. the prostitute's offence of contravening what is now s 20(1A)(a). In view of the provisions of s 18(2) of the Riotous Assemblies Act,[14] the customer would be liable to the same penalties, if not as a common law accessory in the alternative. Forfeiture in this case is therefore legally competent under POCA.

[18] Although s 50(1) of POCA requires forfeiture where property is an instrumentality of an offence, the courts must ensure that forfeiture does not amount to arbitrary and therefore unconstitutional deprivation of property. They must be satisfied that the consequences of a forfeiture order are

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[11] Section 2 (offences related to racketeering activities), s 4 (money laundering), s 6 (receiving the proceeds of unlawful activities) and s 9 (gang related offences).
[12] Section 38(1) read with ss 48(1) and 50(1).
[13] Section 22(a) of the Sexual Offences Act.
[14] Note 7.

proportionate to the purpose for which it is made. They therefore have a discretion to decline forfeiture, despite s 50(1), if the impact of the deprivation would be out of proportion to that purpose.[15]

[19] The court below did not deal with proportionality in its judgment. The limited forfeiture ordered was motivated by the instrumentality finding, not by any proportionality exercise.

[20] As pointed out in *NDPP v Vermaak*,[16] although there has been some difference of views on the question whether POCA applies to crimes which cannot be categorised as organised crimes,[17] this court has held that it does.[18] That decision was approved by a unanimous Constitutional Court.[19] That it does, was also the conclusion of five judges of the Constitutional Court in *Mohunram.*[20] The other judgments in that case left the question open but nevertheless countenanced an approach whereby, in an instance not involving a crime designated in the text of POCA, one would be concerned to determine how closely or remotely, as the case might be, the offence in such matter was connected to the main purpose of POCA. In the other

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[15] *NDPP v Cook Properties* (note 10) para 74; *NDPP v Van Staden* 2007 (1) SACR 338 (SCA) paras 5 and 8; *Prophet v NDPP* 2007 (2) BCLR (CC) paras 58 to 61*; NDPP v Mohunram* (note 10) paras 56 to 63, 122 to 123 and 142 to 143.
[16] 2008 (1) SACR 157 (SCA) para 4.
[17] Usually referred to as 'ordinary crimes' or 'individual criminal wrongdoing'.
[18] *Prophet v NDPP* 2006 (1) SA 38 (SCA).
[19] *Prophet v NDPP* (note 15).
[20] Note 10.

judgments it was suggested that the test might be whether the offence under consideration was such that it rendered conventional penalties inadequate.[21] One would therefore, on that approach, have regard to the penalties prescribed for the particular offence.

[21] In arguing against forfeiture, counsel for Mr Geyser stressed the predominance of the business' liquor income over its income from letting the upper rooms for prostitution. He urged that a comparison favourable to his client's case was to be drawn with *Mohunram's* case, where forfeiture was refused.[22] He also contended that it would be disproportionate if the State acquired the property and stripped Mr Geyser of an asset which the latter deposed was currently worth R2 million. Such a result, counsel said, would constitute excessive punishment for an offence for which the prescribed penalties, and particularly a possible sentence of three years' imprisonment, were sufficient deterrent.

[22] These submissions cannot, in my view, prevail. I have already said that commercial sex was the central feature of the business. Nothing justifies the inference that the bar would have existed, much less been viable, just on

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[21] *Mohunram*, paras 126 and 145.
[22] By a majority of six to five.

its own. It served to facilitate creation of an atmosphere conducive to what was the principal business of the house.

[23] In *Mohunram* the offences involved were contraventions of the KwaZulu-Natal Gambling Act 10 of 1996. The offender, through a close corporation, bought a commercial property. He partitioned it. In one part he conducted a lawful glass and aluminium business. In the other he installed 57 unregistered gaming machines, thus operating an unlicensed casino. He was charged with unlawful possession of the machines and with employing three people to work in the casino. The upshot was that the machines were confiscated and destroyed and he paid fines totalling R88 5000. As mentioned, forfeiture of the property was held by a divided Constitutional Court to be excessive and was refused.

[24] There are material differences between *Mohunram* and the present case. First, the property in that matter was bought and used for two purposes. One was legitimate. Here, the property was acquired solely for a criminal purpose.

[25] Secondly, gambling indeed has negative social implications and therefore requires statutory regulation.[23] But, armed with the necessary licenses and registration it is lawful. By contrast, brothels are not capable of legal regulation; they remain illicit.[24] And there can be little doubt, to my mind, that brothel-keeping would be seen by a majority in society, if not society as a whole, as morally more reprehensible than operating unregistered gaming machines. Brothel-keepers, as mentioned, commit their own offence and aid in the commission of the prostitutes' offence. In doing so, they themselves earn an income from prostitution.[25]

[26] Thirdly, the offending machines having been removed, which were the essential means by which the principal offence in *Mohunram* was committed, the property was capable of use for the legitimate glass and aluminium business. Here, there was no independent lawful enterprise. The brothel business and the property were inextricably linked. Stopping that business involved taking the property. It is not Mr Geyser's case that he ever had, or would in future have, another use for it.

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[23] '(G)ambling is an activity that could pose a threat to individuals' psychological, financial and even physical health, as well as those of their families and communities': *Magajane v Chairperson, North West Gambling Board* 2006 (5) SA 250 (CC) paras 81 to 82

[24] In *Jordan* a challenge to the constitutionality of ss 2 and 3 of the Sexual Offences Act failed.

[25] It was not shown that Mr Geyser actually lived off the earning of prostitution as opposed to just receiving an income from it. Living wholly or partly on the earnings of prostitution is an offence under s 20(1)(a) of the Sexual Offences Act.

[27] Fourthly, in *Mohunram*, apart from losing his machines (which he valued at R285 000), the offender paid a very substantial fine. In the present instance Mr Geyser's business partner paid an admission of guilt fine which was trifling by comparison. He himself, according to the evidence, refused to pay an admission of guilt fine, steadfastly maintaining that he had committed no offence. Accordingly he has, as yet, sustained no punishment at all.

[28] It follows that the result in *Mohunram* offers little if any assistance in the advancement of Mr Geyser's case.

[29] Coming to the contention that loss of a property allegedly worth R2 million would be unconstitutionally disproportionate, a number of important observations were made by this court in *NDPP v Vermaak*,[26] with which I respectfully agree, and which point the way to the answer in this case. They are contained in the following paragraphs:

'[10] It was pointed out in *Cook Properties* that an order of forfeiture inevitably operates as both a penalty and a deterrent but I think its primary purpose is remedial. Punishment and deterrence are part of the function of sentence and I do not understand the Act to be aimed at simply adding to sentences that might be imposed. On the contrary, I think it is apparent from the nature of the measure that forfeiture aims

[26] 2008 (1) SACR 157 (SCA).

primarily at crippling or inhibiting criminal activity, and it is in that light that the discretion to order it ought to be exercised.

[11] Where an offence has been committed in the course of a broader enterprise of criminal activity that is being conducted by the offender in association with others it can serve not only to inhibit the particular offender from continuing that activity but also to arrest the continuance of that activity by others who are party to the ongoing enterprise. And even where the offence is committed in the course of an ongoing criminal enterprise that is being conducted by the offender alone the withdrawal of property is capable of having a severely inhibiting effect on its continuance. It seems to me, in other words, that forfeiture is likely to have its greatest remedial effect where crime has become a business.'[27]

[30] The primary question, therefore, is not: would forfeiture constitute punishment (whether excessive or at all), but: would forfeiture have more than the necessary remedial effect?

[31] When Mr Geyser bought the property he must have known that prostitution and brothel-keeping were criminal. Although the evidence suggests the existence, before delivery of the *Jordan* judgments,[28] of speculation in some quarters that the result of that case might open the way

[27] In para 19 there is, furthermore, reference to the significance of the consideration (if present) that an offender has acted 'in deliberate defiance of the law'.
[28] Handed down on 9 October 2002.

to legalised brothel-keeping and prostitution, it is not his case that he thought so or that he banked on such a result.

[32] Undeterred by the *Jordan* decision and the police operation on 21 February 2003, he continued with his criminal activities.

[33] The evidence reveals that in September 2004 the police issued a formal notice to him, Ms Basson and Mr Hattingh that 'Ambassadors' was a brothel and that POCA could be enforced against them unless they desisted. Not even this very specific warning had any remedial effect. It is therefore appropriate to say that Mr Geyser acted throughout in deliberate defiance of the law.

[34] Counsel for Mr Geyser submitted that if the authorities wished to inhibit Mr Geyser's activities they had a substantial penal provision at their disposal and that forfeiture of the property would be disproportionate to the ends sought to be achieved. Without in any way understanding that submission as indicative of Mr Geyser's readiness to accept any sentence at all, the fact is that the record in this case justifies the inference that apart from the investigative raid and the imposition of insignificant admission of guilt fines, the police and the prosecution services had neither the resources nor the inclination to institute criminal proceedings in this matter. Once

again, however, even if prosecution had occurred and had resulted in punishment and, conceivably, some deterrence, the predominant focus, as I have said, is not on deterrence. As held by this court in *Vermaak,* where the offence involves the operation of a business, the primary focus is on remedial effect even though the question of an imposed or potential criminal sentence may still have some relevance.

[35] In my judgment the required remedial effect is one which will convey the unmistakable message to Mr Geyser, to other brothel-keepers and to the public at large that the law does not turn a blind eye to the persistent and obdurate pursuit of a criminal business and will act to demonstrate that brothel-keeping does not pay. The appropriate means by which to convey that message in this case is by forfeiture of the property in question.

[36] There is some dispute, and uncertainty, on the record as to the value of the property. It was bought for R320 000 and an unspecified amount was spent on its renovation. Although the bond debt comprises R600 000 in capital and very possibly double that sum in interest, counsel for Mr Geyser contended that Mr Hattingh would be barred by the *ex turpi causa* principle from recovery. Accordingly, it was argued, what Mr Geyser would be deprived of by forfeiture would be the full current value of the property. On

the case for the NDPP, an estate agent (who was not able to obtain access to the property) estimated a value of R900 00. Be that all as it may, the argument that forfeiture of the property would be disproportionate is, in my view, misplaced.

[37] Assuming, for purposes of argument, that forfeiture would deprive Mr Geyser of the full unbonded current value of the property, and that it is worth R2 million, he can have no legitimate cause for complaint. What he paid out of his own pocket he knowingly invested in a criminal enterprise and for no other purpose. There is no acceptable ground for saying he should get that sum back. As to the increase in the capital value of the property, this will have been due to the improvements he effected as well as to increases in property values in the area. Although the legal reason for his having access to this capital gain is because he is the sole member of the owner corporation, the factual reason is because he acquired the property, and used it more or less incessantly thereafter, solely for a criminal purpose. It is not alleged he would ever have carried on any other activity or business on the property nor, indeed, that he will do so now. It follows that if he had not embarked on his criminal enterprise he would not have achieved the gain that he seeks to retain.

[38] For all the reasons discussed, I hold that the NDPP has established that forfeiture will not be disproportionate to the purposes which POCA aims to achieve.

[39] The court below should therefore have ordered forfeiture of the entire property.

[40] The order of this court is as follows:

A. The appeal succeeds with costs, including the costs of two counsel.

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

C. The order of the Court below is set aside and replaced by the following order:

‘1. An order is granted in terms of the provisions of section 50 of the Prevention of Organised Crime Act 121 of 1998 (“the Act”) declaring forfeit to the State the immovable property situated at 829 Church Street, Arcadia, Pretoria, together with its contents (“the property”), which property is presently subject to a preservation of property order granted by this court on 15 June 2005.

2. The *curator bonis* appointed by this court in terms of the order granted on 15 June 2005 shall continue to act as such with authority to

perform all the functions specified in the Act subject to the provisions of the Administration of Estates Act 66 of 1965 and the supervision of the Master of the High Court.

3. The *curator bonis* shall have all such powers, duties and authority as provided for in the Act and in this order, including such powers, duty and authority reasonably incidental thereto and shall, in addition, be subject to the applicable provisions of the Administration of Estates Act 66 of 1965. The fees and expenditure of the *curator bonis* reasonably incurred in the execution of his duties shall be paid from the proceeds of the forfeited property.

4. In terms of section 56(2) of the Act, the property shall vest in the *curator bonis* on behalf of the State on the date on which the forfeiture order takes effect.

5. The *curator bonis* is authorised, as of the date on which the forfeiture order takes effect, to

5.1 assume control of the property and take it into his custody;

5.2 dispose of the property by private sale or other means;

5.3 deduct his fees and expenditure which were approved by the Master of the High Court;

5.4 deposit the balance of the proceeds in the Criminal Assets Recovery account established under section 63 of the Act, number 80303056 held at the South African Reserve Bank, Vermeulen Street, Pretoria;

5.5 perform any ancillary acts which are necessary in the opinion of the *curator bonis*, but subject to any directions of the Criminal Assets Recovery Committee established under section 65 of the Act.

6. The *curator bonis* shall as soon as possible but not later than within a period of 90 days of this order coming into effect, file a report with the applicant and the Master of the High Court indicating the manner in which he:

6.1 completed the administration of the property mentioned above and

6.2 complied with the terms of this order.

7. The Registrar of this court must publish a notice of this order in the Government Gazette as soon as practical after the order is made.

8. Any person affected by the forfeiture order, and who was entitled to receive notice of the application under section 48(2) but who did not receive such notice, may within 45 days after the publication of the notice of the forfeiture order in the Gazette, apply for an order under section 54 of the Act, excluding his or her interest in the property, and varying the operation of the order in respect of the property.

9. All the paragraphs of the order operate with immediate effect, save for paragraphs 4 and 5 which will only take effect on the day that an application for the exclusion of interest in forfeited property in terms of section 54 of the Act is disposed of, or after expiry of the period in which an application may be made in terms of section 54 of the Act.

10. The First and Second Respondents are ordered to pay the costs of this application jointly and severally, the one paying the other to be absolved.'

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CT HOWIE
PRESIDENT
SUPREME COURT OF APPEAL

CONCUR:
SCOTT JA
STREICHER JA
VAN HEERDEN JA
MHLANTLA AJA