THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Case number 624/04
Reportable

In the matter between:

THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS **APPELLANT**

and

MAGDALENA ELIZABETH PARKER **RESPONDENT**

CORAM: HOWIE P, CAMERON, MLAMBO JJA, COMBRINCK et NKABINDE AJJA

HEARD: 15 SEPTEMBER 2005

DELIVERED: 1 DECEMBER 2006

SUMMARY: [1] Criminal law - Application for forfeiture order of property in terms of s 48 of Prevention of Organised Crime Act 121 of 1998: whether property sought to be forfeited to State is an 'instrumentality of an offence'
[2] Court's approach - to sustain a forfeiture court must be able to conclude on a totality of circumstances that the property was substantially instrumental in the commission of the offence.
[3] The Court's order is set out in paragraph [25]

JUDGMENT

NKABINDE AJA

[1] This appeal concerns the question whether the immovable property known as Erf 10085, Elsies River, situated at 13 Avondale Street, Elsies River ('the property'), was 'an instrumentality of an offence' within the meaning of the Prevention of Organised Crime Act 121 of 1998 ('the Act') and so liable to forfeiture under s50(1) (a).[1] The property was earlier made subject to a preservation order in terms of s 38[2] of the Act. The offences envisaged in the phrase 'instrumentality of an offence' as far as this case is concerned are those set out in Schedule 1 of the Act and

[1] S 1 of the Act defines 'instrumentality of an offence' as meaning 'any property which is concerned in the commission or suspected commission of an offence at any time before or after the commencement of this Act, whether committed within the Republic or elsewhere;' and 'property' as 'money or any other movable, immovable, corporeal or incorporeal thing and includes any rights, privileges, claims, securities and any related interest therein and all proceeds thereof;' In *Cook Properties*, referred to in para 14, *infra*, this court considered that 'the words "concerned in the commission of an offence" must … be interpreted so that the link between the crime committed and the property must be functional to the commission of the crime. … that the property must play a reasonably direct role in the commission of the offence. In a real or substantial sense the property must facilitate or make possible the commission of the offence. … the property must be instrumental in and not merely incidental to, the commission of the offence. For otherwise there is no rational connection between the deprivation of the property and the objective of the Act.'; See also the judgment of this court in Simon Prophet v NDPP, case number 502/2004 delivered on 29 September 2005.

[2] S 38 of the Act in so far as herein relevant provides for 'preservation of property orders':

'(1) The National Director [of Public Prosecutions] may by way of an e*x parte* application apply to a 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.

(2) The High Court shall make an order referred to in subsection (1) if there are reasonable grounds to believe that the property concerned –

(a) is an instrumentality of an offence referred to in Schedule 1; or

(b) is the proceeds of unlawful activities.

(3) …

(4) …'

which include any offences referred to in s 13 of the Drugs and Drugs Trafficking Act 140 of 1992 (the 'Drugs Act'). One of the offences mentioned in s 13(1) of the Drugs Act is the offence created by s 5(b) which makes it an offence to 'deal in'[3] dangerous dependence-producing substances or undesirable dependence-producing substances. One of the objects of the forfeiture mechanism in the Act is to assist in putting an end to serious and large scale criminality.[4]

---

[3] S1 of the Drugs Act defines 'deal in', in relation to a drug, as including 'any act in connection with the transhipment, importation, cultivation, collection, manufacture, supply, prescription, administration, *sale*, transmission, or exportation of the drug.

[4] A measure which aims to remove the incentive for crime, not punish. However forfeiture has a punitive result : In this regard, this court (*Cook Properties)* stated that -

'[6] The *Cook Properties…* turn on the meaning of "instrumentality of an offence" in the Act; …The meaning …must be determined in the lights of the overall purpose of the Act. In NDPP v Mohamed NO and Others(Mohamed (1)), the Constitutional Court considered the Act's purpose, as gathered from its long title and preamble, and then assessed its structure and effect, in particular Chapter 6. The provisions of chapter 6 it described as "complex and tightly intertwined, both as a matter of process and substance". Although formally Mohamed (1) concerned only the narrow issue of the constitutionality of the *ex parte* preservation procedure under section 38, Ackermann J's full exposition is in point. He first sketched the need for the legislation against the background of the inadequacy of conventional criminal penalties(paragraph 15):

> "Various international instruments deal with the problem of international crime in this regard and it is now widely accepted in the international community that criminals should be stripped of the proceeds of their crimes, the approach has similarly been adopted by our legislature.".'

'[17] We agree that Chapter 6 has remedial objectives. But these cannot disguise the fact that forfeiture, once exacted, operates as a punishment. The United States Court in a not dissimilar context has observed that the notion of punishment cuts across the division between civil and criminal law. Civil proceedings may advance punitive as well as remedial goals, and sanctions frequently serve more than one purpose. Hence the fact that a civil statute is remedial does not mean that it may not also have a punitive dimension. That certainly applies to Chapter 6. The Legislature has expressly ordained that proceedings under the chapter are "civil . . . not criminal" (section 37(1)), and its provisions have some penal element. At the same time, the chapter's punitive dimension does not mean that its sole or even predominant aim is to punish those implicated. As pointed out in *Mohammed (1)*, the primary objective of provisions of this sort is "to remove the incentive for crime, not to punish" criminals.'

[2] The National Director of Public Prosecutions ('NDPP') applied for and was granted a preservation order in respect of the property by the Cape High Court ('the court *a quo*'). In subsequent forfeiture proceedings pursuant to s 48(1) of the Act[5] the court *a quo* (Cleaver J) dismissed the NDPP's application with costs. With the leave of that court the NDPP now appeals.

[3] The evidence relied upon by the NDPP is set out in affidavits by Advocate Jan Gerber, the Deputy Director of Public Prosecutions, and of Detective Ludwig Durrbaum, respectively. The affidavit of Durrbaum was filed in support of the preservation application. The NDPP's case was that the property, which is currently under the control of a *curator bonis,* is, according to the information procured from the Registrar of Deeds, owned by the respondent. It consists of a main house and an outer

---

[5] The section provides:

'If a preservation of property order is in force the National Director, may apply to a High Court for an order forfeiting to the State all or any of the property that is subject to the preservation of property order.'

room (‘granny flat’) at the back of the main house. The respondent lives in the granny flat. Her son, Henry Parker (‘Henry’), his wife and children live in the main house. A sizeable number of paying lodgers and their families lives in the structures on the property. The property is surrounded by a high wall with metal spikes on top. The only access into the property is through a gate in front of the house. The gate leads into a driveway which is covered by a roof and leads to the main house. There is a couch and television set in the covered driveway. Henry Parker managed the lodging business for the respondent.

[4] Adjacent to the property is a vacant plot No. 10086 (‘the plot’) owned by the municipality. There is a motor vehicle wreck and a shack on the vacant plot.

[5] The NDPP alleged that numerous complaints about drug dealings in the property had been received by the police. The police intelligence

had also reported that Henry used the property as a drug shop. In consequence ten successful entrapment operations carried out in terms of s 252A[6] of the Criminal Procedure Act 51 of 1977 ('CPA') confirmed the complaints and report. These took place over the period June 2002 to July 2003.

[6] The entrapment operations were carried out by way of 'test buys' whereby an undercover policeman ('the trap') was, on different occasions, sent to the property to purchase drugs in the form of dagga 'stoppe,' mandrax and ecstasy tablets as well as crack cocaine crystals. The trap, on such different occasions, entered the property through the gate leading into the covered driveway. He would order the drugs from somebody present on the property at the time. He would wait on the couch in the driveway whilst the seller exited the property through the

[6] Which essentially authorises and renders lawful the use of traps and undercover operations in certain circumstances and deals with the admissibility of evidence so obtained.

same gate and returned with the ordered drugs. In two of the entrapment operations the seller, after taking the order, was seen going to the plot and returning to the property through the gate, carrying the ordered drugs. In one of such operations the seller, after the trap had ordered ten ecstasy tablets and ten crack cocaine crystals, emerged from the main house with only a portion of the order. He explained to the trap that 'they were out of stock.'

[7] Apart from the evidence relating to the entrapment operations, routine patrol investigations during the period September 2001 to October 2002 revealed, *inter alia*, that drugs were found stored on the plot. These consisted of 25 mandrax tablets, ecstasy tablets, a large number of dagga 'stoppe' some of which were found in the wreck and the shack, while others were found elsewhere on the plot.

[8] Forensic analyst reports revealed that the crack cocaine crystals, ecstasy and mandrax tablets and the dagga 'stoppe' contained 'dangerous' and 'undesirable dependence-producing substances.[7]

[9] Some of the sellers were arrested at the completion of a particular deal. In other instances arrest of the seller followed after completion of a number of deals. One of the sellers, a man named Heyens, was arrested and charged with dealing in drugs in contravention of the Drugs Act. He pleaded guilty and was convicted and sentenced. That, however, did not deter him from continuing to sell drugs on the property. He did so despite having been notified[8] by the police to desist from doing so. He was subsequently arrested and charged again with dealing in drugs. Another arrested seller, had sold crack cocaine crystals and ecstasy tablets to the

[7] See Part 11 of schedule 2 of the Act.
[8] The notice was addressed to the 'Wettige huurder' and was served on Heyens on 22 August 2002.Heyens acknowledged receipt by signing 'N.V.T' (nie van toepassing).

trap. He was the accused in several drug related cases which all arose from the entrapment operations conducted on the property.

[10] During November 2002 and after numerous successful entrapment operations and Heyens' arrest, the police attempted to serve a notice on the respondent. She refused to acknowledge receipt of it or to sign it. A copy of the notice was nonetheless left with her. The notice sought to inform her that the police were of the opinion that that the property was an instrumentality of an offence and that the selling of drugs on the property was unacceptable and should cease with immediate effect, failing which an application for a forfeiture order in terms of Chapter 6 of the Act would be made.

[11] The respondent denied that her property was an instrumentality of drug offences. In her answering affidavit in the preservation application the respondent, in an attempt to refute the NDPP's allegations, stated:

'… ek ontken en/of (is) onbewus van die feit dat my eiendom 'n misdaadinstrument van 'n misdaad bedoel in Bylae (1) … [e]k is bewus dat daar voortdurend 'n toeloop is van mense op die erf, dog is ek onbewus wie hulle is. Ek neem maar aan dat dit die huurders en/of hulle familielede en/of vriende is. Die huurbesigheid word gehanteer deur my seun en sy eggenote aangesien ek oud en ongeletterd is …. Ek ontken dat is onbewus dat daar onwettige aktiwiteite plaasvind op my erf. …. [I]n die gevalle waar dwelms gekoop is, die dwelms van die aangrensende leë erf bekom is.

[12] In her answering affidavit in the forfeiture proceedings she reiterated, *inter alia*,-

'ek ontken dat my erf as 'n misdaadinstrument gebruik word en indien dit wel gebruik word, is ek onbewus daarvan, en verder, dat ek ontken dat daar onwettige bedrywighede op die erf plaasvind. . . . dat ek 'n onskuldige eienaar van die eiendom is wat geen persone toesteming gegee het of toegelaat het om onwettige bedrywighede uit te voer op my eiendom.'

In short she contended that she was an 'innocent owner'. It is clear that the respondent did not really take issue with the allegations regarding the

entrapment operations, the arrests on the property, that the property was known as a drug outlet, and that it had facilities in the driveway described by the police as having served the convenience of buyers and thus facilitated drug deals.

[13] The preservation procedure in terms of s 38 of the Act[9] is described by Ackermann J in *NDPP and Another v Mohamed NO and Others* 2002 (4) SA 843 (CC) as a two-staged procedure whereby property which is an instrumentality of a criminal offence is forfeited. The Constitutional Court stated further that:

'. . . Chapter 6 provides for forfeiture in circumstances where it is established, on a balance of probabilities, that property has been used to commit an offence … even where no criminal proceedings in respect of the relevant crime have been instituted. … Chapter 6 is therefore focused, not on wrongdoers, but on property that has been used to commit an offence or which constitutes the proceeds of crime. The guilt or

[9] See fn 2, *supra.*

wrongdoing of the owners or possessors of property is, therefore, not primarily relevant to the proceedings.

… There is, however, a defence at the second stage of the proceedings when forfeiture is being sought by the State. An owner can at that stage claim that he or she obtained the property legally and for value, and that he or she neither knew nor had reasonable grounds to suspect that the property … had been an instrumentality in an offence ('the innocent owner' defence)'.[10]

[14] In the recent judgment in *NDPP v RO Cook Properties (Pty) Ltd and Others* 2004 (2) SACR 208 (SCA); 2004 8 [BCLR] 844 (SCA), this court had occasion to determine, *inter alia*, whether a hotel where drug deals frequently occurred was 'an 'instrumentality of an offence'. The court, after considering the purport of the Act stated that the Legislator, in its definition of the phrase, 'instrumentality of an offence', 'sought to give the phrase a very wide meaning'. It however found that 'a literal interpretation … could lead to forfeiture of property whose role in or

[10] *Supra*, at paras 17 and 18.

utility to a crime is entirely incidental to its commission …', that '[o]ne meaning of 'concerned' is 'to be in a relation of practical connection with; to have to do with; to have a part or share in; to be engaged in; with'[11] and concluded that 'unbounded literalism is not appropriate' for the following reasons:

'… First, the purport of the statute itself suggests some restriction. The purpose of Chapter 6's forfeiture provisions is signalled in the part of the Act's Preamble that states that "no person should benefit from the fruits of unlawful activities, nor is any person entitled to use property for the commission of an offence". The "use" of property "for" the commission of crime denotes a relationship of direct functionality between what is used and what is achieved …

… The second reason for limiting the provisions is that they must be construed consistently with the Constitution. The Bill of Rights provides that "no law may permit arbitrary deprivation of property". And a literal application of the provisions could well lead to arbitrary deprivation. The Constitutional Court has held that a

[11] *Cook Properties,* para 12.

deprivation of property is arbitrary when the statute in question does not provide sufficient reason for the deprivation or is procedurally unfair".[12]

The remarks and conclusion, above, with which I agree, were taken into account by the court *a quo.*[13]

[15] In analysing the evidence the court *a quo* correctly found that the appellant had established that drugs were sold with considerable regularity on the property.[14] Having said that it went on to acquire whether the regular sale of drugs on the property made the property 'an instrumentality of an offence'. It compared the factual situation in this case with the situation where a drug dealer uses a secluded alley in a city as a place from which drugs are regularly sold. The court concluded that as the alley could not constitute 'an instrumentality of an offence' neither did the property. The court found that as the NDPP had failed to establish

[12] *Cook Properties*, *supra*, at paras 14 and 15.
[13] At para 17.
[14] At paras 11 and 15.

facts sufficient to distinguish the property from the alley situation[15] he had therefore 'failed to establish the required closer connection and the application could therefore not succeed. I do not, with respect, agree.

[16] In *Cook Properties* this court, when considering whether the hotel concerned constituted an instrumentality of an offence, held that the frequency of drug deals at the hotel was insufficient to make it a drug shop. The court considered that the paucity of evidence, regarding, *inter alia*, whether (a) the same persons had been arrested on raids on the hotel, (b) rented rooms had been equipped to facilitate drug dealing, and (c) drugs had been manufactured, packaged and/or distributed on the property, militated against a finding that the property was instrumental to the commission of the offence.[16] It is necessary, when making a

[15] At para 15.
[16] See paras 49 and 50 in *Cook Properties*

determination whether property is an instrumentality of an offence, to look at the broader picture of instrumentality.

[17] The situation in *Cook Properties* appears to me to be distinguishable from the situation in this case. There, firstly, the hotel was in business to rent out rooms to the public. It accordingly had a public character and a public space which was not easy for the owner or its employees to control. Secondly, the dealers were tenants who came and went. Thirdly, the hotel was in an area notorious for drug dealing. In this case, we are dealing with a private dwelling which is not in a similarly notorious area. Unlike the hotel scenario, a house owner can reasonably be expected, alone or through family members, to act vigilantly and exercise control in relation to the property to prevent crime there or at least to have an interest in knowing if crime is being committed there. Despite the arrests referred to, dealing in drugs nevertheless continued

unabated. True, there was a variety of different sellers but it is inherently more likely that they were agents for somebody resident on the property rather than that as dealers themselves they went to this house to sell their wares when they could do so in the street or elsewhere. Even in the latter event it is more likely than not that the respondent's son would, as her representative in managing the property, have been aware that the sellers were using the property as their market and permitted them to do so.

[18] The NDPP, in terms of s 50(1) of the Act, bears the onus, on a balance of probabilities, to establish that the property was an instrumentality of an offence. In order to sustain a forfeiture order the court must, in my view, look at the whole picture and determine whether the property, in the totality of the circumstances of the case, was a substantial and meaningful instrumentality in the commission of the offence.

[19] The court *a quo*, in arriving at the conclusion that the property was merely the incidental venue from which drugs were obtainable, does not appear to have looked at the whole picture. It made a comparison, as I have said, between the facts in this case and postulated the situation where drugs are sold regularly by drug dealers in an alley in a city. In my view the two situations are, with respect, not analogous. The alley is clearly just a venue for drug deals. The evidence here goes further than establishing that the property was merely a venue.

[20] A scrutiny of all the evidence, reveals the following features which must be added to what I have said already:

(a) the property was a place where buyers could find drugs for sale;

(b) most of the deals were executed on the same portion of the property, namely, the covered driveway where customers with privacy and relative safety conducted their business;

(c) the frequency of the entrapment operations over a protracted period clearly shows that drug dealing on the property occurred regularly;

(d) it is possible that the trapping incidents were not the only times during which drugs were sold there;

(e) a variety of drugs (mandrax tablets, crack cocaine crystals, ecstasy tablets and dagga ‘stoppe’), was available ;

(f) one of the successful entrapment operations established that the seller entered the main house and returned with ecstasy tablets and crack cocaine crystals. Two reasonable possibilities may be inferred: first, that the ecstasy and cocaine might have been procured from someone else within the house, second, that they might have been stored in the house. However the latter inference seems more plausible when regard is had to the telling words used by the seller concerned that they were ‘out of stock’; and

(g) the adjoining plot and the motor vehicle wreck provided very near yet safely distant storage for some of the drug supply.

[21] As I have indicated earlier, the respondent did not deny any of the specific facts regarding the sales of drugs and the storage of some on the property as well as the fact that a portion of the property was adapted for customer convenience. Although it is not odd to have that kind of adaptation on a residential property, it is, on the totality of the facts in this case, probable that the property was adapted to facilitate the illegal activities on it particularly when regard is had to the failure by the respondent to refute the essential facts.

[22] The respondent's professed lack of knowledge has no bearing on the determination of the issue relating to the first inquiry.[17] Such protestations, in so far as they relate to the first stage inquiry, do not, in any event, establish any material dispute of fact. In my view, on all the

[17] see *Mohamed, supra*, para 13 and *Cook Properties, supra,* paras 10, 11 and 21

evidence, the NDPP has established on a balance of probability that the property was not an incidental venue from which drugs were obtainable, but was in fact a drug shop and therefore substantially instrumental in the commission of the illegal activities. Had the court *a quo* considered all the evidence in deciding whether the property was an instrumentality of an offence, it would, in my view, have answered the question in the affirmative.

[23] Turning to the second stage of the proceedings, the respondent had the opportunity to claim that she obtained the property legally and for value, and that she neither knew nor had reasonable grounds to suspect that the property had been an instrumentality in an offence ('the innocent owner defence'), and apply for an order excluding her interest in the property from the operation of the forfeiture order in terms of s 39(3)[18]

[18] S 39(3) provides: 'Any person who has an interest in the property which is subject to the preservation of property order may enter an appearance giving notice of his or her intention to oppose the making of a forfeiture order or to apply for an order excluding his or her interest in the property concerned from the operation thereof.'

[19] S 48(4) provides:

'(4) Any person who entered appearance in terms of s 39(3) may appear at the application under subsection (1) –

read with s 48 (4)(b)(i) and (ii)[19] of the Act. The provisions of the Act require the respondent, when applying for the exclusion of her property from the operation of a forfeiture order, to establish on a balance of probabilities, *inter alia*, that she neither knew nor had reasonable grounds to suspect that the property was an instrumentality of an offence.[20] She did not so apply. A dispute of fact clearly exists on affidavit regarding the respondent's innocence. Such a dispute of fact, given the fact the respondent is required to discharge the onus with regard to her assertion

---

(a) …
(b) to apply for an order –
(i) excluding his or her interest in that property from the operation of the order; or
(ii) varying the operation of the order in respect of that property,
and may adduce evidence at the hearing of the application.

[20] S52 (1) and (2A) of the Act provides:
'52. Exclusion of interest in property. – (1)The High Court may, on application - … and when it makes a forfeiture order, make an order excluding certain interests in property which is subject to the order, from the operation thereof.'
(2) …
(2A) The High Court may make an order under subsection (1), in relation to the forfeiture of an instrumentality of an offence referred to in Schedule 1, if it finds on a balance of probabilities that the applicant for the order had acquired the interest concerned legally; and-
(a) neither knew nor had reasonable grounds to suspect that the property in which the interest is held is an instrumentality of an offence referred to in Schedule1; or
(b) where the offence concerned had occurred before the commencement of this Act, the applicant has since the commencement of this Act taken all reasonable steps to prevent the use of the property concerned as an instrumentality of an offence referred to in Schedule 1.'

of lack of culpability, must be decided on the facts averred by her and those alleged by the NDPP which she admits.[21]

[24] The court *a quo*, by virtue of its finding on the first stage of the proceedings, concluded that it was not necessary to proceed to the second stage of the inquiry and dismissed the application by the NDPP with costs.[22] The issue on appeal is therefore confined to the question whether the property sought to be forfeited to the State is an instrumentality of an offence. At the hearing *a quo* the respondent did not seek the opportunity to adduce oral evidence to establish either her innocence or the reasons why her property should be excluded from the operation of a forfeiture order. When regard is had to the *caveat* sounded in *Cook Properties*[23] as to the constitutionality of the reverse onus resting on the respondent, it

---

[21] *Plascon-Evans Paints (Pty) Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634E -635C.
[22] See para 17 of Cleaver J's judgment.
[23] *Supra, a*t para 26, the court stated-

> 'We emphasise that none of the owners in the appeals before us invoked the second stage of the Chapter's procedures: in the course each case took, they staked their fortunes rather on a narrow reading of "instrumentality of an offence". As a result these cases do not require us to give a determinative reading of the second-stage provisions. Nor is the constitutionality of the reverse onus resting upon owners facing forfeiture before us. It may be that section 52(2A) (a) should be read, applying the common-law maxim that the law does not demand the impossible, so as to avoid forfeiture when the owner has done "all that reasonably could be expected" to prevent the unlawful use of the property, and that this can properly be done despite the contrasting proximity of sub-paragraph (b). We need not decide that now. Nor do the appeals require as to confront the serious constitutional question whether forfeiture is permissible when the owner has committed no wrong of any sort, whether intentional or negligent, active or acquiescent.'

seems to me that a remittal of the case for oral evidence on that leg of the case is, in the circumstances the appropriate course to take.

[25] In the result the following order is made:

1. The appeal is upheld with costs, including the costs of two counsel.

2. The order of the High Court is set aside and replaced with the following order:

‘1. The property in question having been found to be an instrumentality of an offence, and there being a dispute on the affidavits on the issue of the respondent’s knowledge in so far as the defences provided for in s 52(2A) (a) and (b) are concerned, the matter is referred for the hearing of oral evidence on that issue.

2. The referral is subject to the following:

2.1 The parties are hereby given leave;

2.1.1 to subpoena any deponent to an affidavit presently on record;

2.1.2 to call any witness who is not such a deponent provided:

2.1.2.1 the party concerned has served on the other party (at least 3 weeks before the date appointed for the hearing in the case of a witness to be called by the respondent or at least 2 weeks before such date in the case of a witness to be called by the applicant) a statement setting out the intended evidence-in-chief to be given by such person;

2.1.2.2 the court, at the hearing, permits such person to be called despite the fact that no such statement has been served.

2.2 The rules in respect of discovery and related matters shall apply unless the parties agree in writing to dispense with their application.

3. The matter is remitted to the court *a quo* to deal with the second leg of the inquiry at the hearing referred to in paragraph 2.

_____
NKABINDE AJA

CONCUR:
Howie P
Cameron JA
Mlambo JA
Combrinck AJA

[26] I have had the benefit of reading the judgment of my colleague Nkabinde AJA, and concur in her reasoning and her conclusion that the NDPP succeeded in establishing under the Prevention of Organised Crime Act 121 of 1998 (POCA) that the respondent's home at 13 Avondale Street, Elsies River, was a criminal instrumentality. I also gratefully adopt her exposition of the facts and statutory setting; but because this case has given me difficulty and seems to fall close to the borderline, I add some considerations.

[27] The statute required the NDPP to prove that the property was 'concerned in the commission' of the drug offences. Though the legislation says very broadly that any property 'concerned' in the commission of an offence is liable to forfeiture, both common sense and constitutional principle require us to read that within practicable limits. As Nkabinde AJA points out (para 14), for not just compelling

constitutional considerations, but sound reasons of language arising from the Act, this court held in *NDPP v Cook Properties* 2004 (2) SACR 208 (SCA) that the definition of 'instrumentality' has to be restrictively interpreted. Not literally every material object or immovable property 'concerned' in an offence can be liable to forfeiture, since that would cast an ocean-wide net. The link between the crime and the property must be reasonably direct, and the property must be used in a way that is functional to the commission of the crime. This means it must be instrumental in, and not merely incidental to, the offence. It must play a reasonably direct role in the offence – in a real or substantial sense making the crime possible or easier (*Cook Properties* para 31). Any looser reading would not only be at odds with the statute, but would imperil the constitutionality of its provisions.

[28] The difficulties in determining criminal instrumentality come acutely to the fore with immovable property, as this case in my view shows. Between 2 June 2002 and 25 July 2003, the police conducted no fewer than ten 'sting' operations at the property. Each time traps successfully procured a range of illegal drugs – dagga, mandrax, ecstasy and crack cocaine – from dealers who were on the property and operating from it. The drugs were not only those reputedly regarded as 'soft', like dagga and ecstasy, about whose ill effects there has been debate in the medical literature; but crack cocaine, which is a viciously destructive and addictive substance.

[29] Can the property itself be found to have facilitated or made possible the commission of these offences? It was certainly the site where they took place. In this loose sense it was undoubtedly

'concerned in' the offences. But that is not enough. Merely to provide a venue for crime does not entail instrumentality. Since every crime that is committed has to take place somewhere, something more is required. This is illustrated by the Blenheim Hotel in *Cook Properties* (paras 46-50), where drug dealing also occurred. The police evidence established a high incidence of crime inside and around the hotel, and repeated arrests on drugs charges of persons found on the premises or residing there. Drugs were repeatedly discovered on the premises, as well as drug paraphernalia. In response to this evidence, the judgment in *Cook Properties* noted the public character of the premises: anyone could rent a room or rooms for any length of time; and because the hotel was situated in an area the NDPP's own evidence depicted as rife in crime, it was likely to attract persons who might possess drugs.

There was moreover no evidence that the persons arrested in various raids and searches were the same people (para 49). This court therefore concluded that the hotel was merely the venue at which the offences occurred.

[30] So providing a location is not enough. Either in its character or in the way it is used, the immovable property must itself in some way make the commission of the offence possible or easier. Examples given in *Cook Properties* (para 34) include cultivating land to produce drug crops; appointing, arranging, organising, constructing or furnishing premises to make possible or easier the commission of the crime; or the fact that the particular attributes of a location are used as an enticement to victims (as where a criminal uses a houseboat to lure minors as sexual prey). A powerful recent instance of forfeiture of a house, part of which had been specially

adapted and equipped to manufacture drugs, is the decision of this court in *Prophet v National Director of Public Prosecutions* (29 September 2005) (para 29).

[31] Instances of storage or adaptation are in a sense easy. This case is more difficult. Unlike *Prophet*, there is no suggestion that the premises were adapted to produce drugs or employed for that purpose. The police affidavits did try to suggest that the entrance arrangements – a high wall with a single entry, leading onto a covered driveway furnished with a couch and television – facilitated drug dealing. The evidence from the police traps showed that in three out of the ten stings, buyers were invited to sit on the couch while the drugs were procured.

[32] From this we were urged to find that the property was appointed to facilitate drug dealing; but in my view the basis is

flimsy. Many working class homes have seating on the street side – in garages, driveways and on patios. It is correct, as Mr Trengove emphasised for the NDPP, that the facilities were on occasion used for the convenience of waiting drug buyers. But this does not in my view help to establish that the premises were adapted for drug-dealing.

[33] Nor, apart from the incident Nkabinde AJA mentions in para 20(f) of her judgment, is there any evidence that drugs were stored on the premises. Despite repeated incidents of drug dealing, the police chose not to raid the house (in fact it seems that at no stage did they enter at all). No stashes or stores were found on the property itself.

[34] The importance of the case is that in the absence of evidence of adaptation or storage, the NDPP sought to establish

instrumentality on the basis of the repeated use of the premises as a venue for drug deals. And the evidence indeed shows that the property was the base for a very considerable drug-dealing business. Here the ten successful stings over the year of surveillance are telling, for they show that many more such transactions must have taken place during that period. All the deals were concluded brazenly and without discernible inhibition. So we must also accept the NDPP's assertions that the property 'is a well-known drug outlet in the community' and that, despite numerous complaints, drug dealing from it continued unabated. Indeed, even though some of the stings led to successful prosecutions within the year, and even though warning notices were served at the property, dealing seems to have persisted without restraint.

[35] The NDPP's argument accordingly branded the house a 'drug shop'. The difficulty is that this is not the whole story. The premises are also a home. The owner of the house, Mrs Parker, the respondent, was born on 10 August 1923. She is now 82 years old. She lives in the 'granny flat' behind the house. Her son, Henry 'Boere' Parker, lives with his wife Sandra and teenage daughter Sharon in the main house. he erf is reasonably spacious: 496 square metres, or one-eighth of an acre (municipal regulations in South Africa's major cities standardly permit two semi-detached dwellings plus domestic employees' quarters on such a stand).

[36] And like many working class residences in South Africa, this one is crowded. In addition to the Parkers, the following people were living there when the affidavits resisting forfeiture were filed in February 2004:

(a) Ms Althea Olcker, 20, with her two year-old son;

(b) In a ‘Wendy house’, Mr Martin and Mrs Rachel Valentine, with their 27 year-old daughter and her two children of nine and six;

(c) In another ‘Wendy house’, Ms Mildred de Wet (44) and her twelve year-old son;

(d) In a caravan, Ms Sylvia Roberts (50), living on a disability grant;

(e) In a corrugated iron structure next to the main house, Dawid Berman (57), also living on a disability grant;

(f) In a third ‘Wendy house’, Mr Ricardo and Mrs Karen Scrimgeor, with their two children of four and five.

[37] The police do not dispute this. On the contrary, the main deponent in their first set of affidavits noted that ‘there is a high turnover of people who live in the main house’. Almost twenty

people were thus living on the property during the period in issue. By name none of them seems, nor do the police claim them, to have been implicated in any of the drug stings. In addition to being a 'drug shop', this property had an undeniably residential character.

[38] Yet the fact that the property was home to its residents cannot serve as a veto to a finding that it was also a criminal instrumentality. The house forfeited in *Prophet* was also a residence. Where evidence of adaptation or storage is lacking, and the police case depends principally on the frequency with which the property serves as a venue for criminal conduct, the characterisation of the property as a criminal instrumentality necessarily becomes a question of degree. As Nkabinde AJA observes (paras 16-18), it is necessary to consider the overall picture. This was also the approach in *Prophet* (para 27): as held

there, the court must be able to conclude, after considering the totality of the circumstances, that the property was a substantial and meaningful instrumentality in the commission of the offences.

[39] And, as Nkabinde AJA points out (para 17), this is indeed a stronger case than *Cook Properties*. First, as mentioned, some of the persons involved in the stings were arrested (and even convicted) more than once. This shows a persistent pattern of association between the dealers and the premises. The dealers did not merely happen to be there when they committed their offences: their presence on the property tends to reveal the character of the premises and the use to which they were being put as a place of trade.

[40] Even more tellingly, Mrs Parker tells us that Henry Parker (whom the police claim is a well-known gang leader and drug

dealer in Elsies River) conducts the lodging business on her behalf. She explains that she has relinquished control and supervision of the property to her son: 'My flat is on the opposite side of the erf, and I am unaware of any activities' (*my woonstel is aan die teenoorgestelde kant van die erf en ek is onbewus van enige aktiwiteite*).

[41] As explained in *Cook Properties* (paras 19-20), the guilt or wrongdoing of the occupants or the owner is not the primary focus at the criminal instrumentality stage. Mrs Parker will in due course be entitled to an assessment of what is loosely called the 'innocent owner' defence under s 52 of POCA (*Cook Properties* para 23). The present question is the character of the premises, and whether the drug-dealing that took place there so characterised them that the property can be said to have been instrumental in it. Here the

fact that the house is owner-occupied, and that the owner's son exercises personal control and supervision over it on her behalf is significant, for it leads to the unavoidable inference that his control and supervision embraces not only who resides on the property, but what activities are conducted on them. Henry Parker's presence on the property as a resident, his family relationship with the owner, the supervision he exercises on her behalf, and his oversight over the premises establishes a feature that was found lacking in the particular circumstances of the *Cook Properties* hotel – central organisational control of the premises and what was happening on them. This in turn reveals the instrumental relation of the property to the dealing.

[42] For it is from the control that was exercised over the premises that the import of the sustained drug dealing conducted

from the property must be gauged. The repeated drug sales were not incidental occurrences that happened to take place there. The element of personal supervision and control leads to the inference that the trade in drugs was associated with the property itself in that its location and existence enabled them to occur. The brazen dealing in other words represents a pattern of sustained activity that reveals the use to which the premises were put and their instrumental character in the crimes committed there.

[43] To return to the notion of a ‘drug shop’. A ‘shop’ is a building or part of a building where goods or services are sold (Concise Oxford Dictionary). It is a place that is used to conduct trade. Given the personal control and supervision exercised over these premises, the extent and openness of the dealing show that the property itself was used to conduct a trade in drugs. The

permissive relation between the controlling resident and the dealing conducted from the premises shows that they were utilised as a place of trade. The deals were in other words so extensive and so connected with the occupation of and control over the premises that they establish the character of the premises as a criminal instrumentality.

[44] The fact that no drugs were found on the premises the police attribute to the juxtaposition of the vacant municipal stand next door, which the dealers calculatedly used to store their stock. The entrapment evidence shows that on the overwhelming majority of occasions the dealer would move from the property to the adjacent stand, where the drugs were procured (apparently from a car wreck or a shack). Police later found drugs stored in quantity there. This does not detract from the character of the property as a place of

[45] trade. To operate a trading business it is not necessary to keep stock on site.

[46] I would add that the fact that the property was widely reputed to be a drug outlet does not in my view add to its character as a criminal instrumentality. It is true that the property's reputation as a known drug outlet led directly to the commission of offences there, since the reputation drew purchasers to the location. But that is the point: they were drawn by the reputation, not by anything in the character of the premises. Here the houseboat case, alluded to in *Cook Properties* (para 34), is different, since it was the character of the premises, as conveyed to the victims, that lured them there as sexual prey.

[47] I therefore agree that the NDPP established that the property was a criminal instrumentality and with the order proposed.

E CAMERON
JUDGE OF APPEAL

CONCUR:
HOWIE P
MLAMBO JA
COMBRINCK AJA
NKABINDE AJA