REPUBLIC OF SOUTH AFRICA

IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Case No: 308/2002
Reportable

In the matter between

THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS Appellant

and

SAVVAS IOANNOU KYRIACOU Respondent

BEFORE: Howie P, Brand JA, Nugent JA, Southwood AJA and Mlambo AJA

HEARD: Mon 18 August 2003

DELIVERED: Fri 26 September 2003

SUMMARY**:** Restraint order in terms of Prevention of Organised Crime act, 121 of 1998 – requirements for

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JUDGMENT

MLAMBO AJA

[1] On 25 September 2001 the respondent was convicted by Lombard J in the Orange Free State Provincial Division of the High Court on 102 counts of receiving stolen property knowing that it was stolen and he was sentenced to fifteen years' imprisonment. The value of the property concerned was approximately R4,5 million. After convicting the respondent the learned judge ordered (in terms of s 34(1)(a) of the Criminal Procedure Act 51 of 1977) that the property be returned to the rightful owners. On the following day the learned judge commenced an enquiry to determine whether a confiscation order should be made as contemplated by s 18(1) of the Prevention of Organised Crime act 121 of 1998 ("the Act"). The learned judge found that the respondent had benefited from the offence of which he was convicted, and postponed further conduct of the enquiry to enable the

parties to make submissions relating to the amount of the benefit the respondent had received.

[2] On 11 October 2001, before the enquiry was concluded, the High Court, (Cillié J) made a provisional restraint order as contemplated by Section 26 of the Act, upon the *ex parte* application of the appellant. In terms of that order a *curator bonis* was appointed, and he was authorised to take possession of the property of various close corporations of which the respondent was the sole member, the property of various trusts controlled by the respondent, and certain other specified property, including the respondent's residence and its contents. On the return day that provisional order was set aside by Cillié J.

With leave granted by the court *a quo.*the appellant now appeals against the setting aside of that order. The judgement of Cillié J setting aside the provisional order is reported: see 2002 (2) SACR 67 (0).

[3] Sections 18 and 26 of the Act form part of an elaborate legislative structure created by Chapter 5 which is designed to enable the State to divest convicted criminals of the proceeds of their criminal activities. The central provision of Chapter 5 is s 18, which authorises a court that has convicted a person of an offence, to make what is referred to as a 'confiscation order'. The subsection reads as follows:

> "(1) Whenever a defendant is convicted of an offence the court convicting the defendant may, on the application of the public prosecutor, enquire into any benefit which the defendant may have derived from -
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> (a) that offence;
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> (b) any other offence of which the defendant has been convicted at the same trial; and
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> (c) any criminal activity which the court finds to be sufficiently related to those offences,
>
> and, if the court finds that the defendant has so benefited, the court may, in addition to any punishment which it may impose in respect of the offence, make an order against the defendant for the

> payment to the State of any amount it considers appropriate and the court may make any further orders as it may deem fit to ensure the effectiveness and fairness of that order".

[4] Section 12(3) provides that for purposes of Chapter 5 a person has benefited from unlawful activities 'if he or she has at any time, whether before or after the commencement of this Act, received or retained any proceeds of unlawful activities.'

(5) Section 25 and 26 (which fall within Part 3 of chapter 5) allow for a 'restraint order' to be made in anticipation of the granting of a confiscation order. The purpose of a restraint order is to preserve property so that it may in due course be realised in satisfaction of a confiscation order. Section 26(1) authorises the National Director of Public Prosecutions to apply to a High Court, *ex parte*, for an order 'prohibiting any person from dealing in

any manner with any property to which the order relates'. The remaining provisions of Part 3 confer wide powers upon the Court as to the terms of a restraint order. In particular, it may appoint a *curator bonis* to take charge of the property that has been placed under restraint, order any person to surrender the property to the curator, authorise the police to seize the property and place restrictions upon encumbering or transferring immovable property. It may also make a provisional restraint order having immediate effect and simultaneously grant a rule *nisi* calling upon the defendant to show cause why the order should not be made final. *National Director of Public Prosecutions v Rebuzzi* 2002(2) SA 1 (SCA)

(6) The circumstances in which a restraint order may be made are provided for in s 25(1) as follows:

"A High Court may exercise the powers conferred on it by s 26(1) [i e the powers to make a restraint order]-

(a) when –

(i) a prosecution for an offence has been instituted against the defendant concerned;

(ii) either a confiscation order has been made against that defendant or it appears to the Court that there are reasonable grounds for believing that a confiscation order may be made against that defendant; and

(iii) the proceedings against that defendant have not been concluded; or

(b) when-

(i) that court is satisfied that a person is to be charged with an offence; and

(ii) it appears to the Court that there are reasonable grounds for believing that a confiscation order may be made against such person."

[7] In support of his application for a restraint order in the present case the appellant relied upon an affidavit by Captain Van Wyk, the investigating officer in the case in which the respondent was convicted. Van Wyk pointed

out that the goods that were found in the possession of the respondent had been stolen, in some cases by operators of so-called fly-by-night businesses who obtained goods on credit and then disappeared. He said that he was investigating another matter in which goods to the value of approximately R300,000 had in similar fashion been obtained on credit and had been found on the premises of a business that was controlled by the respondent.

[8] The learned judge in the court *a quo* was of the view that no proper grounds had been established for making a restraint order for two reasons. In relation to the property that had been the subject of the conviction the learned judge pointed out that the benefit that the respondent had received in that regard had already been forfeited in consequence of the order made by Lombard J for the return of the property to the rightful owners and thus, said

the learned judge, it was 'highly unlikely that a confiscation order will be made'

[9] Furthermore, approaching Van Wyk's disputed evidence relating to the further alleged criminal activity of the respondent in accordance with the principles set out in *Stellenbosch Farmers Winery Ltd v Stellenvale Winery* (Pty) Ltd 1957 (4) SA 234(C) and *Plascon –Evans Paints v Van Riebeek Paints* 1984 (3) SA 623 (A), the learned judge concluded that the order sought by the appellant could not be granted 'if the truth cannot be established from the papers'. He went on to say that the "discretion to grant a restraint order is to be sparingly exercised and then only in the clearest of cases and where the considerations in favour substantially outweigh the considerations against,"relying in this regard on what was said in National

Director of Public Prosecutions v Mcasa and Another 2000(1) SACR 263 (TK) at 275 E-F.

[10] In my view the learned judge's approach to the matter was incorrect as was the court's approach in *Mcasa's* case. Section 25(1)(a) confers a discretion upon a court to make a restraint order if, *inter alia,* 'there are reasonable grounds for believing that a confiscation order may be made…' While a mere assertion to that effect by the appellant will not suffice *(National Director of Public Prosecutions v Basson* 2002(1) SA 419 (SCA) at 428 B-C) on the other hand the appellant is not required to prove as a fact that a confiscation order will be made, and in those circumstances there is no room in determining the existence of reasonable grounds for the application of the principles and onus that apply in ordinary motion proceedings. What is required is no more than evidence that satisfies a court that there are

reasonable grounds for believing that the court that convicts the person concerned may make such an order.

[11] A court that convicts an offender is not restricted to making a confiscation order in relation only to the offences of which the offender has been convicted. Section 18(1) of the Act authorises a court to make a confiscation order once it has found that the offender has benefited either from the offence of which he has been convicted, or from any other offence of which he has been convicted at the same trial, or from any criminal activity which the court finds to be sufficiently related to those offences. A finding that the offender has benefited in any of those respects constitutes the jurisdictional fact that is necessary for a court to exercise its discretion to make a confiscation order. Whether the court exercises that discretion, and the extent to which it does so, will depend upon the extent to which the

offender is found to have benefited from either the crime concerned, or from other offences of which he was convicted, or from related criminal activity.

[12] In the present case there is no dispute that the necessary jurisdictional fact already existed at the time the provisional restraint order was sought for Lombard J had already commenced the enquiry contemplated by s 18(1) and had found that the respondent had benefited within the meaning of the section. Indeed, such a finding was inevitable, bearing in mind that the respondent was found to have been in possession of stolen property to the value of approximately R4,5 million. The fact that he was relieved of that property by the order made by the trial court has no bearing on the existence of the jurisdictional fact that is necessary for the court to exercise its discretion to make a confiscation order. Although the respondent has already been deprived of the benefit that he received from the commission of

the crimes of which he was convicted (and in my view it would be an improper exercise of the court's discretion to order the confiscation of further property in relation to those crimes alone) that is not the end of the enquiry. Having found that respondent received a benefit from those crimes the court has a discretion to order the confiscation of benefits he received not only from that criminal activity but also from related criminal activity.

[13] In the course of the enquiry that is to follow as to the extent to which he has benefited from his crimes or from related criminal activity, the respondent is faced with the presumptions created by s22, in particular ss22(1) and 22(3) which provide as follows:

"22(1) For the purposes of determining whether a defendant has derived a benefit in an enquiry under section 18(1), if it is found that the defendant did not at the fixed date, or since the beginning of a period of seven years before the fixed date, have legitimate

sources of income sufficient to justify the interests in any property that the defendant holds, the court shall accept this fact as *prima facie,* evidence that such interests form part of such a benefit.

…

22(3) For the purposes of determining the value of a defendant's proceeds of unlawful activities in an enquiry under section 18(1)-

(a) if the court finds that he or she has benefited from an offence and that-

(i) he or she held property at any time at, or since, his or her conviction; or

(ii) property was transferred to him or her at any time since the beginning of a period of seven years before the fixed date,

the court shall accept these facts as *prima facie* evidence that the property was received by him or her at the earliest time at which he or she held it, as an advantage, payment, service or reward in connection with the offences or related criminal activities referred to in section 18(1);

(b) if the court finds that he or she has benefited from the offence and that expenditure had been incurred by him or her since the beginning of the period contemplated in paragraph (a), the court shall accept these facts as *prima facie* evidence that any such expenditure was met out of the advantages, payments, services or rewards, including any property received by him or her in connection with the offences or related criminal activities referred to in section 18(1) committed by him or her."

[14] Quite apart from the evidence of Van Wyk relating to the additional goods that were found, the appellant expressly put the respondent on notice that he intended to rely upon these presumptions when the following was said in his representative's founding affidavit:

"I submit that in view of the fact that the purpose of the restraint order is to preserve sufficient property to satisfy the confiscation order against the Respondent, the Honourable Court should not only have regard to the amount of

> R4,5 million for which he had been convicted but also take into account the likelihood that Respondent derived much of his income from criminal activities rather than from legitimate sources. In this regard I wish to bring the Honourable Court's attention that the Applicant intends to rely on the presumptions created by section 22 of the act and in particular section 22(3) of the Act with regard to the amount of the confiscation order."

[15] The question in the present case is thus whether there are reasonable grounds for believing that the trial court, taking into account these presumptions, may order the confiscation of the property that was placed under restraint. In my view there are indeed reasonable grounds for believing that that might occur, for the respondent has gone no way at all towards rebutting the presumptions that are created by s 22. (I should add that in his answering affidavit the respondent alleged that these

presumptions offend the constitution but that was not pursued in argument before us.)

[16] The respondent said, rather cursorily, that over the years he has earned profit from trading in shares and from property transactions but he provided little or no detail of the source of the assets used in these transactions, or of the profits that he made. In relation to the trade in shares, he provides no details of any profit or assets he acquired in this manner other that this was between 1967 and 1970. In relation to his property dealing, his explanation covers assets valued at approximately R6 million but leaves the sources of a substantial part of his estate unexplained. I hasten to add that I do not suggest that the respondent will not in due course be able to rebut the presumptions. All we are called upon to determine at this stage is whether there are reasonable grounds for believing that he may not do so, with the result that a confiscation order may be made. In my view the cursory and

vague response of the respondent to the challenge presented to him by s22 does indeed provide grounds for such a belief. I can see no other grounds upon which the discretion to grant a restraint order ought to be exercised against the appellant.

[17] Counsel for the respondent submitted that the appellant should be non-suited for failing to disclose in the *ex parte* application that the trial court had granted a forfeiture order in terms of s34(1) of the Criminal Procedure Act and the amount thereof. It was submitted that such disclosure was called for as it is likely to have influenced the court whether to grant the provisional order or refuse it. It is common cause that the s 34 order was not referred to in the papers

[18] It is correct that utmost good faith must be observed when initiating an *ex parte* application, and failure to disclose and present fully and fairly all

known material facts may constitute a ground to dismiss an application. The duty to disclose extends to all facts which might influence a court in coming to its decision. (*National Director of Public Prosecutions v Basson*, supra at 428(21) I-J.)

[19] The learned judge in the court a *quo* had a discretion, on being apprised of all the facts, to either set aside the provisional order or confirm it. An important consideration in the court *a quo* was the question whether the court that granted the provisional order might properly have been influenced by non-disclosure of the s34 order to refuse relief The learned judge in the court *a quo* heard full argument on this issue but elected to discharge the rule on another ground. He did not deem it necessary to deal with this one. I can see no reason to have discharged the order by reason of the non-disclosure in question. Had disclosure been made the s 34 order

would not have been the answer to a confiscation order. There was, in addition, as already said, the matter of related criminal activity and the force of the presumptions.

[20] Accordingly the appeal is upheld with costs, including the costs occasioned by the employment of two counsel. The order made by the court *a quo* is set aside and substituted for it is the following order:

> "The provisional restraint order is confirmed. The respondent is ordered to pay the costs of the application."

D MLAMBO
ACTING JUDGE OF APPEAL

CONCURRING:

HOWIE P
BRAND JA
NUGENT JA

BRAND JA:

[1] I have had the benefit of reading the judgments of both Mlambo and Southwood AJJA. I concur in the judgment of Mlambo AJA and I share the views reflected therein. I find myself in respectful disagreement with Southwood AJA.

[2] The difference in the diverging judgments seems to pertain, not so much to the interpretation of the relevant provisions of the Act, but to the application of these provisions to the facts of the case. Broadly stated, Southwood AJA is of the view that the jurisdictional requirements referred to in s 25(1)(a)(ii) have not been met in that there appear to be no 'reasonable grounds for believing that a confiscation order may be made against' the respondent. I cannot agree. I believe that reasonable grounds for such belief do indeed exist. Since both the relevant facts and the opposing arguments already appear from the two preceding judgments, I will state the reasons for the view I hold as succinctly as possible.

[3] It is true that the appellant has been deprived of the R4,5 million which appears to have constituted his entire benefit from the crimes of which he had been convicted. I agree with the view expressed by both Mlambo and Southwood AJJA that, if this were the end of the

matter, the trial court would be likely to exercise its discretion in favour of the respondent. However, I believe that there is a real possibility of the trial court concluding that a confiscation order is warranted on the basis that the respondent had derived substantial benefits from offences sufficiently related to those of which he had been convicted. Southwood AJA seems to be of the view that a restraint order can only be based on benefits derived from related criminal activities if the appellant can establish the respondent's involvement in such activities on a balance of probabilities (see par [16] of his judgment). I do not agree. All s 25(1)(a)(ii) requires are reasonable grounds for the belief that the trial court may (not will) conclude that respondent benefited from related criminal activities.

[4] The respondent was convicted on 102 counts of the common law crime of receiving stolen property which he knew to be stolen. The property concerned was found in his possession. It was worth R4,5 million. It is clear that he committed the crime of receiving stolen property on a grand scale. It is most unlikely that a 'fence' who had operated on such a scale would be so unlucky to be caught in possession, on one single occasion, of all the stolen property that he had ever received.

[5] Added to this, there is the fact that the respondent currently owns immovable property to the value of R42 million gross and in excess of R18 million nett of the amounts owing on the bonds registered over them. This is on his own case. In his answering affidavit the respondent does not begin to explain how he acquired this substantial estate. This is where s 22 of the Act comes in. In terms of this section it is presumed that these substantial assets are derived from related criminal activities. In this regard I do not believe that the operation of s 22 can be limited in the way suggested by Southwood AJA in paras [21] and [22] of his judgment. Of course, the respondent may be able to rebut this *onus* at the enquiry. However, since he had failed to indicate virtually any evidence upon which he proposes to rely in doing so, there must at least be reasonable grounds for believing that he may not succeed.

[6] Moreover, it goes without saying that the available evidence should be approached holistically and not on a piecemeal basis. What must *inter alia* be included in the complete picture, is the evidence of Captain van Wyk regarding the allegedly stolen goods to the value of R300 000 that were subsequently discovered on the premises of a business controlled by the respondent. Although, as is

pointed out by Southwood AJA, the allegation that these goods had allegedly been stolen is based on hearsay evidence, the respondent does not dispute this fact. Nevertheless I agree with Southwood AJA that the case made out by Van Wyk against respondent with regard to these goods, seen in isolation, is not entirely convincing, yet it fits the pattern established by his conviction. It is also true, as Southwood AJA points out, that these goods have, in any event, now been removed by the SAPS. However, that, with respect, is not the point. The goods were received from the same so-called 'fly by night' sources and stored in the same warehouse as those that formed the basis of the respondent's convictions. His defence with regard to these goods is a repetition of the one raised in the criminal prosecution. He again denies 'any knowledge of how the goods were obtained' and contends that he 'merely purchased them from sales representatives whom [he] had no reason to suspect of any crime'. In these circumstances there is, in my view, at least a reasonable prospect that the trial court may discern the emergence of a pattern.

[7] For these reasons I agree with Mlambo AJA that there are indeed reasonable grounds for believing that the trial court may order the confiscation of the property placed under restraint and that the

appeal should therefore be upheld with the accompanying costs order that he proposes to make.

…….
F D J BRAND
JUDGE OF APPEAL

Concur:

Howie P
Nugent JA
Mlambo AJA

SOUTHWOOD AJA

[1] I have had the benefit of reading the judgment of my colleague Mlambo AJA and find myself unable to agree with the reasoning and the result. In my view the appeal should fail.

[2] S 26(1) of the Act provides for the appellant to apply by way of an *ex parte* application to a competent High Court for an order prohibiting any person, subject to such conditions and exceptions as may be specified in the order, from dealing in any manner with any property to which the order relates. The purpose of such a restraint order is the preservation of the property so that any confiscation order made in terms of s 18(1) of the Act will be effective. Compare *National Director of Public Prosecutions v Phillips and Others* 2002 (4) SA 60 (WLD) [7].

[3] S 25 of the Act provides for the jurisdictional requirements for an order in terms of s 26. The jurisdictional requirement in issue in the present case is contained in s 25(1)(a)(ii):

'when –

it appears to the court that there are reasonable grounds for believing that a confiscation order may be made against that defendant.'

This jurisdictional requirement necessitates a consideration of the circumstances in which a confiscation order will be made and whether the established facts in the instant case would induce a reasonable person to believe that a confiscation order may be made against the respondent.

[4] S 18 of the Act gives the court the power to make a confiscation order. It provides that:

'(1) Whenever a defendant is convicted of an offence the court convicting the defendant may, on the application of the public prosecutor, enquire into any benefit which the defendant may have derived from –

(a) that offence;

(b) any other offence of which the defendant has been convicted at the same trial; and

(c) any criminal activity which the court finds to be sufficiently related to those offences,

and, if the court finds that the defendant has so benefited, the court may, in addition to any punishment which it may impose in respect of the offence, make an order against the defendant for the payment to the State of any amount it considers appropriate and the court may make any further orders as it may deem fit to ensure the effectiveness and fairness of that order.

(2) The amount which a court may order the defendant to pay to the State under subsection (1) –

(a) shall not exceed the value of the defendant's proceeds of the offences or related criminal activities referred to in that subsection, as determined by the court in accordance with the provisions of this Chapter; or

(b) if the court is satisfied that the amount which might be realised as contemplated in section 20(1) is less than the value referred to in paragraph (a), shall not exceed an amount which in the opinion of the court might be so realised.'

[5] S 12(3) of the Act provides that for purposes of Chapter 5 a person has benefited from unlawful activities if he or she has at any time, whether before or

after the commencement of the Act, received or retained any proceeds of unlawful activities. 'Proceeds of unlawful activities' is broadly defined in s 1 of the Act to mean 'any property or any service, advantage, benefit or reward which was derived, received or retained, directly or indirectly, in the Republic or elsewhere, at any time before or after the commencement of the Act, in connection with or as a result of any unlawful activity carried on by any person and includes any property representing property so derived'.

[6] S 19 of the Act provides for the determination of the value of proceeds of unlawful activities as follows:

'(1) Subject to the provisions of subsection (2), the value of a defendant's proceeds of unlawful activities shall be the sum of the values of the property, services, advantages, benefits or rewards received, retained or derived by him or her at any time, whether before or after the commencement of this Act, in connection with the unlawful activity carried on by him or her or any other person.

(2) In determining the value of a defendant's proceeds of unlawful activities the court shall –

(a) where it has made a declaration of forfeiture or where a declaration of forfeiture has previously been made in respect of property which is proved to the satisfaction of the court –

(i) to have been the property which the defendant received in connection with the criminal activity carried on by him or her or any other person; or

(ii) to have been property which directly or indirectly represented in the defendant's hands the property which he or she received in that connection,

leave the property out of account;

(b) where a confiscation order has previously been made against the defendant leave out of account those proceeds of unlawful activities which are proved to the satisfaction of the court to have been taken into account in determining the amount to be recovered under that confiscation order.'

[7] The clear purpose of these provisions is to ensure that the defendant does not continue to enjoy the benefit of the proceeds of the unlawful activities in which he is or was involved. Compare *National Director of Public Prosecutions v Rebuzzi* 2002 (2) SA 1 (SCA) [2] *National Director of Public Prosecutions v Phillips and Others* supra [42]-[43]. The provisions of s 18 make it clear that these are specific unlawful activities and not simply suspected unlawful activities. S 18(1) provides for an enquiry into any benefit which the defendant may have derived from offences of which the defendant has been convicted at the trial and any criminal activity which the court finds to be sufficiently related to these offences. The court can make this finding only if it knows what other criminal activity is involved. S 18(2) expressly limits the amount which the court may order the defendant to pay to the State under subsection (1) to the value of the defendant's proceeds of the offences or related criminal activities 'as determined by the court in accordance with the provisions of this chapter' (i e in accordance with s 12(3) and s 19 of the Act). Compare *National Director of Public Prosecutions v Rebuzzi* supra [2]-[3].

[8] To show that there are reasonable grounds for believing that a confiscation order may be made against the respondent, the appellant relied on

the fact that the respondent had been found guilty on 102 counts of receiving stolen property to the value of approximately R4,5 million and the fact that on 28 July 2000 the SAPS discovered allegedly stolen goods to the value of approximately R300 000 at the premises of a close corporation controlled by the respondent. In the appellant's founding affidavits no mention was made of the fact that the court convicting the respondent on the 102 counts of receiving stolen property had made an order in terms of s 34(1)(b) of the Criminal Procedure Act 57 of 1977 that the goods be returned to the persons entitled to them. This omission will be considered later.

[9] No other specific criminal activity by the respondent was alleged.

[10] In deciding whether it appears to the court that there are reasonable grounds for believing that a confiscation order may be made against the respondent it must be borne in mind that an application for a restraint order is a civil proceeding and not a criminal proceeding (s 13(1): *National Director of Public Prosecutions v Phillips and Others* supra [39]-[45]), that the rules of evidence applicable in civil proceedings apply (s 13(2)) and that any question of fact must be decided on a balance of probabilities (s 13(5)). Clearly what is required is proper proof of the relevant facts by means of admissible evidence.

[11] In *National Director of Public Prosecutions v Basson* 2002 (1) SA 419 (SCA) [19] Nugent AJA commented on s 25(1) of the Act as follows:

'Section 25(1) of the Act does not permit a court to grant a restraint order upon nothing more than a summary of the allegations made against the defendant concerned, and an expression of opinion by members of the appellant's staff that

a confiscation order will be granted (which is all that was before the Court in the present case). The section requires that it should appear to the court itself, not merely to the appellant or his staff, that there are 'reasonable grounds' for such a belief, which requires at least that the nature and tenor of the available evidence needs to be disclosed. Precisely what evidence is required, and the form that it should take, it is not necessary, to decide in the present case …'

[12] In order to establish that the respondent had benefited from criminal activities sufficiently related to the offences of which the respondent had been convicted the appellant relied on the affidavit of Capt Casparus Johannes van Wyk the investigating officer in the case in which the respondent had been convicted as well as another case in which the respondent had yet to be brought to trial. In his affidavit Capt van Wyk states that on 28 July 2000 the SAPS discovered allegedly stolen goods to the value of approximately R300 000 at the premises of VIVA CASH AND CARRY, a business controlled by the respondent, and attached and removed these goods from the premises. He then proceeds to explain why these goods might be stolen and states that the matter is still under investigation. He also says that the respondent did not dispute ownership of the goods and said that he, the respondent, was in possession of documents to support this claim but that no such documentary proof had been forthcoming. Capt van Wyk concludes by saying that the respondent has in all probability benefited from criminal activities other than those of which he has already been convicted and that these criminal activities are closely related to the offences of which the

respondent has already been convicted. Capt van Wyk is clearly referring to the allegedly stolen goods discovered, attached and removed on 28 July 2000.

[13] Capt van Wyk's evidence as to the question of the goods having been stolen is clearly hearsay and inadmissible. He does not disclose the nature and tenor of the evidence at his disposal to show that the goods were in fact stolen and that the respondent stole the goods or received the goods knowing them to be stolen. He does not even allege that the respondent stole the goods or received the goods knowing them to be stolen.

[14] The respondent admits that the SAPS discovered and attached goods to the value of approximately R300 000 at the premises of VIVA CASH AND CARRY and that these goods were alleged to be stolen. The respondent also admits that he did not deny ownership of the goods but states that he showed Capt van Wyk proof of ownership in the form of invoices – although he was not able to show him all the invoices because some were in the possession of sales representatives. The effect of the respondent's evidence is that he and the manager of VIVA CASH AND CARRY purchased the goods in the ordinary course of business. Capt van Wyk did not file a replying affidavit to dispute the correctness of the respondent's allegations.

[15] Against the background of the respondent's convictions the respondent's explanation may be regarded with some scepticism. However in the absence of positive averments by Capt van Wyk as to the crime the respondent committed and admissible evidence to support these averments the respondent's explanation is not so improbable that it should simply be rejected. The respondent also pointed

out that despite the fact that some 17 months had elapsed since the attachment of the goods the case had not been brought to trial and that the regional court hearing his bail application had wanted to release him on warning. These facts are not disputed by the appellant and there is no explanation for the failure to bring the case to trial. All this indicates that the respondent's involvement in other criminal activities is far from clear cut.

[16] The appellant therefore failed to establish on a balance of probabilities that the respondent was involved in any other criminal activity related to the offences of which he was convicted.

[17] Even if it is accepted (even though it is not alleged) that the respondent has again received stolen property to the value of approximately R300 000 it is common cause that the SAPS have attached and removed and (apparently) are still in possession of that property. This property is the only benefit which the respondent could have derived from the unlawful activity and he has been deprived of that benefit. The overwhelming probability is that if the respondent is again convicted of receiving stolen property the court will make an order in terms of s 34(1) of the Criminal Procedure Act just as was done in the case of the 102 counts of receiving stolen property.

[18] While it is correct that the respondent has benefited from unlawful activities as contemplated in s 12(3) of the Act, which is an essential prerequisite for an order in terms of s 18(1), I cannot agree that the fact that the respondent has been deprived of the property by an order in terms of s 34(1) of the Criminal Procedure Act (and will be deprived of the other property attached on 28 July

2000 by a similar order) has no bearing on whether the court may make a confiscation order. In my view these facts have a direct bearing on that question. I agree with my colleague Mlambo AJA that it would be an improper exercise of the court's discretion to make an order in terms of s 18(1) of the Act when the benefit of the crimes has already been removed by order of court. The same applies where the overwhelming probability is that the property which is the subject of the other apparent criminal activity will also be removed by order of court. At this stage it has been removed by the police and it will not be restored to the respondent unless he is acquitted.

[19] The position is that the respondent has not continued to enjoy the proceeds of the 102 offences of which he has been convicted or the allegedly stolen property which was attached and removed by the SAPS on 28 July 2000. There is therefore no reasonable ground for believing that a confiscation order will be made in terms of s 18(1) of the Act.

[20] I do not agree with Mlambo AJA that the position is altered by the presumptions contained in ss 22(1) and 22(3) of the Act.

[21] S 22(1) applies when the court does not know whether a defendant has derived any benefit from the offences of which he has been convicted or any other criminal activity which the court finds to be sufficiently related to those offences and only 'if it is found that the defendant did not at the fixed date, or since the beginning of a period of seven years before the fixed date, have legitimate sources of income sufficient to justify the interests in any property that the defendant holds'.

In the present case the court knows what benefit the respondent derived from the offences of which he was convicted and the other criminal activity. In the case of the former it was goods to the value of approximately R4,5 million and in the case of the latter it is goods to the value of approximately R300 000. In the light of these facts the presumption cannot operate.

Another reason why the presumption cannot operate is that it was not part of the appellant's case that the respondent did not have legitimate sources of income sufficient to justify the interests in the property which he holds. The appellant did not allege this or tender any evidence on this issue. The respondent's explanation for how he acquired the property was tendered by way of background information and was not disputed by the appellant.

[22] Similarly, the presumption in s 22(3) only applies when the court is not able to determine the value of the defendant's proceeds of unlawful activities. In the instant case the value of the defendant's proceeds of unlawful activities (determined in accordance with ss 12(3) and 19 of the Act) is known. The respondent's properties are therefore irrelevant. They are clearly not the proceeds of the unlawful activities relied upon by the appellant. Compare *National Director of Public Prosecutions v Phillips and Others* supra [76].

[23] The vague allegation made by the appellant in para (20) of the founding affidavit which is referred to by Mlambo AJA in para [14] of his judgment takes the matter no further. If it refers to criminal activities other than those already referred to in this judgment it falls far short of what is required to be established for the purpose of s 25(1)(a)(ii). It is simply a bald statement. There is no indication of the

nature of the criminal activities referred to and there is no indication of the nature and tenor of the evidence available to establish such criminal activities. Compare National Director of Public Prosecutions v Basson supra [19]. The weakness of the appellant's case is reflected in the appellants failure to reply to the respondent's denial of the allegations in para (20) of the founding affidavit; the respondent's pertinent allegation that the vast majority of his income and assets has been built up over a period of thirty years without resorting to any illegitimate means; the respondent's allegation that the paragraph contain speculation in the air and that no factual basis has been laid for the statements in the paragraph.

In the absence of evidence about unlawful activities there will be no basis for the court to make a finding that such criminal activity is sufficiently related to the offences of which the respondent has been convicted at the trial. Such a finding is a necessary prerequisite for the enquiry to be held in terms of s (18). Unless other criminal activity is proved and such a finding is made and the necessary facts established there is no basis for the presumptions to operate.

What the appellant seems to suggest and what Mlambo AJA seems to accept is that because the respondent has large property holdings and the respondent has not explained in detail how he acquired these properties (something which he was not called upon to do) these must have been derived from unlawful activities. In my view there is no factual basis for this.

[24] The court *a quo* could have set aside the order on the grounds of a failure by the appellant to disclose information which might affect the granting of the order. The most important omission was the failure to disclose that the court which

had convicted the respondent had made an order in terms of s 34(1) of the Criminal Procedure Act. This is clearly a relevant fact which would have influenced the court in coming to a decision. It is well established that the utmost good faith must be observed in *ex parte* applications. In *National Director of Public Prosecutions v Basson* supra par [21] this court emphasized that – 'all material facts must be disclosed which might influence a court in coming to its decision, and the withholding or suppression of material facts, by itself, entitles a court to set aside an order, even if the non-disclosure or suppression was not wilful or *male fide* (*Schlesinger v Schlesinger* 1979 (4) SA 342 (W) at 348E–349B).'

[25] This issue was argued fully before the High Court which did not decide to dismiss the application on this ground. Because of the view I take of the merits it is not necessary to decide whether this decision of the High Court should be altered on appeal.

[26] I would dismiss the appeal with costs.

B R SOUTHWOOD
ACTING JUDGE OF APPEAL