THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

Reportable

CASE NO: 368/06

In the matter between :

THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS Appellant

and

W J VERMAAK Respondent

Before:	**MTHIYANE, NUGENT & PONNAN JJA**
Heard:	**20 NOVEMBER 2007**
Delivered:	**28 NOVEMBER 2007**
Summary:	**Prevention of Organised Crime Act 121 of 1998 – instrumentality of an offence – motor vehicle driven under the influence of intoxicating liquor – whether appropriate that vehicle be forfeited.**
Neutral citation:	**This judgment may be referred to as *NDPP v Vermaak* [2007] SCA 150 (RSA)**

NUGENT JA

NUGENT JA:

[1] The respondent was convicted on two counts of driving under the influence of intoxicating liquor. The National Director of Public Prosecutions (NDPP) applied to the High Court at Pretoria under the provisions of chapter 6 of the Prevention of Organised Crime Act 121 of 1998 Act for an order that her motor vehicle be forfeited to the state. The court (Ranchod AJ) held that the Act does not apply to that offence and that a motor vehicle is in any event not an 'instrumentality' of the offence and refused the application. The matter was decided in the court below before this court held the contrary on both those issues in *National Director of Public Prosecutions v Van Staden.*[1] The NDPP now appeals with the leave of that court.

[2] The rules of precedent aim at maintaining a degree of legal certainty, which is itself an element of the rule of law, and are particularly important in courts whose decisions permeate the lower courts and also influence the manner in which the profession and the public order their affairs. This court has always recognised that while it is not bound absolutely by its earlier decisions it will depart from them only with considerable circumspection. Stratford JA expressed that as follows in *Bloemfontein Town Council v Richter*:[2]

'The ordinary rule is that this Court is bound by its own decisions and unless a decision has been arrived at on some manifest oversight or misunderstanding that is there has been something in the nature of a palpable mistake a subsequently constituted Court has no right to prefer its own reasoning to that of its predecessors – such preference, if allowed, would produce endless uncertainty and confusion. The maxim "*stare decisis*" should, therefore, be more rigidly applied in this the highest Court in the land, than in all others.'

[1] 2007 (1) SACR 338 (SCA).
[2] 1938 AD 195 at 232.

That was said at a time when this was the final court and it must be seen in that context. Needless to say this court is now bound to follow the legal principles that dictate decisions of the Constitutional Court (the ratio decidendi of such decisions). But in other cases the principles enunciated in *Richter* still apply.

[3] I would not ordinarily have revisited the decision in *Van Staden* – particularly while this court is constituted of only three members – but for the fact that the subsequent decision of the Constitutional Court in *Mohunram v National Director of Public Prosecutions*[3] might have cast doubt upon its findings. For in that case the Constitutional Court was unable to find that the Act (and chapter 6 in particular) applies to individual criminal wrongdoing and a majority of its members expressly left that question open. If the Act does not apply to offences of that kind then naturally *Van Staden* was wrongly decided. Whether we must in any event follow the decision in *Van Staden* if that is the case is fortunately not a matter that confronts us because of the conclusion to which I have come.

[4] There has for some time been a controversy, engendered largely by the short title of the Act, as to whether it is confined to cases of 'organised crime'. Precisely what that term is said to mean is not altogether clear – the term is not defined in the Act and is used on only one occasion but in circumstances in which its precise meaning is not critical[4] – but that is not important for present purposes. For present purposes I use the term to describe offences that have organizational features of some kind that distinguish them from individual criminal wrongdoing.

---

[3] 2007 (4) SA 222 (CC).
[4] Section 68(b).

[5] That controversy came to an end so far as this court was concerned when it decided in a trilogy of cases – I will refer to them collectively as *Cook Properties*[5] – that the Act is 'designed to go far beyond organised crime and clearly applies to cases of individual wrongdoing'.[6]

[6] That finding in *Cook Properties* was not decisive of any of those cases, which is the principal feature of a ratio decidendi as it was described by Schreiner JA in *Pretoria City Council v Levinson.*[7] But in the later case of *Prophet v National Director of Public Prosecutions*,[8] in which this court adopted and applied the finding in *Cook Properties*,[9] it was. For there was no suggestion in *Prophet* that the offence concerned (manufacturing a scheduled substance in contravention of s 3 of the Drugs and Drug Trafficking Act 140 of 1992) had features that brought it within the scope of 'organised crime'. On the contrary, as pointed out in the judgment, it was not even established that the drugs were being manufactured other than for the appellant's personal use.[10] And indeed, if such additional features were a jurisdictional requirement for the application of the Act, there would have been no need to have adopted the finding in *Cook Properties*.

[7] The decision in *Prophet* was upheld by the Constitutional Court in a unanimous decision.[11] I think it is clear that it viewed the evidence in the same light – had that court considered that special features of the offence concerned

---

[5] *National Director of Public Prosecutions v RO Cook Properties (Pty) Ltd; National Director of Public Prosecutions v 37 Gillespie Street Durban (Pty) Ltd; National Director of Public Prosecutions v Seevnarayan* 2004 (2) SACR 208 (SCA).
[6] Para 65.
[7] 1949 (3) SA 305 (A) at 317.
[8] 2006 (1) SA 38 (SCA).
[9] Para 33.
[10] Para 38.
[11] *Prophet v National Director of Public Prosecutions* 2006 (2) SACR 525 (CC).

(features of 'organised crime') were required to be present before the Act applied I have no doubt that it would have said what those features are and that they were present in that case. I think it follows irresistibly that that court, like this court before it, took the view that the Act is not confined to organised crime, for otherwise the order that it made could not have been given. That must be taken to be part of the ratio of its decision, even though the issue was not pertinently discussed, for every decision necessarily has a ratio and, as pointed out by Schreiner JA in *Fellner v Minister of the Interior*,[12] where the ratio is not expressed it must necessarily be ascertained by inference from the order that was given when seen in the context of the material facts.

[8] While the decision in *Prophet* stands we are bound to follow the legal principle that was first laid down in *Cook Properties* (and adopted in *Van Staden*) that the Act is not confined to organised crime but extends to individual wrongdoing. The individual wrongdoing with which we are now concerned – as *Van Staden* held – falls squarely within the terms of item 33 of Schedule 1. It seems to me that the finding in *Van Staden* that the offence falls within the purview of chapter 6 of the Act was inevitable. *Van Staden* also held, basing itself on the decision of this court in *Mohunram*, that a motor vehicle is an instrumentality of the offence. Nothing that has subsequently been said warrants reconsideration of that finding. Thus on both those issues I see no cause to now question the findings in *Van Staden* and in those circumstances the contrary findings of the court below cannot stand.

[9] But it is now well established, and was repeated in *Van Staden*, that an order for forfeiture may be made only if the deprivation in a particular case is

[12] 1954 (4) SA 523 (A) at 542F-H.

proportionate to the ends at which the legislation is aimed, and distinctions between different classes of offence will feature heavily in that part of the enquiry. I might add that I also think it is far more productive to make those distinctions at that stage of the enquiry, when broadly framed distinctions will suffice, than at the jurisdictional stage, when distinctions need necessarily to be precisely defined and have the real potential to produce anomalies. No doubt that is why, as has already been found, the legislature did not contemplate classes of offences being distinguished at the jurisdictional stage.

[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 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.

[12] Conversely, where the offence is not committed in the course of ongoing criminal activity, as in cases of the kind that are now in issue, the ordinary criminal remedies are quite capable of serving the purpose of deterring the commission of further offences, whether by the particular offender or by other offenders. If the sentences that are available to serve that purpose are inadequate it is open to the legislature to remedy that defect, but I do not think that forfeiture should be seen as a means of 'topping-up' penalties that are imposed by a court.

[13] It seems to me that those two extremes assist in exercising the discretion to order forfeiture: the closer the offence comes to the first extreme the more appropriate it will be to order forfeiture; and the closer the offence is to the second extreme the less appropriate that will be. That seems to me what Moseneke DCJ had in mind (and I respectfully agree) when he said, in one of the three judgments delivered in *Mohunram*,[13] none of which commanded a majority:

'[I]n deciding whether or not forfeiture of property would be proportionate, the question whether the instrumentality of the offence is sufficiently connected to the main purpose of POCA must be considered. I join Sachs J in emphasising that the more remote the offence in issue is to the primary purpose of POCA, the more likely it is that forfeiture of the instrumentality of the crime is disproportionate. In other words, when ordinary crime is in issue, the sharp question should be asked whether it is a crime that renders conventional criminal penalties inadequate.'

Naturally, the approach that I suggest is not inflexible. There might be cases in which the offence, by itself, falls within the second class that I have described, but where the circumstances in which it is committed call for something additional to the ordinary remedies to inhibit further offences. But I do not think

[13] Para 126.

I need elaborate. I intend only to indicate that it is with those broad principles in mind that I have exercised my discretion in this case.

[14] In my view the offence of driving under the influence of intoxicating liquor is unquestionably at the second extreme. I am well aware that it is a widespread and noxious offence, that contributes significantly to death and injury on the roads, as indicated by the evidence that was produced in this case. But the sentences that are available for the offence (a fine or up to six years' imprisonment), which in my experience are seldom applied to anything like the full, seem to me to be quite capable of having the necessary deterrent effect. It is true, as pointed out by the NDPP, that without a vehicle the offender cannot again commit the offence, but in reality it functions as little more than an additional penalty. A motor vehicle that is used to commit that offence seems to me to fall into a class that is altogether different to the infrastructure that is required to engage in, for example, the business of manufacturing or trafficking in drugs, or the business of operating an illegal casino. It seems to me that very special circumstances will be required for the forfeiture of a vehicle to be a proportionate response to the commission of the offence. The circumstances in which the offences in this case were committed are not particularly exceptional and can be briefly stated.

[15] On 5 July 2004 a motorist observed the respondent driving her vehicle over the kerb of a street in Groblersdal and almost colliding with a cyclist. She then drove diagonally across the street and collided with a fence. The motorist stopped his vehicle and approached the respondent but, oblivious to his presence, she reversed the vehicle and continued on her way. The motorist returned to his vehicle and followed her while alerting the traffic police. The respondent veered

from side to side of the street, passed a stop sign without stopping, almost collided with an oncoming vehicle, and drove into the grounds of a school where she came to a halt. The respondent was heavily intoxicated. A sample of blood revealed a concentration of alcohol of 0.36 grams per 100 millilitres of blood.[14]

[16] About four months later, on 25 October 2004, a traffic officer observed the respondent again veering from side to side as she drove along a street in Groblersdal. He stopped the respondent and observed that she was intoxicated. (An analysis of the concentration of alcohol in her blood is not disclosed by the evidence).

[17] Prior to the commission of those two offences the respondent was convicted on one occasion of driving a vehicle while the concentration of alcohol in her blood exceeded the prescribed limit (the concentration of alcohol in her blood on that occasion was 0.38 grams per 100 millilitres) and sentenced to 12 months' correctional supervision.

[18] The two incidents I have described resulted in the respondent being convicted (on pleas of guilty) on two counts of driving a motor vehicle while under the influence of intoxicating liquor. A report prepared by a probation officer detailed a rather unfortunate domestic life that had contributed to the respondent turning to drink. The probation officer reported that the respondent was anxious to have assistance to overcome her excessive drinking and recommended that she be referred to a rehabilitation centre. The respondent was sentenced on each count to a fine of R8 000 or three years' imprisonment, in each case suspended for five years on condition, amongst others, that she receive

[14] The maximum concentration of alcohol in the blood may be 0.05 grams per 100 millilitres of blood.

treatment for a minimum of six months, and her driving licence was suspended for a period of 12 months. The vehicle that is now sought to be forfeited (it is at present in the possession of the state under an interim preservation order) is a dilapidated Volkswagen Jetta.

[19] I do not think the circumstances I have described come even close to justifying a forfeiture order. It is apparent from the evidence I have described, and from the sentence that was imposed, that the court that convicted the respondent considered the seat of the problem not to be a course of reckless conduct in deliberate defiance of the law, but rather an illness of alcohol abuse, and I see no reason to disagree. It seems to me that forfeiture of the vehicle will function as no more than an additional penalty for the commission of the offences. That is precisely what we said was not permissible in the following passage in *Van Staden*:

'For the Act exists to supplement criminal remedies in appropriate cases and not merely as a more convenient substitute.'

On those grounds the order made by the court below was correct and the appeal must fail.

[20] The appeal is dismissed with costs.

R.W. NUGENT
JUDGE OF APPEAL

CONCUR:

MTHIYANE JA)

PONNAN JA)