IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CCT19/06

Kumarnath Mohunram and Shelgate Investments CC v The National Director of Public Prosecutions and BOE Bank Limited (Law Review Project Intervening as Amicus Curiae)

Date of judgment: 26 March 2007

MEDIA SUMMARY

The following media summary is provided to assist in reporting this case and is not binding on the Constitutional Court or any member of the Court.

This morning the Constitutional Court handed down judgment in a matter concerning the forfeiture of property alleged to be the instrumentality of an offence in terms of the Prevention of Organised Crime Act 121 of 1998 (POCA).

In 1998, Mr Mohunram became the sole member of Shelgate Investments CC. Through Shelgate Investments, Mr Mohunram began trading as Vryheid Glass and Aluminium on the property in issue. Along with the legal business, however, he partitioned the building and continued slot machine gambling operation that already existed on the premises. On 18 April 2001 Mr Mohunram was arrested and charged with contravening certain sections of the KwaZulu Natal Gambling Act of 1996 relating to operating a casino without a licence. He pleaded guilty and paid admission of guilt fines totalling R88 500. More than R2 000 in cash and 57 gambling machines valued at about R285 000 in total were seized on the premises by the police and ultimately confiscated.

The National Director of Public Prosecutions (NDPP) applied to the Natal High Court for the civil forfeiture of the property. The NDPP argued that the property was an "instrumentality of an offence" as defined in section 1 of POCA. The High Court dismissed the application. The NDPP successfully appealed to the Supreme Court of Appeal (SCA). In upholding the appeal the SCA held that the property was an instrumentality of the offence of operating an illegal casino because it was intimately concerned in the commission of this offence. The SCA also rejected the argument that forfeiture of the property would be disproportionate.

Mr Mohunram (and Shelgate Investments) appealed against the judgment of the SCA to the Constitutional Court. They did not challenge the constitutionality of POCA, but argued that the property was not an "instrumentality" and that its forfeiture would be disproportionate in the light of (among other things) the punishment Mr Mohunram had already received. The NDPP argued to the contrary that the property was integral to the commission of the offences and that the forfeiture was not disproportionate. The Constitutional Court allowed the Law Review Project (LRP) to intervene as a friend of the Court. The LRP argued that gambling is not by itself an offence for which there can be forfeiture under POCA; that Shelgate's property is not an

"instrumentality of an offence"; that the forfeiture is disproportionate and that the forfeiture provisions in the KZN Gambling Act exclude operation of the provisions of POCA.

Van Heerden AJ held that the gambling operation in issue was an offence covered by POCA. POCA does not only apply to discrete areas of organised crime, but can encompass illegal acts outside of money laundering, racketeering, and criminal gang activity. She held further that, in weighing the severity of the interference with Mr Mohunram's rights to the property against the extent to which the property was used to commit the specific offence in question, the forfeiture in this case was proportionate.

Van Heerden AJ acknowledged the important state objective in regulating gambling and the severe negative effects it can have on communities and its possible connection to other organised crimes. The KwaZulu Natal Gambling Act addresses the seizure of the machines and proceeds used in gambling operations, whereas POCA addresses civil forfeiture of a wider scope by including "instrumentalities" or property involved in a crime. Here, the property was specifically adapted in various ways to operate a casino over a period of time. The fact that Mr Mohunram suffered criminal penalties for his illegal acts does not mean that civil forfeiture under POCA is disproportionate. The property to be forfeited belongs to Shelgate, not to Mr Mohunram. Shelgate has to date lost nothing as a result of its illegal activities. While Mr Mohunram is admittedly the sole member of Shelgate, it does have a separate corporate personality. Mr Mohunram and Shelgate have enjoyed the advantages of their separate legal personalities and must also bear the consequences of this arrangement. Even if one disregards Shelgate's separate corporate personality, the net profits Mr Mohunram made from his illegal gambling operation offset the total loss he suffered from the other criminal penalties imposed on him and the loss that he and Shelgate would suffer from forfeiture of the property.

Van Heerden AJ thus concluded that she would have dismissed the appeal with no order as to costs. Langa CJ, Madala J, Van der Westhuizen J and Yacoob J concurred in her judgment.

Moseneke DCJ, with whom Mokgoro J and Nkabinde J concurred, concluded that leave to appeal should be granted and that the appeal should be upheld with costs. On the issue whether the property concerned was an "instrumentality of an offence", he held, in line with van Heerden AJ, that the property concerned was an instrumentality of the offence in question. Moseneke DCJ further held that it was not necessary to decide the issue whether the scope of POCA is designed to reach beyond "organised crime offences" so as to apply to cases of individual wrongdoing.

In deciding whether or not forfeiture of property would be proportionate, Moseneke DCJ held that the instrumentality of the crime must be shown to be sufficiently connected to the main purpose of POCA, that being to remove the incentive for crime and to serve as an adequate deterrent to the individual concerned and to society at large. Having been satisfied that no link was shown to exist, Moseneke DCJ concluded that, on the facts taken as a whole, the forfeiture order was disproportionate and the conduct of Mr Mohunram did not warrant the forfeiture of the immovable property.

Sachs J, with whom O'Regan J and Kondile AJ concurred, supported the judgment by Moseneke DCJ. Although he agreed with van Heerden AJ that the property was indeed an instrumentality

of the offence, he disagreed with her conclusion that the forfeiture of the property was proportionate. In his view the closer the criminal activities are to the primary objectives of POCA, the more readily should a court grant a forfeiture order. Conversely, the more remote the activities are from these objectives, the more compelling must the circumstances be. POCA was not adopted with a view to providing either a substitute for or a top-up of ordinary forms of law enforcement. Though gambling has come to be linked in the public mind with gangsterism and money laundering, there was no evidence that Mr Mohunram was linked to any gangs, and his down-market casino would hardly have served as a meaningful agency for laundering money. Imposing a forfeiture order on top of the penalties imposed as a result of his prosecution was disproportionate. Sachs J pointed to the risk that if the Asset Forfeiture Unit spread its net too widely so as to catch the small fry, it could make it easier for the big fish and their surrounding shoal of predators to elude the law.