CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 56/05

SIMON PROPHET Applicant

versus

THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS Respondent

Heard on : 7 March 2006; 10 May 2006

Decided on : 29 September 2006

JUDGMENT

NKABINDE J:

Introduction

[1] This case raises a number of questions concerning the interpretation and application of the provisions of the Prevention of Organised Crime Act 1998 (the POCA).[1] The case arises out of the alleged manufacture of methamphetamine, an undesirable dependence-producing drug, colloquially referred to as "tik", in a "mini-laboratory" on residential premises. The Court is called upon to strike an appropriate balance between two constitutional principles. The one is that no one should be arbitrarily deprived of property. The other is that the State is under an obligation to protect members of the public from criminal depredations.

[1] Act 121 of 1998.

[2] The applicant has applied for leave to appeal against the judgment of the Supreme Court of Appeal[2] in respect of which the order declaring his house forfeit to the State in terms of the POCA by the Cape High Court (High Court)[3] was confirmed.

[3] It is worth mentioning at the outset that the determination of this application has been complicated by various factors. First, it is not clear precisely what relief the applicant seeks. The relief sought in the notice of motion is for special leave to appeal against the judgment and order of the Supreme Court of Appeal and for an order that the costs of this application be costs in the appeal. In the same notice of motion the applicant concludes with the following prayers for substantive relief—

> "1. Declaring that the forfeiture of the Appellants property by the Respondent was not constitutionally defensible and is therefore set aside:
> 2. Declaring that the operation of the provisions of the POC Act in respect of the forfeiture of the Appellant's property was not constitutionally justifiable.
> 3. Declaring that the whole of Chapter 6, alternatively certain sections thereof are not constitutionally valid."

These last two prayers are not appropriate for an application for leave to appeal, as they raise new matters beyond the scope of the appeal. Ordinarily such matters can be raised only in an application for direct access, a procedure which is only permissible in exceptional circumstances. This is a matter to which I will return later.

[2] *Prophet v National Director of Public Prosecutions* 2006 (1) SA 38 (SCA).

[3] *National Director of Public Prosecutions v Prophet* 2003 (6) SA 154 (C); 2003 (8) BCLR 906 (C).

[4] Second, the grounds of appeal advanced by the applicant shifted constantly. The shifting position adopted by the applicant not only made it difficult for this Court to adjudicate upon the application, but also rendered the task of the respondent in responding to the applicant's case unnecessarily burdensome. Third, the applicant sought at a very late stage to lead extensive new evidence at the hearing in this Court. Fourth, both criminal and civil proceedings have been brought against the applicant. The applicant sought to place reliance on aspects of the criminal proceedings to further his cause in the civil proceedings and contended that his right to silence has been violated.

[5] Many of these difficulties arose from the manner in which the application for leave to appeal was prosecuted by the applicant. They could have been avoided had more care been taken during the prosecution of the applicant's case in the High Court, Supreme Court of Appeal and this Court.

Facts

[6] The applicant is the owner of immovable property situated at 54 Balfour Street, Woodstock, Cape Town (the property)[4] which is the subject matter of the litigation in these proceedings. He was, together with Ms Nicola Daniels (Ms Daniels) and Mr Dominic Hiebner (Mr Hiebner), arrested and charged with having contravened sections 3[5] and 5[6] of the Drugs and Drug Trafficking Act (the Drugs

[4] The property was purchased by the applicant for R155 000 and subsequently registered in his name on 18 April 1996. A mortgage bond in favour of the First National Bank is registered against the property. As at 28 June 2001 (when the preservation order was sought and granted) the balance on the bond was R106 229,44.

[5] Section 3 of the Drugs Act provides:

Act)[7] for dealing in prohibited substances and the alleged manufacturing of the scheduled substances respectively.

"No person shall manufacture any scheduled substance or supply it to any other person, knowing or suspecting that any such scheduled substance is to be used in or for the unlawful manufacture of any drug."

[6] Section 5 provides:

"No person shall deal in—

(a) any dependence-producing substance; or

(b) any dangerous dependence-producing substance or any undesirable dependence-producing substance,

unless—

(i) he has acquired or bought any such substance for medicinal purposes—

(aa) from a medical practitioner, veterinarian, dentist or practitioner acting in his professional capacity and in accordance with the requirements of the Medicines Act or any regulation made thereunder;

(bb) from a pharmacist in terms of an oral instruction or a prescription in writing of such medical practitioner, veterinarian, dentist or practitioner; or

(cc) from a veterinary assistant or veterinary nurse in terms of a prescription in writing of such veterinarian,

and administers that substance to a patient or animal under the care or treatment of the said medical practitioner, veterinarian, dentist or practitioner;

(ii) he is the Director-General: Welfare who acquires, buys or sells any such substance in accordance with the requirements of the Medicines Act or any regulation made thereunder;

(iii) he, she or it is a medical practitioner, veterinarian, dentist, practitioner, nurse, midwife, nursing assistant, pharmacist, veterinary assistant, veterinary nurse, manufacturer of, or wholesale dealer in, pharmaceutical products, importer or exporter, or any other person contemplated in the Medicines Act or any regulation made thereunder, who or which prescribes, administers, acquires, buys, transships, imports, cultivates, collects, manufactures, supplies, sells, transmits or exports any such substance in accordance with the requirements or conditions of the said Act or regulation, or any permit issued to him, her or it under the said Act or regulation; or

(iv) he is an employee of a pharmacist, manufacturer of, or wholesale dealer in, pharmaceutical products, importer or exporter who acquires, buys, transships, imports, cultivates, collects, manufactures, supplies, sells, transmits or exports any such substance in the course of his employment and in accordance with the requirements or conditions of the Medicines Act or any regulation made thereunder, or any permit issued to such pharmacist, manufacturer of, or wholesale dealer in, pharmaceutical products, importer or exporter under the said Act or regulation."

[7] Act 140 of 1992.

[7] The circumstances that gave rise to the arrests and culminated in these proceedings are set out in the opposing affidavits lodged by the respondent and from which the following emerge. During December 2000 Detective Captain Johan Smit (Captain Smit), an investigating officer in the South African Police Service (SAPS) and the narcotics detective designated by the South African Narcotics Bureau (SANAB) to monitor chemicals in the Western Cape, received information about the unlawful importation into South Africa of phenylacetic acid. This substance is listed in Part II of Schedule 1 to the Drugs Act. The substance, it is stated, may be used to manufacture methamphetamine, an undesirable dependence-producing substance listed in Part III of Schedule 2 to the Drugs Act. On 30 January 2001 Captain Smit and his colleagues observed the applicant receiving 2kg of phenylacetic acid from Mr Hiebner. The substance was taken to the property by the applicant. Further investigation established that the applicant subsequently purchased 500g of caustic soda and three litres of distilled water from the Litekem Pharmacy in Cape Town, and took them to the property.

[8] According to Superintendent Casper Hendrik Venter (Superintendent Venter), who is a narcotics detective and forensic analyst with the Forensic Science Laboratory (FSL) attached to the SAPS, the diluted caustic soda is necessary in the final process of manufacturing methamphetamine.

[9] Captain Smit applied for and obtained a search warrant to search the property. Upon arrival at the property Captain Smit and his colleagues knocked at the door and

demanded access. They forced open the door and entered the house as there was no response. Captain Smit observed the applicant running from the old kitchen carrying a cardboard box. He heard the sound of a glass breaking at the back of the house. The property was searched by Captain Smit, assisted by Detective Sergeant Grimmbacher, Detective Captain Cockrill, other members of SANAB, Superintendent Venter, and other members of the FSL.

[10] The police found, among other things—

(a) five bottles of methylamine in one of the bedrooms;

(b) a broken glass and a yellowish-brown fluid in the bowl of the toilet at the back of the house. The fluid, according to Captain Smit, smelled strongly of chemicals;

(c) an unopened container of phenylacetic acid delivered by Mr Hiebner to the applicant on 30 January 2001;

(d) a handwritten document on the table in the "opwaskamer" adjacent to the laboratory which, according to Superintendent Venter, detailed an alternative method to synthesise methamphetamine;

(e) loose documentation containing information about drugs and drug formulas, including a recipe for the extraction of 1-phenyl-2-propanone from a solution;

(f) a vacuum sealer and cool drink straws routinely used to package methamphetamine and ephedrine for sale;

(g) a flask containing a small amount of what was later established as chilled methalymine; and

(e) an electronic scale used to measure quantities of chemicals.

While the search was in progress Ms Daniels removed a glass containing a liquid which had been stored in the freezer compartment of the refrigerator and poured its contents down the drain of the kitchen sink.

[11] Superintendent Venter seized various chemical substances, laboratory equipment and documents recording chemical processes.[8] He subsequently analysed the seized chemical substances and verified their identity. After analysing the sample of the yellowish-brown fluid which had been found in the bowl of the toilet, he found that the fluid contained phenylacetic acid and 1-phenyl-2-propanone. The 1-phenyl-2-propanone was, according to him, about to be purified by means of a process involving benzene and diluted potassium hydroxide. Potassium hydroxide was found in the laboratory, as was the benzene. Superintendent Venter also analysed the small quantity of the liquid that remained in the glass container which had been stored in the freezer and found that it contained chilled methalymine.

[12] Superintendent Venter said that the arrival of the police at the property interrupted the unlawful manufacturing process of methamphetamine. He explained

[8] These include: (a) chemicals and chemical apparatus used in a laboratory to synthesise chemical substances; (b) phenylacetic acid and 1-phenyl-2-propanone; (c) literature containing information and formulas on both how to make various drugs and their effect; (d) a large quantity of cool drink straws and a vacuum sealer; (e) an electronic scale; and (f) a glass containing remnants of a liquid.

that one of the ways in which methamphetamine is manufactured is by combining 1-phenyl-2-propanone with chilled methalymine. He concluded that it would have been possible to synthesise 400g to 600g of methamphetamine from the chemical substances found on the property. Superintendent Venter tendered the exhibits and the results of his analysis for inspection and re-analysis by the applicant if he desired to do so. Based on his experience, Captain Smit estimated the street value of that amount of methamphetamine to be approximately R250 000. He said that methamphetamine sells for about R500 per gram.

[13] Upon arrest, Mr Hiebner made a statement that he had previously ordered chemicals on behalf of the applicant. The applicant, so said Mr Hiebner, had told him to place an order for chemicals in the name of Mr Harris. The applicant represented to Mr Hiebner that he operated a leather-softening business and that Mr Harris was his partner in the business. An invoice attached to one of Captain Smit's affidavits indicated that phenylacetic acid and methylamine had been ordered from B & M Scientific by Kevin Harris. Captain Smit established that the latter name was a false name.

High Court

[14] Relying on these facts, the respondent initiated proceedings in the High Court in terms of section 38[9] of the POCA for a preservation order in respect of the property.

[9] Which, insofar as herein relevant, provides:

> "(1) The National Director may by way of an *ex 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.

A preservation order was granted on 28 June 2001 and a curator bonis was appointed to assume control over the property. A forfeiture order in terms of sections 48 and 50 of the POCA was subsequently sought. Section 48(1) 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."

Section 50(1) reads as follows—

> "The High Court shall, subject to section 52, make an order applied for under section 48(1) if the Court finds on a balance of probabilities that the property concerned—
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> (a) is an instrumentality of an offence referred to in Schedule 1;
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> (b) is the proceeds of unlawful activities; or
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> (c) is property associated with terrorist and related activities."

[15] In an affidavit dated 20 July 2001 opposing the grant of a forfeiture order, the applicant stated that the property was purchased before the POCA came into operation and that its provisions could not be applied retrospectively; that the respondent had failed to establish that the property was an instrumentality of an offence; and that no methamphetamine was found on the property. The applicant also expressed his intention to obtain expert opinion with regard to the chemicals that had been found on the property.

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(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;

(b) is the proceeds of unlawful activities; or

(c) is property associated with terrorist and related activities."

[16] The applicant later supplemented his answering affidavit and informally applied for a stay of the civil forfeiture proceedings pending the finalisation of the criminal trial against him, on the basis that he would be prejudiced if the civil proceedings continued, and that he had never been involved with organised crime, money laundering, gangs or racketeering as envisaged in the long title of the POCA. The explanation he proffered for the fitted laboratory was that the room adjacent to the old kitchen served as an experimental room where he regularly conducted informal chemical experiments as a hobby. He stated that he had deliberately elected to remain silent because he did not want to incriminate himself while the criminal trial was pending but would disclose exactly what he was doing when the "time [was] right". He contended that the respondent used the POCA, which he said was aimed at syndicates and not against individual persons, for an ulterior motive to use him as a "test run" before going after the persons for whom the legislation is intended. He contended further that the respondent should invoke the provisions of the Drugs Act to apply for the forfeiture of his property if he were convicted.

[17] The High Court refused to stay the civil proceedings on the basis that: (a) no formal application for a stay had been made; (b) the applicant had already elected to file a comprehensive affidavit in which he dealt with the facts asserted by the respondent for forfeiture; (c) an application for a stay of civil proceedings pending the determination of related criminal proceedings will only be granted in those cases where an accused is legally compelled to give evidence in the civil proceedings; and (d) section 35(5) of the Constitution could be relied upon if the accused felt that he

had suffered an infringement of his right against self-incrimination. The Court granted the forfeiture order on 22 May 2003. It found that the property was an instrumentality of an offence because—

> "[i]t was a place to store the chemicals, rooms on the property were being used to process, refrigerate and 'synthesise' these chemicals, into what on a balance of probabilities was methamphetamine. The property cannot be divorced from these acts, it was an integral part, an instrumentality."[10]

[18] The applicant applied to the High Court for leave to appeal to the Supreme Court of Appeal on several grounds. The High Court refused leave to appeal. The applicant then applied to the Supreme Court of Appeal for leave to appeal against the whole of the judgment and order of the High Court.

Supreme Court of Appeal

[19] In his affidavit supporting the application, the applicant stated that he stood by the grounds set out in the notice of appeal, but added that for the respondent to have taken his property without compensation and without his having been convicted of any crime constituted a violation of his rights set out in the Bill of Rights. The applicant further criticised the judgment of the High Court on the basis that the Court "simply discard[ed] the proportionality enquiry . . . and thereafter simply proceed[ed] to use the 'instrumentality test' to decide the matter." In the notice of appeal the applicant simply sought the substitution of the order of the High Court with an order "[t]hat the application is dismissed with costs."

[10] Above n 3 at para 27.

[20] The applicant argued that: (a) the forfeiture was unwarranted because it did not rationally advance the interrelated purposes of Chapter 6; (b) a constitutional interpretation of section 50 of the POCA requires there to be proportionality between the offence committed and the property forfeited; and (c) the forfeiture of the property was "significantly disproportional" to the crime allegedly committed. He argued further that as forfeiture under Chapter 6 is not contingent upon a criminal charge or even a conviction, it should be invoked in the narrowest of circumstances where there are criminal charges dealing with the same facts.

[21] It should be noted here that after he had sought leave to appeal to the Supreme Court of Appeal, but before the appeal was heard, the applicant was acquitted of the criminal charges by the Magistrates' Court. An important factor leading to his acquittal was the fact that after the trial-within-a-trial, the magistrate set aside the search warrant that had been obtained by Captain Smit, and ordered that all evidence flowing from the execution of that warrant be excluded from the criminal proceedings. The State did not appeal the decision setting aside the search warrant.

[22] On 29 September 2005 the Supreme Court of Appeal[11] confirmed the decision of the High Court. In measuring the strength and extent of the relationship between

[11] Per Mpati DP, Streicher, Mthiyane, Cloete and Ponnan JJA. The Supreme Court of Appeal supported the procedure enunciated in *National Director of Public Prosecutions v (1) R O Cook Properties (Pty) Ltd; (2) 37 Gillespie Street Durban (Pty) Ltd and Another; (3) Seevnarayan* 2004 (8) BCLR 844 (SCA) at para 31, holding at para 26 that:

> "[T]o constitute an instrumentality of an offence the property sought to be forfeited must in a 'real or substantial sense . . . facilitate or make possible the commission of the offence' and

the property sought to be forfeited and the offence, and assessing the extent of the involvement of the property in the offence, the Supreme Court of Appeal had regard to: (a) whether the use of the property in the offence was deliberate and planned or merely incidental and fortuitous; (b) whether the property was important to the success of the illegal activity; (c) the period for which the property was illegally used and the spatial extent of its use; (d) whether its illegal use was an isolated event or had been repeated; and (e) whether the purpose of acquiring, maintaining or using the property was to carry out the offence.[12] In support of its finding that the property was an instrumentality of an offence the Supreme Court of Appeal found that—

> "[T]he property, although used by the appellant as his home, was adapted and equipped (by the fitting of an extractor fan and other laboratory paraphernalia) to unlawfully manufacture drugs from chemical substances. Its use was deliberate and planned and important to the success of the illegal activities, which could not be conducted openly. So far as the spatial use of the house is concerned, almost the entire house was used either to store chemicals and equipment necessary for the manufacturing process or to manufacture scheduled substances and drugs, particularly methamphetamine."[13]

[23] The Court remarked further that the offence involved goes beyond the fact that only a small quantity of 1-phenyl-2-propanone was found on the property. It

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> that it 'must be instrumental in, and not merely incidental to, the commission of the offence'. As to immovable property the Court held that the mere fact that an offence was committed at a particular place did not by itself make the premises concerned an instrumentality of the offence and that some closer connection than mere presence on the property would ordinarily be required. Further, that either 'in its nature or through the manner of its utilisation, the property must have been employed in some way to make possible or to facilitate the commission of the offence'. Where premises are used to manufacture, package or distribute drugs, or where any part of the premises has been adapted or equipped to facilitate drug-dealing (which in terms of s 1(1) of the Drugs Act includes 'manufacturing') they will in all probability constitute an instrumentality of an offence committed on them." (Footnotes omitted)

[12] Supreme Court of Appeal judgment above n 2 at para 27.

[13] Id at para 29.

pointed to the following additional factors: that although a small room in the house was converted into a "mini-laboratory", virtually the entire house and garage were used to store or keep chemicals and other equipment; that the quantity of chemicals found on the property was sufficient to synthesise 400g to 600g of methamphetamine; that the street value of such a quantity of methamphetamine was approximately R250 000 and that drug trafficking and drug abuse are a scourge in any society and are viewed in a serious light. It took into account also the value of the property when purchased, the mortgage bond balance and the current value of the property; that the applicant, though unemployed received income from rental earned on immovable property owned by his late father, and that the forfeiture would therefore not leave him destitute.[14]

[24] The Supreme Court of Appeal found that the constitutional application of Chapter 6 requires proportionality between the crime committed and the property to be forfeited. The majority of the Court[15] however, having had regard to United States jurisprudence[16] and based on the postulate of ensuring "that the purpose of the law is not undermined", set a standard of "significant disproportionality" in relation to deprivation of property as arbitrary and thus unconstitutional. It also held that the owner of the property needs to place the necessary material for a proportionality

[14] Id at paras 38-40.

[15] Mpati DP, Streicher, Mthiyane and Cloete JJA.

[16] See *United States v Bajakajian* 524 US 321 (1998), a case where the State sought the forfeiture of the sum of US $57 144 which the possessor had attempted to take out of the country illegally. The majority of the United States Supreme Court held that the forfeiture was punitive and that the test for the excessiveness of the punitive forfeiture involves solely a proportionality determination. It held that the principle of proportionality is the touchstone of the constitutional enquiry under the Excessive Fines Clause.

analysis before the Court.[17] Ponnan JA felt "constrained to disagree." He held, in his minority judgment, that the yardstick of "significant disproportionality" was rigid, and constitutionally excessive and accordingly could "hardly be constitutionally defensible", particularly when coupled with the requirement that the property owner should place the necessary material for the proportionality analysis before the court. The Court found that no disproportionality justifying the refusal of a forfeiture order had been shown to exist. Aggrieved by the decision the applicant applied to this Court for leave to appeal against it.

In this Court

[25] The main ground of appeal relates to the constitutional validity of Chapter 6 of the POCA. The applicant asked this Court to determine—

> "Whether or not the whole of Chapter 6 is constitutionally valid, alternatively, whether individual sections thereof, or some of the sections, either read alone or read together, whether by operation, enforcement or enactment thereof are constitutionally valid."

The applicant averred that the said sections violated his rights to dignity, privacy, fair trial, silence, the right to be presumed innocent until proven guilty and the right not to be arbitrarily deprived of property.

[26] He contended that the Supreme Court of Appeal failed to find that the operation of the POCA violates his rights in terms of section 25(1) of the Constitution.

[17] Supreme Court of Appeal judgment above n 2 at para 37.

The applicant challenged both the majority holdings that he had a duty to place factors before the Court to assist it in making a proportionality analysis and that the Court would not interfere with a forfeiture unless it could be shown that it was significantly disproportionate. He contended that such holdings amount to unconstitutional interpretation and application of the provisions of Chapter 6. The applicant further contended that the Supreme Court of Appeal should have considered the question whether the search of the property, consequent upon which the evidence obtained gave rise to the suspicion that the property was an instrumentality of an offence, was constitutionally defensible. He based his argument on the fact that the Magistrate in the related criminal proceedings found that the search was unconstitutional; the applicant was acquitted; and the respondent had decided not to appeal the holdings of the Magistrate in respect of the search warrant. The respondent opposed the application on several grounds. It asked that the application for leave to appeal be dismissed with costs.

Issues

[27] The issues raised by the application for leave to appeal relate to: (a) the constitutional challenge to the POCA; (b) the constitutionality of the forfeiture in this case and the proper constitutional approach to that question; (c) whether the evidence obtained in consequence of the search was admissible for the purpose of determining whether the property was an instrumentality of an offence; (d) the question of the reverse onus; and (e) the contemporaneous institution of both the civil and criminal proceedings. These issues will be considered later in this judgment.

[28] It is convenient to deal first with the application to adduce new evidence before I consider the jurisdictional matters and other issues raised in this application.

Application to adduce new evidence

[29] At the first hearing on 7 March 2006 the applicant sought without a formal application to adduce further evidence in terms of rule 31.[18] The evidence sought to be adduced is contained in three documents: (a) an affidavit by Michael Alan Smith (Mr Smith) dated 28 February 2006 (Mr Smith's affidavit); (b) the transcript of the criminal trial of the applicant and his co-accused in the Cape Town Regional Court presided over by Mr H J le Roux, which started on 17 November 2004 and ended on 8 April 2005 with the acquittal of the applicant (the transcript); and (c) a memorandum by the Director of Public Prosecutions of the Cape of Good Hope (DPP) to the senior public prosecutor in the Cape Town Magistrates' Court dated 26 May 2005 (memorandum) indicating that the DPP did not intend to appeal the decision of the magistrate.

[30] In oral argument at the first hearing in this Court, counsel sought to tender this further evidence. The hearing of the application for leave to appeal as well as the

[18] Rule 31, in so far as herein relevant, provides:

> "(1) Any party to any proceeding before the Court . . . shall be entitled, in documents lodged with the Registrar in terms of these rules, to canvass factual material that is relevant to the determination of the issues before the Court and that does not specifically appear on the record: Provided that such facts—
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> (a) are common cause or otherwise incontrovertible; or
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> (b) are of an official, scientific, technical . . . nature capable of easy verification."

informal application to adduce new evidence was postponed and a costs order was made against the applicant, as he had tendered the wasted costs of that hearing. Fresh directions were issued, [19] advising the parties of the date to which the application was postponed, putting the applicant on terms to lodge a formal application to adduce new evidence, giving the respondents an opportunity to file affidavits in response to the new evidence tendered by the applicant, as well as written argument on the application to adduce new evidence.

[31] At the resumed hearing on 10 May 2006 a substantive application for leave to adduce further evidence, the respondent's opposing affidavits, evidence in rebuttal on affidavits, as well as written submissions on both that application and the merits were before the Court.

[32] In an application lodged on 16 March 2006 the applicant also applied for condonation for the lateness of the application to adduce further evidence. I have carefully considered the explanation advanced. I am satisfied that the explanation is adequate especially given the fact that the application is only one day late as well as the fact that the respondent had not opposed it The application for condonation should, in the circumstances, be granted.

[33] Before turning to deal with the documents sought to be introduced on appeal, it will be useful to indicate that there are two routes for the admission of late evidence

[19] Directions issued by the Chief Justice on 8 March 2006.

on appeal in this Court. The first is rule 31 of the Rules of this Court[20] which permits parties to adduce relevant material that is common cause or otherwise incontrovertible or is of an official, scientific, technical or statistical nature and capable of easy verification.[21] The second is in terms of section 22 of the Supreme Court Act,[22] which is incorporated into the Rules of this Court by rule 30. This Court has considered the circumstances in which evidence may be tendered in terms of section 22 on several occasions and concluded that it may only be done in exceptional circumstances where the evidence sought to be submitted is "weighty, material and to be believed"[23] and there is a reasonable explanation for the late filing of the evidence. I now deal in turn with the documents sought to be introduced on appeal in the light of these principles.

Mr Smith's affidavit

[34] There is much which is of little relevance in this affidavit but the following are the salient facts of the allegations that emerge.

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[20] See text of rule 31 above n 18.

[21] See the discussion of the application of this rule in *S v Lawrence; S v Negal; S v Solberg* 1997 (4) SA 1176 (CC); 1997 (10) BCLR 1348 (CC) at paras 22-3; see also *Prince v President, Cape Law Society and Others* 2002 (2) SA 794 (CC); 2002 (3) BCLR 231 (CC) at para 10; and *Rail Commuters Action Group and Others v Transnet Ltd t/a Metrorail and Others* 2005 (2) SA 359 (CC); 2005 (4) BCLR 301 (CC) at paras 37-8.

[22] Act 59 of 1959. Section 22 provides:

> "The appellate division or a provincial division, or a local division having appeal jurisdiction, shall have power—
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> (a) on the hearing of an appeal to receive further evidence, either orally or by deposition before a person appointed by such division, or to remit the case to the court of first instance, or the court whose judgment is the subject of the appeal, for further hearing, with such instructions as regards the taking of further evidence or otherwise as to the division concerned seems necessary; and
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> (b) to confirm, amend or set aside the judgment or order which is the subject of the appeal and to give any judgment or make any order which the circumstances may require."

[23] See *Rail Commuters* above n 21 at para 43. See also *S v Lawrence* above n 21 at para 24.

[35] Mr Smith, who holds a B.Sc (Hons) degree in chemistry, is a chemistry lecturer. His affidavit purports to challenge Superintendent Venter's conclusion that the applicant was in the process of manufacturing methamphetamine on the property. He states that Superintendent Venter's interpretation is "an oversimplification of the steps actually needed" for the synthesis of methamphetamine.

[36] The applicant's reason for seeking to adduce the evidence by Mr Smith is to prove, it was contended, his innocence on the basis that Superintendent Venter's analysis was scientifically incorrect. That, according to the applicant, has a direct bearing on the findings of the Supreme Court of Appeal that he was in the completion stage of the synthesis of methamphetamine. He argued that rule 31 does not require the furnishing of an explanation for the lateness of the affidavit.

[37] The respondent opposed the application to adduce further evidence and to that end put up several affidavits to rebut the evidence of Mr Smith if his evidence were to be admitted.

[38] It is true that rule 31 does not expressly require an explanation for lateness, however our courts have always required an explanation for the late tender of evidence.[24] There are important reasons of fairness in an adversarial system why this is so. The late filing of an application in terms of rule 31 would also require an

[24] See for instance *S v Lawrence* above n 21 at para 15; *Rail Commuters* above n 21 at paras 36-8; *S v De Jager* 1965 (2) SA 612 (A) at 613C; *S v Swanepoel* 1983 (1) SA 434 (A); *S v Mohlathe* 2000 (2) SACR 530 (SCA) at para 8.

explanation for the late filing. The applicant clearly made a deliberate choice not to adduce Mr Smith's evidence earlier and take the Court into his confidence. His counsel correctly conceded in oral argument that the information contained in the affidavit is "objectively ascertainable" and could have been obtained at any stage. The applicant, in so far as Mr Smith's affidavit is concerned, has clearly been remiss. It would be a travesty of justice and a precedent which could lend itself to abuse were this Court, on account of the reason that rule 31 does not require an explanation, to exercise its discretion in favour of the applicant where there has been remissness and recantation. The application falls to be determined on this ground alone. It is however also clear that Mr Smith's affidavit does not fall within the terms of rule 31. Although it is scientific evidence, it is disputed by the respondent and is not capable of easy verification. That ground of admissibility is therefore not open to the applicant. Nor may the applicant rely on section 22 of the Supreme Court Act to admit Mr Smith's affidavit. The evidence does not meet the stringent criteria set for admissibility by this Court.

Transcript

[39] The applicant sought to introduce the transcript to establish (a) his lack of culpability in respect of the offence he was charged with and (b) that the search warrant on the strength of which the property was searched by the police was invalid. He argued that the transcript will: (a) show the manifest inequity that prevails when an accused is simultaneously faced with a criminal trial in relation to the commission of an offence as well as civil forfeiture proceedings in relation to the same offence; (b)

assist the Court in determining the constitutionality of the search and seizure conducted on the property which according to him is "the essential question"; and (c) show whether the Supreme Court of Appeal was correct in concluding that the acquittal was on a technicality.

[40] In the notice of motion the applicant contended that the transcript "should be the sole yardstick by which it should be measured whether an offence had been committed and that such yardstick is pertinent to the adjudication of the merits of this application." He contended that the Supreme Court of Appeal, in concluding that the property was an instrumentality of an offence "had to decide the guilt of the Applicant before it also decided whether it was appropriate that he forfeit his property". He argued, in addition, that the question of instrumentality cannot operate in a vacuum but had to be determined against the backdrop of the question whether any person has committed an offence.

[41] The respondent did not dispute that the transcript is an accurate reflection of the criminal proceedings in the Magistrates' Court. He contended however that the transcript was inadmissible for, among other things, lack of relevance and that the evidence sought to be introduced already formed part of the record before the Court.

[42] The main reason that the applicant wanted to have the transcript of the proceedings in the Magistrates' Court admitted was to persuade this Court to accept that Court's conclusion that the evidence gathered during the search on the property

should be excluded, and its conclusion that the applicant be found not guilty. It needs to be said that the provisions of Chapter 6 are not conviction-based.[25] The findings of the Magistrate as reflected in the transcript in a related criminal trial are, for the purpose of this judgment, irrelevant and may be described as "superfluous" or "supererogatory evidence"[26] because they amount to an opinion on a matter in which a judge might, in the forfeiture application have to decide. In any event, on the record, the applicant has admitted what was found on the property and has not sought to withdraw those admissions. Accordingly, the transcript falls to be excluded.

Memorandum

[43] The applicant also sought to introduce the memorandum by the DPP reflecting his decision not to pursue an appeal against the Magistrate's decision to set aside the search warrant on the grounds that it had been improperly obtained. The contention is that the Magistrate's decision on the search warrant was thus rendered "final and unassailable". The evidence contained in the memorandum is irrelevant for the determination of the issues before this Court. In any event that evidence already formed part of the record. The evidence is, in my view, also inadmissible on account

[25] Section 50(4) provides that the validity of a forfeiture order "is not affected by the outcome of criminal proceedings . . . in respect of an offence with which the property concerned is in some way associated". See also *Cook Properties* above n 11 at para 20; *National Director of Public Prosecutions and Another v Mohamed NO and Others* 2002 (4) SA 843 (CC); 2002 (9) BCLR 970 (CC) at para 16.

[26] Schwikkard et al *Principles of Evidence* 2 ed (Juta, Lansdowne 2002) at 83 para 8.3. See also section 42 of the Civil Proceedings Evidence Act 25 of 1965; *Hollington v Hewthorne and Co Ltd* [1943] 2 All ER 35 adopted in *Hassim (also known as Essack) v Incorporated Law Society of Natal* 1977 (2) SA 757 (A) at 764E-765E.

of the fact that the DPP was expressing a legal opinion on matters a court might have to decide.[27]

[44] I therefore conclude that the application to adduce further evidence should be refused with regard to all three documents. I consider the application for leave to appeal on the record as it stood before that application was launched.

Jurisdictional matter

[45] An applicant who seeks leave to appeal to this Court must satisfy two requirements: first, the application must raise a constitutional matter or issues connected with decisions on a constitutional matter[28] and, second, it must be shown that it is in the interests of justice for this Court to grant leave to appeal.[29] I deal with the two requirements in turn.

Does the application raise a constitutional matter?

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[27] See Zeffertt et al *The South African Law of Evidence* (Butterworths, Durban 2003) at 295.

[28] Section 167(3) of the Constitution provides:

> "The Constitutional Court—
>
> (a) is the highest court in all constitutional matters;
>
> (b) may decide only constitutional matters, and issues connected with decisions on constitutional matters; and
>
> (c) makes the final decision whether a matter is a constitutional matter or whether an issue is connected with a decision on a constitutional matter."

[29] Section 167(6) of the Constitution provides:

> "National legislation or the rules of the Constitutional Court must allow a person, when it is in the interests of justice and with leave of the Constitutional Court—
>
> (a) to bring a matter directly to the Constitutional Court; or
>
> (b) to appeal directly to the Constitutional Court from any other court."

[46] The application does raise important constitutional issues. Asset forfeiture orders as envisaged under Chapter 6 of the POCA are inherently intrusive in that they may carry dire consequences for the owners or possessors of properties particularly residential properties. Courts are therefore enjoined by section 39(2) of the Constitution[30] to interpret legislation such as the POCA in a manner that "promote[s] the spirit, purport and objects of the Bill of Rights", to ensure that its provisions are constitutionally justifiable, particularly in the light of the property clause enshrined in terms of section 25 the Constitution.[31]

[47] The respondent conceded that the application raises constitutional issues. What is however objectionable, the respondent contended, is that the applicant has raised the constitutional challenges for the first time in the application for leave to appeal. The question then arises whether it is in the interests of justice to grant leave to appeal.

Is it in the interests of justice to grant leave to appeal?

[30] Section 39(2) of the Constitution provides:

> "When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights."

[31] Section 25(1) of the Constitution provides:

> "No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property."

[48] Section 167(6)[32] of the Constitution read with rule 18[33] of the Rules of this Court makes provision for this Court to grant leave to a litigant, when it is in the interests of justice (a) to bring a matter directly to it or (b) to appeal directly to it from any other court. The question whether it is in the interests of justice to grant leave involves a careful and balanced weighing-up of all relevant factors. The considerations are case-specific and often vary, but are informed by the broad requirement of whether by hearing the case the interests of justice will be served.[34] The prospects of success is an important consideration when deciding whether to grant

[32] See above n 29.

[33] Rule 18 provides:

> "(1) An application for direct access as contemplated in section 167(6)(a) of the Constitution shall be brought on notice of motion, which shall be supported by an affidavit, which shall set forth the facts upon which the applicant relies for relief.
>
> (2) An application in terms of subrule (1) shall be lodged with the Registrar and served on all parties with a direct or substantial interest in the relief claimed and shall set out—
>
> (a) the grounds on which it is contended that it is in the interests of justice that an order for direct access be granted;
>
> (b) the nature of the relief sought and the grounds upon which such relief is based;
>
> (c) whether the matter can be dealt with by the Court without the hearing of oral evidence and, if it cannot,
>
> (d) how such evidence should be adduced and conflicts of fact resolved.
>
> (3) Any person or party wishing to oppose the application shall, within 10 days after the lodging of such application, notify the applicant and the Registrar in writing of his or her intention to oppose.
>
> (4) After such notice of intention to oppose has been received by the Registrar or where the time for the lodging of such notice has expired, the matter shall be disposed of in accordance with directions given by the Chief Justice, which may include—
>
> (a) a direction calling upon the respondents to make written submissions to the Court within a specified time as to whether or not direct access should be granted; or
>
> (b) a direction indicating that no written submissions or affidavits need be filed.
>
> (5) Applications for direct access may be dealt with summarily, without hearing oral or written argument other than that contained in the application itself: Provided that where the respondent has indicated his or her intention to oppose in terms of subrule (3), an application for direct access shall be granted only after the provisions of subrule (4)(a) have been complied with."

[34] See *Radio Pretoria v Chairperson, Independent Communications Authority of South Africa, and Another* 2005 (4) SA 319 (CC); 2005 (3) BCLR 231 (CC) at para 19.

leave to appeal but it is not the only matter to be considered when the interests of justice are being weighed. There are a number of other factors which have to be assessed together in this inquiry.[35] In considering the question whether it is in the interests of justice to grant the application for leave to appeal the different forms of relief sought by the applicant need to be considered separately. Given the fact that the merits of each issue are relevant to the interests of justice, it is convenient to deal with both together. The issues raised in this application are therefore dealt with in the remainder of this judgment in the order in which they are referred to in paragraph [27] above.

Constitutional challenge to the POCA

[49] The applicant asked this Court to determine whether Chapter 6 or its individual sections read alone or read together, are constitutional in that they violate his rights to dignity, privacy, fair trial, silence, the right to be presumed innocent until proven guilty and the right not to be arbitrarily deprived of property. The fundamental difficulty confronting the applicant is that the attack on the constitutionality of the POCA is raised for the first time in this Court. Neither in the High Court nor in the Supreme Court of Appeal did the applicant seek the declaration of constitutional invalidity.

[35] See *Shaik v Minister of Justice and Constitutional Development and Others* 2004 (3) SA 599 (CC); 2004 (4) BCLR 333 (CC) at para 16.

[50] The applicant's problems are compounded by the fact that in his written argument in the Supreme Court of Appeal he specifically accepted that the POCA passes constitutional muster. He said—

> "It is accepted that organised crime has become a growing international problem and that societies in transition (like South Africa) are particularly susceptible to organized crime groups. It is further accepted that ordinary criminal law measures are ineffective in targeting these criminal organizations, thus necessitating extraordinary measures such as civil forfeiture in terms of chapter 6 of POCA. Based on these exigencies, it is accepted that on an objective analysis POCA passes constitutional muster." (Emphasis added) (Footnotes omitted)

[51] The applicant conceded in written argument before this Court that the constitutional challenges were not raised by his counsel at the hearing before the Supreme Court of Appeal, but then, very surprisingly, contended that all the constitutional aspects that are canvassed in this application, "albeit not in formal legalese or language", were raised. He argued that the constitutional issues were raised in the Supreme Court of Appeal. This kind of discursiveness is incomprehensible, and cannot and should not be countenanced.

[52] The applicant has neither filed an application for direct access nor joined the Minister of Justice as a party in spite of the requirement of rule 5[36] of the Rules. He

[36] Rule 5 provides:

> "(1) In any matter, including any appeal, where there is . . . any inquiry into the constitutionality of any law, including any Act of Parliament . . . and the authority responsible for the executive or administrative act or conduct or . . . for the administration of any such law is not cited as a party to the case, the party challenging the constitutionality . . . shall, within five days of lodging with the Registrar a document in which such contention is raised for the first time in the proceedings before the Court, take steps to join the authority concerned as a party to the proceedings.

should have done so.[37] He has not, despite the fact that the directions issued out of this Court invited him to do so.

[53] In any event this Court[38] has warned that constitutional litigation requires accuracy in the identification of statutory provisions that are attacked on the ground of their constitutional invalidity and reasonable precision in the formulation of the attacks and disciplined compliance with the Rules. The applicant has clearly not adhered to that discipline. This failure on the part of an applicant puts both himself and the respondent at a disadvantage as both litigants would not have had "the opportunity of reconsidering or refining their respective arguments in the light of a prior judgment"[39] of the other courts, thereby having a negative impact on this Court's ability to determine the matter properly. This line of jurisprudence is well settled.[40] I conclude therefore that it is not in the interests of justice to grant leave to appeal on that challenge. I turn to consider the constitutionality of the forfeiture.

Constitutionality of the forfeiture

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(2) No order declaring such . . . law to be unconstitutional shall be made by the Court in such matter unless the provisions of this rule have been complied with."

[37] See *Beinash and Another v Ernst & Young and Others* 1999 (2) SA 116 (CC); 1999 (2) BCLR 125 (CC) at paras 27-8. See also *Jooste v Score Supermarket Trading (Pty) Ltd (Minister of Labour Intervening)* 1999 (2) SA 1 (CC); 1999 (2) BCLR 139 (CC) at paras 7-8.

[38] See *Shaik* above n 35 at para 25.

[39] See *Carmichele v Minister of Safety and Security and Another (Centre for Applied Legal Studies Intervening)* 2001 (4) SA 938 (CC); 2001 (10) BCLR 995 (CC) at para 59.

[40] See *Dormehl v Minister of Justice and Others* 2000 (2) SA 987 (CC); 2000 (5) BCLR 471 (CC) at para 5; *S v Bierman* 2002 (5) SA 243 (CC); 2002 (10) BCLR 1078 (CC) at paras 7-8; *Fourie v Minister of Home Affairs* 2003 (5) SA 301 (CC); 2003 (10) BCLR 1092 (CC) at para 12; *Zondi v MEC for Traditional and Local Government Affairs and Others* 2005 (3) SA 589 (CC); 2005 (4) BCLR 347 (CC) at para 13.

[54] This issue entails both what constitutes an instrumentality of an offence, and the proportionality of the forfeiture under Chapter 6. Both these questions raise important constitutional issues of substance and need to be determined to resolve the key complaint of the applicant: the question whether the order declaring his property forfeit should be set aside. In my view, it is therefore in the interests of justice that the applicant be granted leave to appeal on these issues and I deal with the questions in turn.

Instrumentality of an offence

[55] The question arises whether the property is an instrumentality of an offence.[41] Section 50 of the POCA requires a court asked to grant an order for forfeiture to find on a balance of probabilities that the property is an instrumentality of an offence. The applicant contended that a suspicion that property is concerned in the commission of an offence is not sufficient reason to deprive a person of his property and therefore constitutes unconstitutional deprivation of property. This argument relates only to preservation orders granted under section 38 of the POCA because the applicant contended that a preservation order must be granted if there are reasonable grounds to believe that the property is an instrumentality of an offence. The applicant seemed to lose sight of the standard of proof that must be discharged before a property is said to have been an instrumentality of an offence. It is necessary to emphasise that in

[41] Defined in section 1 of the POCA as:

> "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".

forfeiture proceedings, the higher standard of certainty is required – proof on a balance of probabilities.

[56] In *Cook Properties* the Supreme Court of Appeal 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 is reasonably direct and that the employment of the property must be functional to the commission of the crime. . . . [T]he 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."[42]

[57] On the evidence before this Court it is beyond doubt that the property, to borrow the phrases used in *Cook Properties*, was appointed, arranged, organised, furnished and adapted or equipped[43] to enable or facilitate the applicant's illegal activities. Superintendent Venter's evidence clearly indicated that all the five rooms of the house and the garage on the property were used for illegal drug manufacturing activities and associated storage of the chemicals, equipment and other articles. A small room in the house was used as a "mini-laboratory". It was fitted with laboratory equipment. Household furniture, including a refrigerator, table and storage cupboards in the house was used for the drug-manufacturing activities. All these clearly show that the property was concerned in the commission of the drug offences and not merely incidental thereto. Accordingly, I cannot fault the High Court and the

[42] *Cook Properties* above n 11 at para 31.

[43] Id at paras 34 and 49.

Supreme Court of Appeal in their findings in this regard. The next question to be considered relates to proportionality.

Proportionality

[58] Civil forfeiture provides a unique remedy used as a measure to combat organised crime. It rests on the legal fiction that the property and not the owner has contravened the law. It does not require a conviction or even a criminal charge against the owner. This kind of forfeiture is in theory seen as remedial and not punitive. The general approach to forfeiture once the threshold of establishing that the property is an instrumentality of an offence has been met is to embark upon a proportionality enquiry – weighing the severity of the interference with individual rights to property against the extent to which the property was used for the purposes of the commission of the offence, bearing in mind the nature of the offence.

[59] The POCA is an important tool to achieve the goal of reducing organised crime. Its legislative objectives are set out in its Preamble which observes that: (a) criminal activities present a danger to public order and safety and economic stability and have the potential to inflict social damage; and (b) South African common law and statutory law fail to deal adequately with criminal activities and also fail to keep pace with international measures aimed at dealing effectively with such activities. Its scheme seeks to ensure that no person convicted of an offence benefits from the fruits of that or any related offence, and to ensure that property that is used as an instrumentality of an offence is forfeited.

[60] The POCA uses two mechanisms to ensure that property derived from an offence or used in the commission of an offence is forfeited to the State. The mechanisms are set out in Chapters 5 and 6. Chapter 5, in sections 12 to 36, provides for the forfeiture of the benefits derived from the commission of an offence but its confiscation machinery may only be invoked once a defendant has been convicted, while Chapter 6, in sections 37 to 62, provides for forfeiture of the proceeds of and properties used in the commission of crime. This case involves the mechanism set out in Chapter 6.

[61] While the purpose and object of Chapter 6 must be considered when a forfeiture order is sought, one should be mindful of the fact that unrestrained application of Chapter 6 may violate constitutional rights, in particular the protection against arbitrary deprivation of property particularly within the meaning of section 25(1) of the Constitution, which requires that "no law may permit arbitrary deprivation of property." In *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* (*FNB*)[44] this Court held that "arbitrary" in section 25(1) means that the law allowing for the deprivation does not provide sufficient reason for the deprivation or allows deprivation that is procedurally unfair. The Court said—

[44] 2002 (4) SA 768 (CC); 2002 (7) BCLR 702 (CC) at para 100.

> "[F]or the validity of such deprivation, there must be an appropriate relationship between means and ends, between the sacrifice the individual is asked to make and the public purpose this is intended to serve. It is one that is not limited to an enquiry into mere rationality, but is less strict than a full and exacting proportionality examination."[45]

[62] The Court set out factors relevant in establishing arbitrariness in relation to deprivation of property.[46] While the standard for establishing arbitrariness is different to the standard of proportionality, these factors are relevant in highlighting what is considered by this Court in cases where property is involved. The following considerations are important—

1. The relationship between the purpose of the deprivation and the person whose property is affected;
2. The relationship between the purpose of the deprivation, the nature of the property affected and the extent of the deprivation;
3. A more compelling purpose is required where the property rights involved are the ownership of land or corporeal movables;
4. The reasons should be more compelling as more incidents of ownership are affected;
5. Depending on the nature and extent of the rights affected, the test is one that comprises elements of rationality and proportionality, moving closer towards proportionality as the effects increase; and

[45] Id at para 98.

[46] Id at para 100.

6. The inquiry takes full account of the relevant circumstances of each case.

It follows therefore that a factor-based approach is preferable. This salutary approach is similar to that enunciated in *S v Manamela*.[47]

[63] In this case some of the relevant factors appear to be the following: whether the property is integral to the commission of the crime; whether the forfeiture would prevent the further commission of the offence and its social consequences; whether the "innocent owner" defence would be available to the applicant; the nature and use of the property; and the effect on the applicant of the forfeiture of the property.

[64] The property in issue was clearly integral to the commission of the crime. It was adapted for the purpose of facilitating the manufacture of "tik": one of the rooms was customised into a home laboratory and the other rooms were used to store chemicals and equipment. On the applicant's own version, materials for manufacturing were found on his premises. While he submits that he uses the laboratory to advance his hobby in alchemy, he was on a balance of probabilities utilising it to produce prohibited substances that give rise to grave social dislocation. Further manufacture would necessarily be prevented by the forfeiture of the property. Finally, although the property is the applicant's home, he would not be rendered

[47] *S v Manamela and Another (Director-General of Justice Intervening)* 2000 (3) SA 1 (CC); 2000 (5) BCLR 491 (CC) at paras 32-3.

homeless by the forfeiture. As the owner of the property, he would also not have the "innocent owner" defence open to him.

[65] The applicant contended that the provisions of the POCA that interfere with the property rights do not disclose a sufficient reason for doing so and are therefore arbitrary. The applicant referred to the fact that he was acquitted in the criminal proceedings and that only a small quantity of the prohibited substance, 1-phenyl-2-propanone was found, as well as the fact that no methamphetamine was found on the property. It does not appear to me that the quantity of the prohibited substance should be a decisive factor in determining proportionality as contended by the applicant. The quantity of a prohibited substance actually found may be unhelpful as it may not give any reliable indication of the involvement of the property in the commission of the offence. In any event the applicant seems to have been unmindful of the evidence that the street value of the methamphetamine which could have been produced from the chemicals found on the property was approximately R250 000. I share the view expressed by the Supreme Court of Appeal that the consideration of the offence involved goes beyond the fact that only a small quantity of 1-phenyl-2-propanone was found on the property. The fact that no methamphetamine was found is, in my view, of no compelling significance in the circumstances of this case.

[66] Section 50(4) provides that the validity of a forfeiture is not affected by the outcome of criminal proceedings in respect of an offence with which the property concerned is in some way associated. Supposedly for that reason, the applicant

accepted that the invocation of chapter 6 of the POCA is not contingent upon a conviction or even a criminal charge. The applicant contended however that where there are criminal charges dealing with the same facts, Chapter 6 of the POCA should be invoked in the narrowest of circumstances. The Supreme Court of Appeal dealt convincingly with that argument and said—

> "[T]he acquittal of the appellant on a technicality indicates the difficulties the State has to contend with in its endeavours to combat drug-related crimes. And a prosecution, followed by a conviction and sentence is no bar to the invocation of ch 6. Counsel accepted that organised crime has become a growing international problem and that societies in transition (like South Africa) are susceptible to organised crime groups, and that ordinary criminal law measures are ineffective in targeting these criminal organisations, thus necessitating extraordinary measures such as civil forfeiture in terms of ch 6 of the Act."[48]

[67] The facts in this case demonstrate that there was an adaptation in almost every single room in the house to facilitate the manufacturing of drugs. The house was not incidental to the offence. It was so closely connected to the equipment used in the manufacturing of drugs that the two cannot be separated. As far as the relationship between the owner of the property and the offence is concerned, the "innocent owner defence" cannot avail the applicant in this case. What counts in the applicant's favour is the fact that the immovable property in question was also used for residential purposes. The forfeiture will however not leave him destitute because he receives rentals from immovable property in another area.[49]

[48] Supreme Court of Appeal judgment above n 2 at para 32.

[49] See *Jaftha v Schoeman and Others; Van Rooyen v Stoltz and Others* 2005 (2) SA 140 (CC); 2005 (1) BCLR 78 (CC) at para 25. The Court stressed the importance of a break from our past in which people were often left destitute with little regard given to their personal circumstances.

[68] While there have been no identified victims of the applicant's conduct, the evidence adduced illustrates the need to target the problem of drug manufacturing. The social problem caused by drug manufacturing, dealing and usage, particularly in the Western Cape, should not be overlooked. There is an alarming rise in illicit production of, demand for and trade in undesirable dependence-producing substances. The illicit production and use of these substances undermine the legitimate economy and threaten the national stability and security of the country. In addition, they pose a serious threat to the health, welfare and safety of human beings, particularly young people and children, and adversely affect the social and economic foundations of our society. The rapid expansion of drug markets in small residential laboratories creates immeasurable social problems. The sexual abuse of young children, domestic problems, violence inside and outside of the home, health and instability in the Western Cape are attributable in part to the use of "tik" and the prevalence of mini-laboratories in residential areas.

[69] The applicant challenged the choice of the standard of "significantly disproportionate" in the majority judgment of the Supreme Court of Appeal. He argued that this standard exceeds the provisions of the POCA and amounts to an unconstitutional enforcement of its provisions. This issue was the subject of the minority judgment in the Supreme Court of Appeal, per Ponnan JA. He held that that standard was "too strict an evaluative norm"[50] and that "[t]he draconian effect of the

[50] Supreme Court of Appeal judgment above n 2 at para 42.

Act would be exacerbated . . . were the elevated benchmark 'significantly disproportionate' to be applied."[51] Ponnan JA therefore held that the proper question was whether the forfeiture of the property in the circumstances of the case was "disproportionate" (and not "significantly disproportionate" as the majority held). In my view, the question of whether there is a material difference between the test formulated by the majority in the Supreme Court of Appeal and that formulated by Ponnan JA need not be answered in this case. It is perhaps worth pointing out that, as Ackermann JA noted in *FNB,* the precise linguistic formulation of the proportionality test may make little difference. In that case the Court said—

> "[T]he requirement of such an appropriate relationship between means and ends is viewed as methodologically sound, respectful of the separation of powers between Judiciary and Legislature . . . and suitably flexible to cover all situations. It matters not whether one labels such an approach an 'extended rationality' test or a 'restricted proportionality' test. Nor does it matter that the relationship between means and ends is labelled 'a reasonably proportional' consequence, or 'roughly proportional', or 'appropriate and adapted' or whether the consequence is called 'reasonable' or 'a fair balance between the public interest served and the property interest affected'."[52]

It is clear as I have outlined above that the forfeiture of the property in this case is neither significantly disproportionate nor disproportionate, given the nature of the relevant offence, and the extent to which the property was used as an instrument of that offence. The applicant's argument that the forfeiture of his property in this case constituted an "arbitrary deprivation of property" inconsistent with the Constitution must therefore fail.

[51] Id at para 47.

[52] Above n 44 at para 98.

Onus

[70] One further challenge raised by the applicant in respect of the proportionality argument related to the onus placed upon those seeking to resist forfeiture by the Supreme Court of Appeal. He argued that the onus requirement is unconstitutional. The Supreme Court of Appeal said that it was open to the applicant to show that there is significant disproportionality between the crime committed and the property to be forfeited. Despite it being raised by the applicant, the question was not properly argued before us. Moreover, in this case I am satisfied that the forfeiture is not disproportionate in the circumstances of the case. Given that firm conclusion, the question of onus does not arise for decision in this case.

Validity of the search

[71] As noted above, at the criminal trial the evidence gathered by the members of the SAPS during the entry, search and seizure on the property was excluded. The search was held to be unlawful because the warrant had been improperly issued. The applicant contended that because the search on the property was performed on the strength of a defective warrant, the admission of evidence so gathered in the forfeiture proceedings violated his right to privacy. It may well be that the evidence gathered in a manner that violates rights entrenched in the Bill of Rights could be excluded in appropriate cases. Although the applicant has referred to this ground in his application for leave to appeal to the Supreme Court of Appeal, he did not persist with the attack on the validity of the warrant authorising the search on the property and the

admissibility of the evidence yielded by the ensuing search. In his affidavits on the record, the applicant did not dispute the respondent's version of what was found at his home during the search. The applicant cannot assail the decision of the Supreme Court of Appeal on those grounds. His failure to raise this issue before the Supreme Court of Appeal inhibits his ability to raise them for the first time in this Court. Clearly, as a result of that failure this Court is deprived of the benefit of the Supreme Court of Appeal's consideration of such issues, some of which relate to established principles of the common law. It is not therefore in the interests of justice to grant leave to appeal on this matter.

Contemporaneous institution of the civil and criminal proceedings

[72] In argument, the applicant suggested that the fact that the forfeiture proceedings had run concurrently with the criminal proceedings was unconstitutional, in that it had prejudiced his right to a fair trial. In support of this argument, he pointed to the fact that he had applied in the High Court for a stay of the forfeiture proceedings pending the finalisation of the criminal proceedings against him and his two co-accused on the basis that an adverse finding by the High Court could impact on his right to be presumed innocent. It should be noted however that the applicant only applied for a stay of the forfeiture proceedings after he had already lodged affidavits resisting those proceedings. After he was acquitted, the applicant never sought to lodge further affidavits in order to furnish a full explanation with the Supreme Court of Appeal and this Court. Given that he did not do so, it cannot be said that these proceedings have been unfair.

[73] Accordingly, without deciding whether the contemporaneous institution of the civil and criminal proceedings could be unfair, the applicant did not show that it was unfair in this case.

Conclusion

[74] I conclude that the appeal should be dismissed.

Costs

[75] The applicant has tendered to pay the wasted costs of the hearing on 7 March 2006. With respect to the costs of the second hearing, he submitted that costs should follow the result. The respondent has asked for costs on appeal.

[76] When approaching this Court the applicant sought to ventilate important issues of constitutional principle. Generally, this Court is slow in making a costs order against such a litigant unless, for example, he has been vexatious or frivolous or acted with improper motives or it is in the interests of justice to direct him to pay the costs. It cannot, in the circumstances of this case, be said that the applicant was frivolous or vexatious or acted with improper motives, although it must be said that the manner in which the appeal was prosecuted left much to be desired. For these reasons it would, in my view, be appropriate to make no order as to costs.

Order

[77] The following order is therefore made:

1. Condonation is granted for the late filing of the application to adduce further evidence;
2. The application to adduce further evidence is dismissed;
3. The application for leave to appeal is granted in respect of the question whether the forfeiture of the applicant's property is constitutional;
4. The appeal is dismissed with no order as to costs.

Langa CJ, Moseneke DCJ, Madala J, Mokgoro J, O'Regan J, Sachs J, Skweyiya J, Van der Westhuizen J and Yacoob J concur in the judgment of Nkabinde J.

For the applicant:	WA Fischer instructed by Napoleon and Vogel Attorneys.
For the respondent:	W Trengove SC, AM Breitenbach and A Erasmus instructed by the State Attorney, Cape Town.