

**THE DRUG DEALER, THE GAMBLER AND THE LONG (?) ARM OF ASSET
FORFEITURE LAW**

Raylene Keightley

Introduction

1. Two recent Constitutional Court judgments have explored and pronounced on the limits of the power of the Asset Forfeiture Unit (“the AFU”) to forfeit property used as an instrumentality of criminal offences:
 - 1.1 ***Prophet v NDPP*** 2007 (2) BCLR 140(CC); 2006 (2) SACR 525 (CC);
 - 1.2 ***Mohunran & Shellgate Investments CC***, unreported, 26th March 2007

2. *Prophet* involved the use of a residential house as a “mini-laboratory” for the manufacture of “tik”. *Mohunran* involved the use of part of legitimate business premises for running an unlicensed, and hence illegal, “down market” casino.

3. The Constitutional Court upheld the forfeiture order in *Prophet*, but discharged it in *Mohunran*.

4. At the heart of the two judgments lies the tension between two constitutional principles. *First*, the State’s constitutional obligation to adopt and implement appropriate law enforcement mechanisms in order to protect the

public from criminal deprivations. *Second*, the constitutional imperative that guards against arbitrary deprivation of property.

5. This tension requires that robust law enforcement measures, like asset forfeiture, must be tempered by the need to avoid arbitrary deprivations of property.
6. The two constitutional court judgments give some indication of how this court intends resolving this tension. However, as I will indicate, the judgments possibly raise more questions than answers in this regard.

Prefatory issues

7. The relevant asset forfeiture provisions are contained in the Prevention of Organised Crime Act 121 of 1998 (“POCA”).
8. The *Prophet* and *Mohunran* cases were concerned with only one type of asset forfeiture, viz. the forfeiture of *instrumentalities* of offences (“instrumentality forfeiture”). Both cases concerned applications to forfeit immovable property as instrumentalities of offences.
9. POCA provides for two other scenarios where asset forfeiture proceedings may be implemented:

- 9.1 The forfeiture of proceeds of unlawful activities (“proceeds forfeiture”);
and
- 9.2 Forfeiture of property held by a person who is convicted of a criminal offence and who is found to have benefited therefrom (“criminal forfeiture”).
10. Both instrumentality forfeiture and proceeds forfeiture are mechanisms of so-called “civil forfeiture” in that no conviction is necessary as a precursor to asset forfeiture proceedings being instituted. The AFU need only establish, on a balance of probabilities, that particular property is either an instrumentality of an offence or is proceeds of unlawful activities before the property will be vulnerable to forfeiture.
11. The relevant key elements of instrumentality forfeiture are the following:
- 11.1 The definition of “instrumentality of an offence” is very wide:
- “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.”*
- 11.2 If a court, in a forfeiture application, finds that the property concerned is an instrumentality of an offence, POCA provides that the court “*shall*” order the forfeiture of the property.
- 11.3 A forfeiture of property interests may be avoided if an interested party is able to satisfy the court that he or she “*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 Schedule 1”.

11.4 This is the so-called “innocent owner defence”, which has been described by the courts as the “ignorant owner defence”.

12. Given these key elements, it is perhaps not surprising that of the three types of forfeiture available under POCA, the courts have proceeded most cautiously with instrumentality forfeitures.
13. Instrumentality forfeitures throw into sharpest relief the possibility of a forfeiture order resulting in an arbitrary deprivation of property.
14. As a result, even prior to the two Constitutional Court judgments being handed down, the SCA held that the “shall” referred to earlier (in respect of both proceeds and instrumentality forfeitures) should be read as “may”. In other words, the potential unconstitutionality of the relevant section of POCA was avoided by recognizing that the courts have a discretion to order forfeiture or not.
15. In addition, the SCA held that before ordering an instrumentality forfeit, a court must embark on a *proportionality inquiry*. This requires the court to determine whether there is a rational relationship between means and ends. In other words, to determine whether the forfeiture of a particular

instrumentality (the means) serves a legitimate law enforcement purpose (the ends). If not, then the forfeiture of the property would be disproportionate, and would be unconstitutional as being an arbitrary deprivation of property.

16. One final background issue relates to the ambit of POCA and of the forfeiture provisions contained therein. The POCA's short title and the preamble indicate that its underlying objective is to provide measures to act against organized crime (in the form of certain offences created in the Act, viz. money laundering, racketeering and gang activities). However, the courts have long recognized that the asset forfeiture provisions are intended to apply to all types of crime (not only those created in POCA) and to crimes committed by individuals.

The judgments

17. There are certain commonalities of fact between the drug dealer, Mr Prophet, and the gambler, Mr Mohunran:

- 17.1 There was no evidence that either of the two individuals was part of an organized crime syndicate.

- 17.2 The size of the illegal enterprises conducted by each of the individuals was not particularly substantial:

- 17.2.1 Mr Prophet's house was found to contain a small amount of manufactured methamphetamine and a quantity of

“precursor” chemicals that could have produced “tik” with a street value of R250 000.

17.2.2 Mr Mohunran had installed 57 gaming machines in a portion of his glass and aluminum business, providing him with a profit of R30 000 per month (R420 000 over the 14 months for which the casino operated).

17.2.3 The property concerned in both cases had mixed legal and illegal use. Mr Prophet’s “mini-lab” was in his residential house and Mr Mohunran’s “down-market casino” was in a portioned off portion of his legal business.

17.2.4 Both Mr Prophet and Mr Mohunran stood to suffer substantial prejudice from the forfeiture of their immovable properties.

18. What, then, led to the conclusion by the Constitutional Court that the forfeiture of Mr Prophet’s house would not amount to an arbitrary deprivation of property, whereas the forfeiture of Mr Mohunran’s property would be arbitrary?

19. It is possible to identify certain factual differences between the two cases which seemed to have some influence on the court:

19.1 Mr Prophet’s crime was inherently illicit and involved a noxious substance, viz. “tik”.

19.2 Mr Mohunran's activity was initially not illegal. It only became illegal when the KZN gambling laws were amended. It was also not inherently illegal in that the purpose of the gambling laws were regulatory in nature.

19.3 Mr Prophet had escaped criminal sanction (he was discharged on a technicality in the criminal case), whereas Mr Mohunran had paid a fine and had had his gaming equipment and a small amount of proceeds forfeited as part of the criminal proceedings.

19.4 Mr Prophet had a source of income from other property he owned and would not be left destitute, whereas Mr Mohunran would have to find new premises from which to conduct his legal business.

19.5 The court also seemed to be influenced by the fact that Mr Prophet's illegal activities covered the whole house, whereas Mr Mohunran's were limited to only a portion.

20. These types of considerations fall within the ambit of factors that the courts previously have identified as being relevant for purposes of determining whether a particular forfeiture would be disproportionate or not. Our courts have previously identified factors that assist in weighing up the impact of the forfeiture on the respondent with the severity of the crime and the public interest in preventing crime. Courts have also taken into account the extent of the property's involvement in the crime as a factor relevant to proportionality.

21. In addition, the courts have been careful to express that the purpose of instrumentality forfeitures is deterrence and not punishment. Factors that weigh in favour of a punitive effect, as opposed to a deterrent effect clearly will be pertinent. In this regard, Mr Mohunran's criminal punishment, and forfeiture of the gaming machines was a factor that weighed with the majority of the Constitutional Court. In fact, all three judgments state that asset forfeiture should not be used as a substitute for ordinary criminal sanctions.
22. Based on the above factors, it is perhaps understandable that the second majority judgment, written by Sachs J, in the Mohunran case, referred to Mr Mohunran's case as being a "marginal" one in terms of proportionality but one, nonetheless that did not support the forfeiture of the property.
23. Of course, it is open to debate whether the differences between the facts of the two cases really were distinguishable enough to warrant the upholding of the forfeiture in the one case with the refusal of forfeiture in the other.
24. A further issue that arises out of the Constitutional Court's different treatment of the two cases is the extent to which, it seems, forfeiture orders in instrumentality cases will depend on such fine factual distinctions. If this is to be the case in future, then it is to be expected that instrumentality

cases will be heavily litigated, with likely delays in achieving legal certainty in these cases.

25. Is there anything further to be gleaned from the judgments that may throw some light on the different treatment meted out to the drug dealer and the gambler? It would seem, indeed, that there is.
26. In the Mohunran case, the AFU faced a curved ball arising out of arguments submitted by the *amicus* in the case, the Law Review Project. In its submissions, the LRP sought to argue, contrary to what had been previously settled in the case law, that insofar as instrumentality forfeitures are concerned, the effect of the relevant provisions was that a forfeiture order could only be granted in a case in which the offence concerned is one of the offences established by POCA, viz. money laundering, racketeering and gang activity.
27. The Constitutional Court did not make a determination in this regard as no constitutional attack was launched against the relevant provisions.
28. However, the lack of any connection between Mr Mohunran's activities and "organized crime" was a material factor in both the majority judgments. Both of these judgments hold that the more remote the offence concerned

is from “organized crime” the more likely will be a finding that the forfeiture of the property would be disproportionate and arbitrary.

29. The rationale of the majority judgments in this regard is that to avoid amounting to an arbitrary deprivation of property, the forfeiture must serve the broad purpose of POCA, viz. the fight against organized crime. This approach downplays the factor of the general seriousness of the offence, which our courts have previously accepted. Instead, it seems as if of more importance is whether the offence can be categorized as an “organized crime” offence. If not, the majority judgments make it clear that a finding of disproportionality will be likely.

30. There are difficulties with too rigid an application of the approach displayed in the majority judgments, particularly the approach adopted in the *Moseneke DCJ et al* judgment:

30.1 First, there is no definition of organized crime in POCA. The Act establishes certain offences to deal with organized crime, but it would be incorrect to imagine that organized criminals only commit those types of offences.

30.2 Second, as the minority judgment points out, “ordinary” crimes, committed by individuals may have a greater detrimental affect on the public than crimes committed by “organized” criminals.

30.3 Third, the distinction between “organized” crimes and “ordinary” crimes for purposes of forfeiture proceedings is likely to be drawn artificially in practice and will create legal uncertainty. Mr Prophet was not shown to be part of an organized crime syndicate. However, it seems to have been sufficient that the type of crime in which he was involved was one commonly linked to organized crime. On the contrary, Mr Mohunran was found to have operated a “down-market” casino for profit. This activity was found to have no link with organized crime. What, then, of the individual who manufactures drugs in his house but claims it is for individual use or who says that he sold them on as an individual? Will the nature of the offence be sufficient to create the required link with “organized crime”? Or, will the AFU have to prove in each case that there was a link with organized crime. What, then, of the illegal casino operator who runs his business for a profit but who may also be laundering money for syndicates on the side. Must the AFU prove that his business was being used to launder money for organized crime, or will it be sufficient to lead evidence that establishes that set-ups of that kind are frequently used for laundering purposes?

Conclusion

31. While courts obviously need to be vigilant regarding the potentially far-reaching effects of asset forfeiture in instrumentality cases, it is unfortunate

that the jurisprudence has developed to the extent that there now seems to be far more uncertainty regarding the proper reach of the law than previously existed. Furthermore, this uncertainty is likely to prevail as it is in the nature of the proportionality inquiry that a determination is made on a case by case basis. The recent judgments of the Constitutional Court must be lauded for grappling with the tension between law enforcement and property rights. However, when viewed together, they have created legal loopholes that are likely to prove extremely difficult to knit together. The effect is likely to be prejudicial to law enforcement authorities than to those who use or allow their property to be used for criminal purposes.