



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Case No: 356/11

No Precedential Significance

In the matter between:

Sagren Perumal	First Appellant
Pushpaganthie Perumal	Second Appellant
Rajambal Pillay	Third Appellant
Sadhasivan Pillay	Fourth Appellant
P3 Trucking CC	Fifth Appellant
Sadhasivan Pillay N.O.	Sixth Appellant
Poogendran Naidoo	Seventh Appellant
Loganathan Perumal	Eighth Appellant
Marilyn Hariputh	Ninth Appellant
and	
The National Director of Public Prosecutions	Respondent

Neutral citation: *Sagren Perumal v NDPP* (356/11) [2011] ZASCA 37 (29 March 2012)

Coram: MPATI P, HEHER, SNYDERS, and MAJIEDT JJA and PLASKET AJA

Heard: 15 March 2012

Delivered: 29 March 2012

Summary: Forfeiture of assets – proceeds of unlawful activities – the Prevention of Organised Crime Act 121 of 1998.

ORDER

On appeal from: KwaZulu-Natal High Court, Durban (Moosa AJ sitting as court of first instance):

- 1 The appeal is upheld with costs.
- 2 The order of the court below is set aside and replaced by the following:

 'The application is dismissed with costs.'

JUDGMENT

SNYDERS JA (MPATI P, HEHER and MAJIEDT JJA and PLASKET AJA concurring):

[1] This matter is before us with leave of the court below (Moosa AJ in the Kwa-Zulu-Natal High Court, Durban). It originated as an ex parte application by the National Director of Public Prosecutions (NDPP), the respondent, in terms of s 38 of the Prevention of Organised Crime Act 121 of 1998 (POCA).¹ An order was obtained on 12 March 2004 (the preservation order) and the property attached in terms of that order comprises 221 items and some cash, as reflected in an inventory compiled by the curator bonis appointed by the court to take control of the property. It includes immovable and movable property owned by each of the appellants. The order was published in the *Government Gazette* on 2 April 2004 in terms of s 40 of POCA.² The respondent timeously approached the court, on essentially the same founding papers, for an order in terms of s 48 of POCA for the forfeiture of the property seized under the preservation order. The application was opposed by all the appellants, argued on 20 October 2008 and on 3 March

¹ Section 38 empowers the NDPP to approach a high court, ex parte, for an order preserving property reasonably believed to be 'an instrumentality of an offence', 'the proceeds of unlawful activities' or 'associated with terrorist and related activities'. When such an order is obtained the relevant high court authorises the seizure of the property and makes 'ancillary orders that the court considers appropriate for the proper, fair and effective execution of the order'.

² Section 40 provides for the expiry of a preservation order, 90 days after publication in the *Government Gazette*, unless there is an application for a forfeiture order pending before a high court in relation to the preserved property.

2011 a forfeiture order was granted of all the assets attached pursuant to the preservation order. The appellants appeal that order.

[2] All of the appellants that are natural persons are related to each other. The first appellant is married to the second appellant. The third appellant is the second appellant's mother. The fourth appellant is the second appellant's brother and is the sole member of the fifth appellant and also the sixth appellant, in his capacity as the sole member of the fifth appellant. The first four appellants and their families lived together in a house registered in the third appellant's name, to which I will refer as the Kings Avenue house. The seventh appellant is the nephew of the first appellant. The eighth appellant is the first appellant's brother, and is married to the ninth appellant.

[3] The third appellant passed away before the hearing of the matter in the court below. Both counsel confirmed that application was made and granted by the court below for the substitution of the third appellant with the first and second appellants, the executors in the estate of the third appellant. That amendment is not reflected in any of the papers, but I accept that it was duly made. Purely for convenience, I will continue to refer to the third appellant as such.

[4] The attached property comprises the Kings Avenue house, registered in the name of the third appellant, its contents, various motor vehicles, the content of the Boyz-2-Men night club and an investment policy. The case of the respondent was that all of the assets belong to the first appellant, despite being registered in the names of his various family members, and are either the proceeds of unlawful activities, or an instrumentality of crime.

[5] At the commencement of the hearing in this court, counsel informed us that the respondent has partially abandoned the judgment of the court below to the extent that the dispute between the parties in this court only involves the Kings Avenue house, an Iveco Eurotech truck (the truck) and a Henred Freuhauf Platform truck trailer (the truck trailer), registered in the name of the fifth appellant, and a Volkswagen Caravelle motorvehicle, registered in the name of the first appellant. The rest of the property has already been returned to the appellants. This agreement between the parties limits the issues between them to the extent that the interests of the seventh to ninth respondents are no longer

affected. Counsel were also agreed that the effect of this agreement should not have any influence on the costs order to be made.

[6] A successful application for forfeiture of assets in terms of s 48(1) of POCA requires a court to find, on a balance of probabilities, that the property concerned is either an instrumentality of an offence or the proceeds of unlawful activities.³ Section 48 is part of chapter 6 of POCA which focuses, unlike chapter 5, on property and not on the wrongdoer. There is therefore no need for an existing criminal conviction or pending criminal proceedings before the NDPP avails himself of the provisions of s 48 and there were none in this case.⁴ The court, faced with an application in terms of s 48, simply asks the question whether the property was an 'instrumentality of an offence' or 'the proceeds of unlawful activities'.⁵

[7] The abandonment of part of the judgment of the court below and the confinement of the case to the limited items of property listed above, further restricted the enquiry to whether the property was the proceeds of the alleged unlawful drug dealing activities of the first appellant and it is no longer necessary to consider whether any property was an instrumentality of an offence.

[8] The respondent's case is that the first appellant is one of the biggest, if not the biggest, drug dealer in the greater Durban area, that the assets still under preservation belong to him, are the proceeds of his drug dealing activities and have been registered in the names of his family members or their businesses in order to falsely create the impression that they do not belong to him. In order to establish these allegations in application proceedings the respondent faced the application of the well known principles established in *Plascon-Evans Paints*

³ Section 50: '(1) 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; (b) is the proceeds of unlawful activities; or (c) is property associated with terrorist and related activities.'

⁴ Section 50(4) 'The validity of an order under subsection (1) is not affected by the outcome of criminal proceedings, or of an investigation with a view to institute such proceedings, in respect of an offence with which the property concerned is in some way associated.'

⁵ *National Director of Public Prosecutions v R O Cook Properties (Pty) Ltd; National Director of Public Prosecutions v 37 Gillespie Street Durban (Pty) Ltd & another; National Director of Public Prosecutions v Seevnarayan* 2004 (2) SACR 208 (SCA) paras 19-21.

Limited v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A) at 634H-635C. The issue in this appeal therefore turns on whether the trial court correctly concluded that the undisputed allegations in the founding affidavit, taken with the appellants' allegations in the answering affidavits that are not clearly untenable, establish, on a balance of probability, that the first appellant is indeed a drug dealer and that he acquired the identified assets from the proceeds of his drug dealing activities.

[9] It is clear from the founding affidavits on behalf of the respondent that the first appellant had been under investigation by various members of the then Directorate of Special Operations for drug-related offences since the early 1980s.⁶ Apart from ordinary investigative procedures of questioning potential witnesses, the provisions of the Interception and Monitoring Prohibition Act 127 of 1992 were used to eavesdrop on the first appellant's conversations, s 252A of the Criminal Procedure Act 51 of 1977 (CPA) was used to attempt to entrap the first appellant and various searches in terms of the CPA were conducted, all in an effort to gather evidence of his drug dealing activities. Several of the investigators deposed to the affidavits that constitute the founding papers against the appellants.

[10] Amod Khalil Hoosen (Hoosen), a senior special investigator employed by the National Prosecuting Authority and attached to the DSO, adduces direct evidence in the second sentence of the following extract from his affidavit (the references to 'Perumal' in all the quotations that follow are references to the first appellant):

'My investigations revealed that Perumal had been involved in drug dealing activities for the past 16 years. On or about 1990 while conducting drug investigations in the Chatsworth area I arrested Perumal for possession of about 250 mandrax capsules.'

Hoosen does not mention any of the relevant circumstances surrounding this arrest. The first appellant discloses in his answering affidavit that the arrest never

⁶ The DSO was created by s 7 of the National Prosecuting Authority Act 32 of 1998, and special investigators could be appointed in terms of s 19A of the same Act. The DSO was disbanded by the National Prosecuting Authority Amendment Act 56 of 2008 and replaced by the Directorate for Priority Crime Investigation by the South African Police Service Amendment Act 57 of 2008.

led to a prosecution. This fact casts serious doubt over the cogency of Hoosen's allegation.

[11] The rest of Hoosen's affidavit does not reveal any personal knowledge of the first appellant's alleged drug dealing activities, but consists of conclusions based on affidavits gathered in the course of the investigations of the first appellant. What follows are his main conclusions:

'During the said investigations Perumal was linked and implicated in numerous drug-dealing incidences in which large amounts of drugs were found and seized from various persons whom Perumal used to store and sell drugs.

My investigations revealed that even though Perumal used Runners to conduct his drug dealing activities he was nevertheless directly actively involved in negotiating and conducting the drug dealing transactions himself.

My further investigations revealed that the proceeds derived from the sale of drugs were ultimately paid over to Perumal and that he regularly handled large amounts of cash, which was generated from the sale of drugs.'

[12] Clarence Francisco Jones (Jones), an investigator in the same position as Hoosen, described his conclusions as follows:

'My analysis of Perumal's drug dealing activities revealed that Perumal conducted his drug dealing activities in a highly organized and secretive manner. He only employed and used close associates and family members that he trusted to conduct his drug dealing activities. He further sold and supplied drugs mainly to established clientele whom he trusted. He did not directly do the selling of the drugs himself and he generally did not agree to be directly approached to do drug dealing transactions.'

[13] These conclusions contain an obvious contradiction with those drawn by Hoosen in the second extract quoted in para 11 above. The true source of the conclusions is the affidavits of interviewees. The interviewees' affidavits reveal a missing link between the available evidence that they provide and the confidently stated factual conclusions reached by the deponents to the founding affidavits. What follows are a few examples.

[14] Hoosen relied on an affidavit by one Crystal Moodley. She described herself as the mistress of one 'Shangwen', who had since passed away. The part of her affidavit that comes closest to implicating the first appellant, reads as follows:

'There was one occasion I was introduced to a person by the name of Bimbo. This Bimbo was the person that was Shangwen's friend and I was present when a deal was made for him to supply Ecstasy tablets. I knew Ecstasy as "E". The deal was done outside the nightclub owned by Bimbo known as Boyz to Men. The person that handed the "E" tablets to Shangwen was Poogen that worked for Bimbo. Shangwen was on numerous occasions with Bimbo and he used to phone him often and it would seem to me that they were close. There were occasions that I was present when he picked up monies from a drug dealer known as "Bill Kandasamy" or Merebank. Shangwen told me that he supplied "buttons" to this person.'

[15] This evidence does not support any of the conclusions drawn by Hoosen. Even if it is accepted that the reference to 'Bimbo' in the extract is a reference to the first appellant the allegations lack detail, fail to disclose the basis of the knowledge professed therein and, more fundamentally, do not provide any connection relating to drug dealing between the first appellant and any of the persons implicated.⁷

[16] Hoosen also relies on an affidavit by Krishnan Kamalassen Pather (Pather). He is a family member of the first appellant and made an affidavit after he was allegedly assaulted by, amongst other members of his family, the first appellant because he disclosed details of a stolen vehicle in the possession of the first appellant to the police. The only reference to a stolen vehicle in the papers concerns a vehicle that the first appellant bought that was later discovered to have been previously stolen. The vehicle was confiscated by the police, the first appellant made an affidavit in this regard and that appears to have been the end of the matter. Pather's objectivity and reliability, by reason of his alleged conflict with the first appellant, seem questionable. The contents of his disclosures affirm this.

⁷ There is evidence in the papers that the first appellant was also known as Bimbo, but whether all references to 'Bimbo' are necessarily references to the first appellant, is by no means clear.

‘ . . . [the first appellant] bought two houses in Pinetown, one which Steven and his mother-in-law lived in, and the other, which Colleen and he stayed in. I knew that Colleen and [the first appellant] had registered the house on her parents’ name. But I was also aware that the parents could not afford to buy the house as Rajambal’s husband did not earn well.

. . . [the first appellant] received a call after which he went to the outside dirt bin and took out a few tablets, which I was informed and knew to be mandrax (\pm 4 tablets). He then asked me to accompany him. We proceeded to the Pavilion Shopping Complex and met people outside Nando’s. There were three gentlemen in the car and one of whom I knew by sight. . . .

Thereafter using his cell phone [the first appellant] called his nephew Gordon whom we had left behind at the house in Pinetown. Gordon arrived a few minutes later and Bimbo told him to go into the gentlemen’s car and count the money. After doing so Gordon handed them a parcel, which I assumed could only be drugs (mandrax). This was the only incident that I had sight of and interaction with Bimbo’s drug deals. . . .

About four years ago I just moved to my current residence when Bimbo on one of his frequent visits asked me to store drugs for him. He offered to pay my rent and see to my food cost in return for me agreeing to his request. I blankly refused and it was the turning point in our relationship.’

[17] Suspicion may be aroused if all the allegations by Pather are accepted as fact. However, it is clear that, in relation to the immovable properties, he resorted to sweeping statements without revealing the source of his knowledge. In relation to the alleged drug dealing his statements are founded on speculation and presumption and do not warrant the factual conclusions sought to be drawn by Hoosen.

[18] Farouk Naroith (Naroith) also made an affidavit on which Hoosen relied for his factual conclusions against the first appellant. The highpoint of his allegations against the first appellant reads as follows:

‘Bimbo’s nephew, Poogen who also worked at the factory was also involved in the running of the Club. On numerous occasions I noticed Poogen selling ecstasy to patrons at the club. This was done in the presence of Bimbo and with his full knowledge. . . .

Bimbo employed an Indian male known to me as Tony to sell drugs inside the club . . . On numerous occasions I observed customers hand cash to Tony and he in return hands them pills. At the end of the evening or morning Tony hands the cash to either Bimbo or Poogen. I noticed that Bimbo's nephew Poogen was in charge of most of the operations of the club. . . .

On several occasions during 2000 until 2003 I noticed a drug dealer known as Shongwan to visit the Club and to be engaged in deep conversations with Bimbo. On some of these occasions whilst they spoke Bimbo would call Poogen to him and after a short conversation Shongwan would hand over a parcel to Poogen. This parcel in some instances would be wrapped in newspaper and would be tightly taped in brown tape. Poogen would take control of the parcel and after Shongwan had left I would see Bimbo with the parcel. I had occasion to find out the contents of such parcel when I witnessed Bimbo opening this parcel and it revealed large bundles of cash.'

[19] These allegations are largely based on the presumption that it was prohibited substances which were being discussed and sold. It also presumes knowledge of relationships whilst the facts that brought about that knowledge are not disclosed. It should also be borne in mind that what remains of the respondent's case after partially abandoning the judgment of the court below, only pertains to the first appellant's alleged drug dealing activities and not the question whether the Boyz-2-Men nightclub was an instrumentality of an offence.

[20] The affidavit by Naroath contradicts the affidavit by Pather in one vital respect. Whilst Naroath purports to describe drug dealing activities at the nightclub, Pather states that he attended the club on a number of occasions and did not see any drug related activities in the club.

[21] The respondent also relies on evidence seized by Hoosen from the seventh appellant's car. According to Hoosen numerous pieces of paper were seized which contain entries of names and amounts typical of keeping records of the sale of drugs. Copies of the seized pieces of paper are annexed to his affidavit. The first difficulty with this evidence is that the author of the documents is unknown. Secondly, no connection between the documents and the first appellant is alleged. There is a reference to 'Bimbo' in some of the pieces of paper, for example, '39/Bimbo Paid'. Insofar as this evidence is relied on by the respondent as evidence of the first appellant's involvement in drug dealing

activities, it fails hopelessly. The reference to 'Bimbo' is not alleged to be a reference to the first appellant. It is furthermore highly unlikely that the first appellant, an alleged major drug dealer, would buy small amounts of drugs from someone else.

[22] The affidavit of Jones reveals the same inadequacies. He relies on and attaches affidavits by interviewees who recount purchases of mandrax tablets from 'Guy', 'Aka' and 'Anita'. Not a single allegation is made that constitutes evidence that any of the said sellers conducted the sales for and on behalf of the first appellant. Jones also makes the allegation that conversations of the first appellant were recorded during which he had discussions with the second appellant about dealing in 500 mandrax tablets. He arrested the first and second appellants on the strength of these recordings and charged them with conspiracy to deal in mandrax. However, quite startlingly, what the respondent does not disclose in his founding papers is that by the time Jones made the allegations he knew, but failed to disclose, that the criminal prosecution that followed upon this charge had been withdrawn, because the recordings were found to be 'unsuitable for voice comparison analysis'.

[23] Despite having investigated the first appellant for almost 20 years prior to launching proceedings under POCA, despite intercepting the first appellant's conversations, despite searches and seizures of various premises and property, despite trying to entrap the first appellant, the respondent has only put up a smoke and mirrors case which at best raises suspicion but does not sway the balance of probability in his favour.

[24] All of the affidavits relied upon by the respondent fall short of age-old basic principles that pertain to evidence on affidavit. The following quote from *Geanotes v Geanotes* 1947 (2) SA 512 (C) at 514 is relevant:

'It will be noticed that the petitioner fails to give the source of her information, or the grounds of her belief. In *Grant-Dalton v. Win and Others* (1923, W.L.D. 48), it was laid down that the Court will not admit statements of belief and information in interlocutory matters unless the grounds of such information and belief are set out and the Court is satisfied that it is necessary to act upon such statements by reason of the grave urgency of the matter or for purpose of preventing an injury or a threatened illegal invasion of

rights. Mr. Justice Krause at page 186 said, *inter alia*: “The grounds of the deponent’s belief must be stated so as to show that he has some reasonable and proper cause for making the statement, and has not sworn merely to raise an issue. The Court of Appeal in England *In re Young Manufacturing Co., Ltd.* (1900, 2 Ch. 753), held that an affidavit of information and belief not stating the sources of information or belief, is irregular, and therefore inadmissible as evidence, whether on an interlocutory or a final application; and a party or solicitor attempting to use such an affidavit will do so at his peril as to costs.”

[25] The first appellant denies being involved in any form of drug dealing. He also denies that any of the property of the other appellants is his. On behalf of the respondent it was argued that the appellants have not answered the case against them fully or convincingly, but that their denials are vague, sketchy and lacking in details. Accepting, without deciding, that complaint as valid, the case that the appellants had to meet is a poor one and their response to it should be assessed in that light. That their response was not detailed does not supplement the case for the respondent.⁸ The denial of drug dealing activities is consistent with the appellants’ average middle class lifestyle which is apparent from the papers. Nothing the respondent has disclosed points to an affluent lifestyle lived off the proceeds of drug dealing. An intensive investigation over almost two decades has not revealed evidence of the proceeds of drug dealing, or a level of affluence that could possibly sustain an inference of unlawful activities.

[26] Aside from the first appellant’s denial of the respondent’s case, the latter faces an insurmountable hurdle when the allegations by the third appellant are considered. The immovable property the respondent seeks to have declared forfeit is registered in the name of the third appellant. She put up an affidavit explaining that her late husband had been economically active for all of his adult life and that he always managed to save some money. This much is apparent from the fact that during his lifetime they bought two immovable properties. When they acquired the second of the two they lived in one and rented out the other. This continued to render an income to her after his death. She also states that he kept his savings in cash in a safe at home and upon his death at the beginning of

⁸ *Administrator, Transvaal & others v Theletsane & others* 1991 (2) SA 192 (A) at 196C-E.

1998 he left her with approximately R500 000 in cash. She utilised R300 000 of this money to acquire the Kings Avenue property and with the rest she helped her son, the fourth appellant, to acquire the truck and truck trailer that enabled him to earn a living from conducting a transport business.

[27] Nothing in the papers suggests that her version is clearly untenable. The respondent suggests that it is improbable that her late husband earned enough to have enabled him to save an amount of approximately R500 000. No facts are alleged that give rise to such an improbability. On the contrary, the lifestyle of all the appellants supports the third appellant's version. Their lifestyle seems anything but extravagant. They live together, their vehicles are second hand and are relatively old. The Kings Avenue property was purchased during 2002 for R800 000 and was funded by a cash deposit of R300 000 and a mortgage bond in favour of a financial institution in the amount of R500 000 for which friends of the third appellant stood surety. That the money was not disclosed in the liquidation and distribution account drawn by the executor of the deceased estate of the third appellant's late husband gives rise to several plausible inferences and not only the one that the respondent seeks to draw, namely that the money was supplied by the first appellant.

[28] The nature of the property sought to be forfeited does not suggest the presence of an affluent drug dealer trying to hide his wealth, but of an average middle class family going about their daily living. The mere fact that the first appellant was present and, to some extent, instrumental in negotiating the acquisition of the property, does not give rise to the conclusion that the respondent seeks to draw. The allegations on behalf of the respondent that the first appellant is the owner of the Kings Avenue property, the truck and the truck trailer are based on hearsay evidence and assumption, the source or basis of which is not disclosed, and is no stronger than the allegations of his alleged drug dealing activities. The allegations that the first appellant disclosed to the sellers of the Kings Avenue property, the truck and the truck trailer that he was in actual fact the purchaser are highly improbable in the light of the respondent's case that the first appellant was weaving a highly secretive web of deceit about his ownership of the property. If that was so, it is unlikely that he would disclose his deceit to all and sundry.

[29] The respondent has failed to establish, on a balance of probabilities, that the first appellant was a drug dealer and also that the first appellant funded the acquisition of the Kings Avenue house, the truck and truck trailer. Consequently, the court below came to an incorrect conclusion on the application of the principles set out in *Plascon-Evans*.

[30] On behalf of the respondent this court was requested, in the event of a conclusion adverse to the respondent, to refer the matter back to the high court for the hearing of oral evidence. The conclusion to which I have come serves to illustrate a finding of the absence of a dispute of fact that requires a referral for the hearing of oral evidence.⁹ In addition, the desirability of a referral at a stage in the proceedings when much time has expired, witnesses have passed away and the respondent has not availed himself of the fact-finding proceedings available in terms of s 28 of the National Prosecuting Authority Act 32 of 1998, is questionable.

[31] Unfortunately something needs to be said about the judgment of the court below. It consists of 37 pages. Except for two paragraphs it summarises the history of the case, the evidence and the contentions on behalf of the parties. The last two paragraphs read:

‘Summary

- a) If this Court was to analyse and dissect the evidence in detail of many hundreds of pages placed before the above Honourable Court, it will unnecessarily burden this Judgment.
- b) The Court has taken the approach that it has recorded in this Judgment, a Summary of the main points argued by the Applicant and the main points argued by the Respondent.
- c) In the end result, the Court comes to the conclusion set out in the next paragraph.

Judgment by Court

⁹ *Rawlins & another v Caravantruck (Pty) Ltd* 1993 (1) SA 537 (A) at 544G-I.

After having carefully considered and weighed up all the evidence in the Application papers and the Respondents' Opposing Affidavits, and mindful of the fact that the onus is on the Applicant on a balance of probabilities to establish its case, this Court comes to the conclusion that the Applicant has discharged the onus, and that the Application for a forfeiture order is well founded and that the order is hereby granted.'

[31] The judgment contains no evaluation of the evidence, no application of legal principles and no reasoning that sustains the conclusion reached. As such it falls short of principles repeatedly stated in this regard. See *Botes & another v Nedbank Ltd* 1983 (3) SA 27 (A) at 27H-28A; *Road Accident Fund v Marunga* 2003 (5) SA 164 (SCA) paras 31-32; *Mphahlele v First National Bank of SA Ltd* 1999 (2) 667 (CC) para 12. Furthermore, the judgment was delivered two years and five months after the matter was argued. A delay of that duration is simply unacceptable, particularly in the light of the deficiencies that I have highlighted.

[32] The following order is made:

- 1 The appeal is upheld with costs.
- 2 The order of the court below is set aside and replaced by the following:

 'The application is dismissed with costs.'

S SNYDERS

JUDGE OF APPEAL

APPEARANCES:

For the Appellants: K J Kemp SC

Instructed by:

Shashi Marajh & Company, Chatsworth, Durban

Webbers, Bloemfontein

For the Respondent: V I Gajoo SC (with him R Naidoo and A Naidoo)

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