

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 19/06

KUMARNATH MOHUNRAM First Applicant

SHELGATE INVESTMENTS CC Second Applicant

versus

THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS First Respondent

BOE BANK LIMITED Second Respondent

THE LAW REVIEW PROJECT Amicus Curiae

Heard on : 16 November 2006

Decided on : 26 March 2007

JUDGMENT

VAN HEERDEN AJ:

Introduction

[1] This is an application for leave to appeal against a judgment of the Supreme Court of Appeal,¹ upholding an appeal from a judgment of the Pietermaritzburg High Court and replacing the order of that court with an order declaring an immovable property forfeit to the state in terms of the Prevention of Organised Crime Act 121 of 1998 (“POCA”). The property in question is registered in the name of the second

¹ *National Director of Public Prosecutions v Mohunram and Others* 2006 (1) SACR 554 (SCA).

applicant, Shelgate Investments CC (“Shelgate”). The first applicant, Mr Kumarnath Mohunram, holds a 100 percent member’s interest in Shelgate. The forfeiture order was granted on the basis that such property was an “instrumentality” of an offence under the KwaZulu Natal Gambling Act 10 of 1996 (“the KZN Gambling Act”).

[2] On 19 October 2001, the Pietermaritzburg High Court granted a preservation order in terms of section 38(2) of POCA. The order related to a sectional title unit in a scheme known as the Malapin Centre together with an undivided share in the common property (“the property”). The National Director of Public Prosecutions (“NDPP”), the first respondent before this Court, in due course applied to the High Court under section 48 of POCA for a forfeiture order in terms of section 50. A mortgage bond is registered over the property in favour of NBS, one of the operating divisions of BOE Bank Limited (“BOE”), nominally the second respondent before this Court but which does not oppose any of the relief sought by the applicants. BOE filed a notice in terms of section 39(3) of POCA as a party with an interest in the property. It did not oppose the application for a forfeiture order, but merely sought to retain its interest in the property through the mortgage bond registered in favour of NBS, more particularly its rights as a secured creditor in terms of section 43(3)(a) of POCA.

[3] The High Court dismissed the NDPP’s application for a forfeiture order, concluding that the property had not been shown to be an instrumentality of an offence. The NDPP appealed to the Supreme Court of Appeal, which upheld the appeal and granted the forfeiture order. It is that judgment against which the

applicants now seek leave to appeal to this Court. They also apply for condonation for the late filing of the record. As the explanation given by them for the delay is satisfactory and the NDPP consented to the late filing of the record, the condonation application should be granted.

[4] This Court has allowed the Law Review Project (“LRP”) to intervene in this matter as *amicus curiae*. Written as well as oral argument was addressed to the Court on behalf of the LRP.

Factual background

[5] In 1998, Mr Mohunram purchased the 100 percent member’s interest in Shelgate. He took occupation of the premises, partitioned the building and commenced trading as Vryheid Glass and Aluminium. However, along with the legitimate glass and aluminium business, Mr Mohunram also operated up to 57 gaming machines on the premises. This was done in contravention of section 44 of the KZN Gambling Act, which provides that no person may operate a casino² unless validly licensed.³ In terms of section 3(3)(a) of the same Act, the owner of a building may not allow any other person to conduct any gambling activity therein or thereon unless that person has been duly licensed.⁴ Shelgate as owner acted in contravention

² The word “casino” is defined in section 1 of the KZN Gambling Act as “any premises upon which . . . gaming machines may be played under the authority of a casino licence issued by the [KwaZulu-Natal Gambling] Board in terms of this Act”.

³ Section 44 provides that: “No person may operate or attempt to operate a casino unless he or she is in possession of a valid licence issued by the Board in terms of this Act”.

⁴ Section 3(3)(a) reads as follows:

“The owner of any building, dwelling, structure or premises of any other nature whatsoever shall not use such building, dwelling, structure or premises of any other nature whatsoever for

of this section, “allowing” its sole member, Mr Mohunram, to conduct the illegal casino. Mr Mohunram also contravened section 95(2), read together with section 55, of the Act by being in possession of unregistered gaming machines without a permit for the storage of these machines. Finally, by employing people to work in his unlicensed casino, Mr Mohunram contravened section 3(4)(b) of the Act, which prohibits such employment.⁵

[6] In April 2001, Mr Mohunram was arrested in connection with his illegal casino operation. He was subsequently charged with 57 counts of contravening section 95(2) of the KZN Gambling Act (being in possession of 57 unregistered gaming machines without the requisite permits), as well as with three counts of contravening section 3(4)(b)⁶ (employing three people in his unlicensed casino). He paid admission of guilt fines of R1 500 each in respect of counts one to 57 (R85 500 in total) and of R1 000 each in respect of counts 58 to 60 (R3 000 in total). In addition, under the provisions of the KZN Gambling Act, he forfeited about R2 100, being monies that were found and seized on the premises during a police raid. His 57 gaming machines

gambling purposes or allow any other person to conduct any gambling activity therein or thereon unless he or she or the person conducting the gambling activity in or on such building, dwelling, structure or premises, is in possession of a licence issued in terms of this Act”.

⁵ In terms of section 3(4)(b): “No person shall employ or offer employment to any person in any gambling activity, unless he or she is the holder of a valid licence issued in terms of this Act”.

⁶ The relevant annexures to the charge sheets refer to “. . . Section 4(b) read with Sections 1 and 94 of the KZN Gambling Act”, but it is clear from the description of the offences in each charge sheet (“the accused did unlawfully employ or offer employment to any person, to wit [name of person] in any gambling activity of which he is not a valid licence holder issued in terms of the Kwa-Zulu Natal Gambling Act No. 10 of 1996”) that this is an error and that the reference should actually be to section 3(4)(b).

(which he valued at approximately R285 000 in total) were also seized and destroyed in terms of the same legislation.⁷ Shelgate was not charged.

[7] Subsequently, the NDPP launched the proceedings that ultimately led to the forfeiture order in respect of the property and culminated in the present application.

Application for leave to appeal

[8] Before leave to appeal to this Court can be granted, it is incumbent on the applicants to satisfy two requirements: (a) the application must raise a constitutional matter or issues connected with decisions on constitutional matters;⁸ and (b) it must be in the interests of justice that leave be granted.⁹

[9] In the light of the recent judgment of this Court in *Prophet v National Director of Public Prosecutions*,¹⁰ it must be accepted that the application for leave to appeal does indeed raise a constitutional issue. In *Prophet*, Nkabinde J, writing for a unanimous Court, held as follows:

⁷ Section 94(4) of the Act provides that:

“In addition to any penalty contemplated in this section—

(a) all monies, coins, notes, chips, cheques, any documents acknowledging debt or other articles used for securing the payment of money . . . found in or at the place where such contravention occurred shall be forfeited to the Provincial Administration of the Province for disposal, including destruction, at the discretion of the Minister; and

(b) any gaming equipment or gaming machines found in or at the place where such contravention occurred shall be destroyed forthwith.”

⁸ Section 167(3)(b) of the Constitution of the Republic of South Africa, 1996.

⁹ Id at section 167(6).

¹⁰ 2007 (2) BCLR 140 (CC); 2006 (2) SACR 525 (CC) at para 46.

“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 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 of the Constitution.”¹¹ (Footnotes omitted.)

[10] The applicants contended that it is also in the interests of justice to grant leave to appeal. According to them, the facts of this case are fundamentally distinguishable from those of previously decided cases where forfeiture orders in terms of POCA have been granted. The applicants submitted that this appeal highlights the questions whether, in the particular circumstances of this case, the property in question was indeed an “instrumentality of an offence” for the purposes of POCA and, if so, whether the forfeiture was “proportional”. It was further argued that the mischief admitted to by Mr Mohunram is not the mischief envisaged in the long title of, or the preamble to, POCA. The Supreme Court of Appeal thus erred in failing to consider whether the legislature intended that a person who engaged in what the applicants called “a universally condemned offence, such as drug dealing” ought to be treated in precisely the same way, as regards the forfeiture provisions, as a person who “at all times pursued legitimate business interests” on the property in question and “committed an offence simply by not having a licence for that particular activity”.

[11] As indicated above, BOE did not oppose the application for leave to appeal and abides the decision of this Court. The NDPP conceded that the application for leave

¹¹ Id.

to appeal does raise a constitutional matter. It submitted, however, that it is not in the interests of justice to grant leave to appeal because the applicants do not have reasonable prospects of success.¹² This Court should thus dismiss the application for leave to appeal or, alternatively, dismiss the appeal itself.

[12] The amicus curiae, the LRP, made it clear that it raised no challenge to the constitutionality of POCA. It submitted, however, that this case raises a constitutional issue because the Supreme Court of Appeal interpreted the relevant provisions of the KZN Gambling Act and of POCA in the light of the text and the overall structure of the latter statute without proper regard to the Constitution, with the consequence that the forfeiture which it upheld in this case constituted: (i) an unlawful and arbitrary deprivation of property and thus an infringement of section 25 of the Constitution;¹³ and/or (ii) a penal deprivation of property that is grossly disproportionate, arbitrary and irrational and so infringed the “cruel and unusual punishment clause” in the Constitution.¹⁴ The grounds relied on by the LRP for these conclusions will be considered in greater detail below.

[13] In my view, it is in the interests of justice that the applicants be granted leave to appeal on the issues raised by them. As stated in *Prophet*:

¹² In this regard, it should be noted that, while the prospects of success are an important consideration in deciding whether or not to grant leave to appeal to this Court, it is not the only matter to be considered. See *Prophet* above n 10 at para 48; see also *Minister of Safety and Security v Luiters* 2007 (2) SA 106 (CC); 2007 (3) BCLR 287 (CC) at paras 24 and 32.

¹³ The relevant part of section 25(1) 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.”

¹⁴ Namely section 12(1)(e), in terms of which: “Everyone has the right to freedom and security of the person, which includes the right not to be treated or punished in a cruel, inhuman or degrading way.”

“This issue [the forfeiture of the applicant’s property] 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.”¹⁵

The applicants contended that the facts in this present matter are fundamentally distinguishable from those of any of the decided cases in which civil forfeiture under POCA has been granted and requires a fresh examination of both the issues of instrumentality of an offence and of proportionality of a forfeiture order. This being so, it is in the interests of justice that the applicants be granted leave to appeal on the issues raised by them.

Issues

[14] As Harms JA pointed out in the Supreme Court of Appeal judgment in this case:

“There are usually three main issues in a case such as this to decide and they are (a) whether the property concerned was an instrumentality; (b) whether any interests should be excluded from the forfeiture order; and (c) whether the forfeiture sought would be disproportionate.”¹⁶

In the present application, as before the Supreme Court of Appeal, the second issue does not arise, but the other issues both remain in dispute. Before dealing with these

¹⁵ Above n 10 at para 54.

¹⁶ Above n 1 at para 2.

issues, however, it is necessary to consider several of the points raised (the first in considerable detail) by the LRP.

The meaning of “offence” in the context of Chapter 6 of POCA

[15] The LRP submitted that POCA was construed by the Supreme Court of Appeal in a manner that improperly brought gambling per se within the compass of the Act and that, in consequence, the forfeiture provisions of POCA were incorrectly brought to bear on Shelgate’s property. According to the LRP, the offences for which forfeiture is potentially competent are limited to those “created” by POCA, that is, racketeering under Chapter 2, money laundering under Chapter 3 and criminal gang activities under Chapter 4. The LRP collectively terms these offences “organised crime offences”. Since unlicensed gambling, without more, is not an organised crime offence, no order of forfeiture can, it was contended, competently be made under POCA on the basis of the provisions authorising the forfeiture of the instrumentalities of this offence.

[16] The LRP argued that, in proceedings before the courts which have considered the relevant provisions of POCA, an “assumption” has been made that, provided an offence falls within the ambit of Schedule 1 to POCA, forfeiture is competent. Underlying this assumption is an acceptance of the proposition that the “offence” contemplated in the phrase “instrumentality of an offence referred to in Schedule 1”, as it appears in sections 38 and 50(1), includes every offence listed in the Schedule, whatever its nature. According to the LRP, this assumption is unfounded, as POCA

makes a clear distinction between “offences”, on the one hand, and “crimes” and “unlawful activities”, on the other. The “proceeds of unlawful activities”, which by virtue of its definition includes crimes, can be declared forfeit whatever the nature of the unlawful activity or crime, giving expression to the ancient doctrine that no one should be permitted to profit from his or her wrongdoing. By contrast, so contended the LRP, before the instrumentalities of wrongdoing can be declared forfeit, the act or omission must be “an organised crime offence” as contemplated in POCA and, *in addition*, the “offence” must be one referred to in Schedule 1. Thus, the reference to Schedule 1 simply limits the ambit of the offences under POCA that can provide the basis for the grant of the forfeiture order. Were it otherwise, the legislature could have been expected to incorporate the reference to Schedule 1 in the definition of “instrumentality of an offence” in section 1.

[17] The effect of this approach, the LRP submitted, is that wrongdoing that fails to satisfy *both* these requirements cannot provide a basis for the grant of a forfeiture order under POCA. The LRP accepted that gambling without a licence falls within the compass of Schedule 1 and that gambling can, in circumstances where it is *also* an organised crime offence, constitute an offence within the contemplation of POCA. Gambling may therefore be the basis or infrastructure of an offence contemplated by POCA, but it must in addition be shown that the statutory requirements of systematic racketeering, criminal gang activity or money laundering are present. Thus, according to the LRP, if only one of the two requirements is satisfied, no forfeiture is competent, as in this case where there was no proof of the second requirement.

[18] The LRP found support for this construction of POCA in what it regarded as the purpose and object of POCA, as reflected in the short and long titles and the preamble – namely to prevent organised crime. It also relied for its submissions in this regard on the actual text of POCA, contending that throughout POCA, the word “offence”, when used without qualification, refers exclusively to “organised crime offences”. The LRP sought to illustrate this contention by referring in particular to section 18. This section provides for the making of a confiscation order in respect of the “proceeds of offences or related criminal activities” when a defendant is convicted of an “offence” and empowers the trial court to enquire into any benefit that the defendant may have derived from “that offence” and from “any other offence of which the defendant has been convicted at the same trial”.¹⁷ The import of this distinction between two kinds of offences, so submitted the LRP, is to differentiate between offences under POCA (“organised crime offences”) and all other crimes (“ordinary crimes”).

[19] The LRP argued further that, under the scheme of POCA, section 19(2) makes it clear that property forfeited on the basis that it constitutes the proceeds of crime

¹⁷ Section 18(1) of POCA reads as follows:

“Whenever a defendant is convicted of an offence the court convicting the defendant may, on the application of the public prosecutor, enquire into any benefit which the defendant may have derived from—

- (a) that offence;
- (b) any other offence of which the defendant has been convicted at the same trial; and
- (c) any criminal activity which the court finds to be sufficiently related to those offences, and, if the court finds that the defendant has so benefited, the court may, in addition to any punishment which it may impose in respect of the offence, make an order against the defendant for the payment to the State of any amount it considers appropriate and the court may make any further orders as it may deem fit to ensure the effectiveness and fairness of that order.”

must be brought into account by a criminal court in determining the quantum of a confiscation order it proposes to make.¹⁸ No equivalent provision is made for the court to take into account property that has been declared forfeit on the grounds that it is an instrumentality of the crime in question. According to the LRP, the legislature might conceivably have thought that it would be just and fitting to ignore relevant forfeiture orders in this way on the basis that the crime in question constituted an “organised crime offence”. It could, however, never have contemplated that every declaration of forfeiture of property arising out of *any* crime listed in Schedule 1 would be left out of account by a criminal court making a confiscation order simply because the property forfeited constituted an instrumentality of the relevant crime.

[20] According to the LRP, the courts have consistently recognised that the forfeiture of the instrumentalities of any crime embraced by Schedule 1 can produce arbitrary and unjust consequences. In an effort to moderate the problem, they have been forced to reconstruct the statute by interpreting the word “shall” in section 50(1) as “may”.¹⁹ Only in this way have the courts been able to create a discretion, which

¹⁸ In terms of section 19(2) of POCA:

“In determining the value of a defendant’s proceeds of unlawful activities the court shall – (a) where it has made a declaration of forfeiture or where a declaration of forfeiture has previously been made in respect of property which is proved to the satisfaction of the court – (i) to have been the property which the defendant received in connection with the criminal activity carried on by him or her or any other person; or (ii) to have been property which directly or indirectly represented in the defendant’s hands the property which he or she received in that connection, leave the property out of account; (b) where a confiscation order has previously been made against the defendant leave out of account those proceeds of unlawful activities which are proved to the satisfaction of the court to have been taken into account in determining the amount to be recovered under that confiscation order.”

¹⁹ See for example *National Director of Public Prosecutions v Cole and Others* 2005 (2) SACR 553 (W); [2004] 3 All SA 745 (W) at paras 12-15, discussing *National Director of Public Prosecutions v (1) RO Cook Properties (Pty) Ltd; (2) 37 Gillespie Street Durban (Pty) Ltd and Another (3) Seevnarayan* 2004 (8) BCLR 844 (SCA); 2004 (2) SACR 208 (SCA); [2004] 2 All SA 491 (SCA).

they have said is to be exercised by reference to the principles of proportionality. The LRP acknowledged that this reconstruction of the statute may be conceptually justified in order to give due weight to the provisions of the Bill of Rights. It nevertheless contended that there is no denying that the legislature intended the forfeiture to be obligatory once the requirements of section 50 were satisfied. Parliament could never have harboured such an intention, the LRP submitted, unless it envisaged that the only offences for which an order of forfeiture based on instrumentality would be competent would be those offences created by POCA itself. The legislature might have been willing to countenance obligatory forfeiture in respect of offences as harmful to society as organised crime offences, but it could hardly have had the same intention in respect of all the offences referred to in Schedule 1.

[21] These submissions are not convincing. First, it is important to note that, subsequent to the judgment of the Cape High Court in *National Director of Public Prosecutions v Carolus and Others*,²⁰ in which Bignault J held that Chapter 6 of POCA²¹ (as it was then) was not retrospective in effect,²² the Act was amended by the Prevention of Organised Crime Second Amendment Act 38 of 1999,²³ (“Act 38 of 1999”) “so as to make it clear that the provisions of Chapters 3, 5 and 6 are applicable in respect of instrumentalities of offences and proceeds of unlawful activities where

²⁰ 1999 (2) SACR 27 (C); [1999] 2 All SA 607 (C).

²¹ Chapter 6 deals with the civil recovery of property and includes the provisions governing preservation of property orders and forfeiture orders.

²² And thus could not be invoked on the basis of unlawful activities committed before the coming into operation of POCA on 21 January 1999. *Carolus* above n 20 at 36f-38f. The Cape High Court judgment was upheld on appeal to the Supreme Court of Appeal in *National Director of Public Prosecutions v Carolus and Others* 2000 (1) SA 1127 (SCA); [2000] 1 All SA 302 (SCA).

²³ Which came into operation on 7 September 1999.

such offences or unlawful activities occurred before the commencement of the Act”,²⁴ that is, that these provisions do operate retrospectively.

[22] The definition of “instrumentality of an offence” in section 1(1) of POCA was substituted so as to mean:

“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”. (Emphasis added.)

The definition of “proceeds of unlawful activity” was also substituted to mean:

“. . . any property or any service, advantage, benefit or reward which was derived, received or retained, directly or indirectly, in the Republic or elsewhere, *at any time before or after the commencement of this Act*, in connection with or as a result of any unlawful activity carried on by any person, and includes any property representing property so derived.”²⁵ (Emphasis added.)

[23] The point of the amending legislation was driven home most pertinently by the insertion of a new section 1(5) into POCA in the following terms:

“Nothing in this Act or in any other law, shall be construed so as to exclude the application of any provision of Chapter 5 or 6 on account of the fact that –

- (a) any offence or unlawful activity concerned occurred; or
- (b) any proceeds of unlawful activities were derived, received or retained, *before the commencement of this Act.*” (Emphasis added.)

²⁴ See the preamble to Act 38 of 1999.

²⁵ Section 1(b) of Act 38 of 1999. At the same time, the following definition of “unlawful activity” was inserted into section 1(1):

“any conduct which constitutes a crime or which contravenes any law whether such conduct occurred *before or after the commencement of this Act* and whether such conduct occurred in the Republic or elsewhere”. (Emphasis added.)

[24] This being so, the contention of the LRP to the effect that the offences for which forfeiture under Chapter 6 of POCA is potentially competent are limited to the offences “created” by Chapters 2, 3 and 4 of POCA (what the LRP calls “organised crime offences”) cannot be correct. A reading of POCA, as amended, makes it clear that it applies to offences committed before and after the commencement of the Act and accordingly has a wider ambit than that of offences that were “created” by POCA, and which thus only existed from its date of commencement in January 1999.

[25] It is certainly true that POCA, even as amended, is not a model of legislative clarity and coherence. The short title refers only to the prevention of “organised crime”, while the first two phrases of the long title state that the Act is “to introduce measures to combat organised crime, money laundering and criminal gang activities” and “to prohibit certain activities relating to racketeering activities”. As pointed out by Griesel J in *National Director of Public Prosecutions v Seevnarayan*, the organised crime *leitmotif* forms “a recurrent theme throughout the Act”.²⁶ Notwithstanding this recurrent theme, the wording of POCA as a whole makes it clear that its ambit is *not* in fact limited to so-called “organised crime offences”, so that the initial impression created by the short and long titles, as well as by most of the paragraphs of the preamble, is incorrect. This is misleading and more than a little unfortunate. However, as pointed out by the NDPP, arguments along the lines of that advanced by the LRP in this regard have been considered and rejected by the Supreme Court of

²⁶ 2003 (2) SA 178 (C); [2003] 1 All SA 240 (C) at para 60.

Appeal on two prior occasions. In *Cook Properties*, the court held that such an interpretation of POCA:

“... radically truncates the scope of the Act. It leaves out portions of the long title, as well as the ninth paragraph of the preamble. These show that the statute is designed to reach far beyond ‘organised crime, money laundering and criminal gang activities’. The Act clearly applies to cases of individual wrong-doing.”²⁷

[26] In the recent case of *National Director of Public Prosecutions v Van Staden and Others*,²⁸ the Supreme Court of Appeal reiterated that the provisions of POCA “are designed to reach far beyond organised crime and apply also to cases of individual wrongdoing”.²⁹ It is not correct (as the LRP would have it) that these judgments have simply made an “assumption” that, provided an offence falls within the ambit of Schedule 1, forfeiture is competent. On the contrary, the interpretation of the relevant provisions of POCA by the Supreme Court of Appeal in these cases was based on the wording of the Act and formed part of the ratio decidendi of the judgments.

[27] So too in *Prophet*, although the offence in question was drug-manufacturing, there would appear to have been no evidence before the court to link the “backyard laboratory” conducted by Mr Prophet with racketeering, money laundering or criminal

²⁷ *Cook Properties* above n 19 at para 65, rejecting the restrictive interpretation given to POCA by Griesel J in *Seevnarayan* above n 26 at paras 58-63. See also the Supreme Court of Appeal judgment in *Prophet v National Director of Public Prosecutions* 2006 (1) SA 38 (SCA); 2005 (2) SACR 670 (SCA) at para 33, where this passage from *Cook Properties* was cited, apparently with approval.

²⁸ 2007 (1) SACR 338 (SCA).

²⁹ *Id* at paras 1 and 10.

gang activities. On the contrary, as was expressly acknowledged by Mpati DP in the Supreme Court of Appeal judgment in that case:

“[w]hether the appellant was manufacturing drugs for sale or for personal use is unknown. But drug trafficking and drug abuse are a scourge in any society and are viewed in a very serious light. The penalties provided for drug offences in the Drugs Act are testimony to this.”³⁰

[28] The LRP also contended that the structure of POCA “suggests that the regime for the forfeiture of the instrumentalities of an offence was added almost as an afterthought” and that this regime was “plainly designed to be ancillary and to play a mere supportive role”. However, as pointed out by the NDPP, this Court stated in *National Director of Public Prosecutions and Another v Mohamed NO and Others*³¹ that POCA (and particularly Chapters 5 and 6 thereof),

“... represents the culmination of a protracted process of law reform which has sought to give effect to South Africa’s international obligation and domestic interest to ensure that criminals do not benefit from their crimes”.³²

[29] Paragraph 9 of the preamble to POCA in its original form read as follows:

³⁰ Above n 27 at para 38. Counsel for Mr Prophet argued before the Supreme Court of Appeal that he did –

“not fall into the category [of offences] envisaged by the Act, in that he has never been convicted of a drug-related offence; that there was no supporting evidence from anyone else that he dealt in drugs; no prohibited substances were found on the property; he is not a member of a gang and has no links with gangs . . .” Id at para 31

While Mpati DP expressed the view (at para 34) that “counsel minimises the appellant’s culpability in this matter and the extent of his operations”, the allegation in respect of the absence of evidence of links between Mr Prophet and any gang-related activities does not appear to have been challenged. See also *Prophet* above n 10 at para 46.

³¹ 2003 (4) SA 1 (CC); 2003 (5) BCLR 476 (CC) at para 16. See also *National Director of Public Prosecutions and Another v Mohamed NO and Others* 2002 (4) SA 843 (CC); 2002 (9) BCLR 970 (CC) at paras 15-16.

³² See further in this regard *Carolus* above n 20 at paras 9-30 and generally, South African Law Reform Commission *Report on International Co-operation in Criminal Prosecutions* (Project 98) December 1995, Chapter 4.

“AND WHEREAS persons should not benefit from the fruits of organised crime and money laundering, legislation is necessary for the preservation and forfeiture of property which is concerned in the commission or suspected commission of an offence”.

This paragraph was substituted in terms of section 13 of Act 38 of 1999 with the following paragraphs:

“AND WHEREAS no person convicted of an offence should benefit from the fruits of that or any related offence, whether such offence took place before or after the commencement of this Act, legislation is necessary to provide for a civil remedy for the restraint and seizure, and confiscation of property which forms the benefits derived from such offence;

AND WHEREAS no person should benefit from the fruits of unlawful activities, nor is any person entitled to use property for the commission of any offence, whether such activities or offence took place before or after the commencement of this Act, legislation is necessary to provide for a civil remedy for the preservation and seizure, and forfeiture of property which is derived from unlawful activities or is concerned in the commission or suspected commission of an offence”.

[30] The change of wording, read together with the other provisions of Act 38 of 1999 discussed above, illustrates the intention of the legislature to make it quite clear that the civil forfeiture provisions of POCA reach beyond the categories of organised crime created by the Act. The applicants did not attack the constitutionality of the provisions of POCA dealing with civil forfeiture of the instrumentalities of offences on the basis that, if these provisions are interpreted so as to apply to offences other

than “organised crime offences”,³³ then they are unconstitutional and invalid. Neither did they challenge the constitutionality of the amendments to POCA by Act 38 of 1999. Not surprisingly, as an amicus curiae, the LRP did not seek to raise any challenge to the constitutionality of POCA itself, but confined its arguments to the matters as pleaded by the parties, in the manner set out above. Like the applicants, it too made no attempt to show that the judgments of the Supreme Court of Appeal in either *Cook Properties*³⁴ or *Van Staden*,³⁵ as regards the ambit of POCA, were wrong.

[31] Had there been a proper constitutional challenge by one of the parties, then in terms of Rule 5 of the Constitutional Court Rules,³⁶ the Minister of Justice would have had to be joined as a party to the proceedings. Furthermore, the NDPP and the Minister would then have had the opportunity to place before the Court information and arguments relating to justification in terms of section 36³⁷ of the Constitution.³⁸ If

³³ This was the interpretation followed by the Supreme Court of Appeal in *Cook Properties* above n 19 at paras 53-58 and 65 and in the *Van Staden* case above n 28 at paras 1 and 7.

³⁴ Above n 19.

³⁵ Above n 28.

³⁶ Rule 5 provides:

“(1)In any matter, including any appeal, where there is . . . any inquiry into the constitutionality of any law, including an 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.

(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 Section 36 provides:

“The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors including –

(a) the nature of the right;

the NDPP were to be required in an application for a preservation order or for a forfeiture order under POCA, to show that the offence in question, in addition to being one of the Schedule 1 offences, also constitutes (or at the least is rationally connected to) racketeering, money laundering or criminal gang activities, this might unduly hamper the achievement of the objects of POCA. This possibility might have to be considered by this Court in an appropriate future matter. I refrain from expressing a view one way or the other in this regard. The fact of the matter is that, because of the manner in which the papers in this case were framed and the proceedings conducted, neither the NDPP nor the Minister had any opportunity to place information of this kind before the Court.

[32] In *Prince v President, Cape Law Society, and Others*, this Court stated the following:

“Parties who challenge the constitutionality of a provision in a statute must raise the constitutionality of the provisions sought to be challenged at the time they institute legal proceedings. In addition, a party must place before the Court information relevant to the determination of the constitutionality of the impugned provisions.

-
- (b) the importance of the purpose of the limitation;
 - (c) the nature and extent of the limitation
 - (d) the relation between the limitation and its purpose; and
 - (e) less restrictive means to achieve the purpose.

³⁸ As pointed out by this Court in *Beinash and Another v Ernst & Young and Others* 1999 (2) SA 116 (CC); 1999 (2) BCLR 125 (CC) at para 27, the executive authority responsible for the legislation in question has a direct interest in whether or not the legislation is found to be constitutional and must be given the opportunity to defend the legislation should it wish to do so:

“Often the relevant organ of state is best positioned to provide the necessary arguments of justification should the issue of the provision’s constitutionality come down to the question of the right’s limitation. It is often the only party that can provide this Court with the evidence it will need to enable it to tailor its order in terms of the options available under s 172(1)(b) of the Constitution.”

Similarly, a party seeking to justify a limitation of a constitutional right must place before the Court information relevant to the issue of justification. I would emphasise that all this information must be placed before the Court of first instance. The placing of the relevant information is necessary to warn the other party of the case it will have to meet, so as to allow it the opportunity to present factual material and legal argument to meet that case. It is not sufficient for a party to raise the constitutionality of a statute only in the heads of argument, without laying a proper foundation for such a challenge in the papers or the pleadings. The other party must be left in no doubt as to the nature of the case it has to meet and the relief that is sought. Nor can parties hope to supplement and make their case on appeal.”³⁹ (Footnote omitted.)

[33] In the absence of any constitutional challenge to either the relevant provisions of Act 38 of 1999 or to the interpretation of the provisions of POCA relating to civil forfeiture of the instrumentality of an offence as extending beyond “organised crime offences” to cover cases of individual wrongdoing, it would, in my view, be wrong for this Court to enquire into and pronounce upon these issues in the present case. Any such enquiry would have to await a proper constitutional challenge if such a challenge were to be brought at some stage in the future.

[34] In conclusion on this point, I remain unconvinced by the LRP’s contention that Chapter 6 of POCA can reasonably be interpreted so as to apply only to so-called “organised crime offences”.

No adequate proof that the casino was operating on Shelgate’s property

[35] The LRP contended that there was no adequate proof on the papers that the illegal casino was in fact operated on Shelgate’s property. It annexed a schedule by

³⁹ 2001 (2) SA 388 (CC); 2001 (2) BCLR 133 (CC) at para 22.

means of which it purported to demonstrate that there was no clarity as to the true physical address of the casino and no certainty on whether the casino was operated on the property registered in Shelgate's name.

[36] These contentions do not withstand scrutiny. Section 37 of POCA makes it clear that proceedings under Chapter 6 are civil proceedings in every sense.⁴⁰ The NDPP applied for, and was granted, a preservation order in respect of section 2 in the scheme known as Malapin Centre (as shown and more fully described on sectional plan number SS 577/96) and an undivided share in the common property in the scheme. The NDPP applied for a forfeiture order in respect of the same property and the order granted by the SCA on appeal related to this property. In the High Court proceedings, the applicants filed two answering affidavits in which they admitted that the property was used to conduct an unlawful casino. Moreover, in their application for leave to appeal to this Court, the applicants did not suggest that there was any dispute regarding the fact that the property had been used to conduct a casino.

[37] The operation of the casino on Shelgate's property is common cause on the papers and it follows that there is no merit in the LRP's contention that it has not been

⁴⁰ In terms of section 37:

“(1) For the purposes of this Chapter all proceedings under this Chapter are civil proceedings, and are not criminal proceedings.

(2) The rules of evidence applicable in civil proceedings apply to proceedings under this Chapter.

(3) No rule of evidence applicable only in criminal proceedings shall apply to proceedings under this Chapter.

(4) No rule of construction applicable only in criminal proceedings shall apply to proceedings under this Chapter.”

shown that Shelgate's property was used by Mr Mohunram to conduct the illegal casino.

Forfeiture provisions of the KZN Gambling Act

[38] The LRP submitted that, in framing the provisions of the KZN Gambling Act, the legislature made specific provision for forfeiture in section 94(4) and, in so doing, signified an intention that the forfeiture regime so created would suffice to meet the mischief sought to be cured by the enactment. Gambling equipment and machines fall within the compass of section 94(4), but the premises on which a casino is operated do not. Thus, it was contended, POCA cannot have been intended to apply to gambling offences covered by the Act.

[39] I do not agree with this submission. First, the relevant section of the KZN Gambling Act creates a further criminal sanction for the offence, whereas Chapter 6 of POCA deals specifically with civil forfeiture. Second, the KZN Gambling Act provides for the forfeiture of the immediate means of the offence, such as gaming machines and money, whereas in appropriate circumstances POCA has a much broader application, as "instrumentality" can extend to include property (such as a house or a factory) which is shown to have been involved in the commission of the offence.

[40] By way of comparison, section 25(1) of the Drugs and Drug Trafficking Act 140 of 1992 ("the Drugs Act") provides as follows:

“Whenever any person is convicted of an offence under this Act, the court convicting him shall, in addition to any punishment which that court may impose in respect of the offence, declare –

- (a) any scheduled substance, drug or property –
 - (i) by means of which the offence was committed;
 - (ii) which was used in the commission of the offence; or
 - (iii) which was found in the possession of the convicted person;
- (b) any animal, vehicle, vessel, aircraft, container or other article which was used –
 - (i) for the purpose of or in connection with the commission of the offence; or
 - (ii) for the storage, conveyance, removal or concealment of any scheduled substance, drug or property by means of which the offence was committed or which was used in the commission of the offence;
- (c) in the case of an offence referred to in section 13(e) or (f),⁴¹ any immovable property which was used for the purpose of or in connection with the commission of that offence,

and which was seized under section 11(1)(g) or is in the possession or custody or under the control of the convicted person, to be forfeited to the State.” (Footnote inserted.)

[41] A criminal prosecution, followed by a conviction, sentence and even a criminal forfeiture, is no bar to the invocation of the civil forfeiture provisions of Chapter 6 of POCA and conversely, as is evident from the *Prophet* case,⁴² the invocation of these provisions is not contingent upon a conviction.⁴³ A declaration of *criminal* forfeiture under section 25 of the Drugs Act does not eliminate the possibility of civil forfeiture,

⁴¹ Sections 5(a) and (b) prohibit any person from dealing in any dependence-producing substance, or in any dangerous or undesirable dependence-producing substance, respectively, unless he or she qualifies in terms of section 5(b)(i)-(iv).

⁴² Above n 10 at para 66, referring to section 50(4) of POCA.

⁴³ By contrast, a conviction is indeed a precondition to the making of a confiscation order in respect of the proceeds of unlawful activities under Chapter 5 of POCA. See in particular section 18(1) of POCA.

in terms of Chapter 6 of POCA, of the instrumentalities of offences referred to in section 13 of the Drugs Act⁴⁴ in appropriate circumstances. The same reasoning applies to the relationship between a *criminal* forfeiture of property in terms of section 94(1) of the KZN Gambling Act in respect of an offence under that Act and a possible civil forfeiture under POCA of property constituting the instrumentality of the same offence.⁴⁵

[42] POCA is national legislation and the KZN Gambling Act is a provincial Act. As casinos are an area of concurrent national and provincial competence in terms of Schedule 4 of the Constitution, the statutes must operate concurrently. However, as will be discussed further below, civil forfeiture under POCA, although it does have remedial objectives, also has palpably punitive or penal effects.⁴⁶ For this reason, in assessing the proportionality of a forfeiture order, criminal penalties (including forfeitures) already incurred must be taken into consideration.

Instrumentality of an offence

⁴⁴ Among the offences referred to in Schedule 1 to POCA is “any offence referred to in section 13 of the Drugs and Drug Trafficking Act, 1992”.

⁴⁵ The same applies to a declaration of forfeiture of property under the broad provisions of section 35(1) of the Criminal Procedure Act 51 of 1977, which reads as follows:

“A court which convicts an accused of *any offence* [including any of the offences referred to in Schedule 1 of POCA] may, without notice to any person, declare –

- (a) any weapon, instrument or other article by means whereof the offence in question was committed or which was used in the commission of such offence; or
- (b) if the conviction is in respect of an offence referred to in Part 1 of Schedule 2, any vehicle, container or other article which was used for the purpose of or in connection with the commission of the offence in question or for the conveyance or removal of the stolen property, and which was seized under the provisions of this Act, forfeited to the State.” (Emphasis added.)

The broad wording of section 35(1) makes it clear that it applies to both cases of individual wrongdoing and to “organised crime”.

⁴⁶ See *Cook Properties* above n 19 at paras 17-18.

[43] I turn now to the first of the two issues identified above.⁴⁷ The correct interpretation and application of the concept “instrumentality of an offence” in the context of POCA were recently, and fully, considered by this Court in *Prophet*.⁴⁸ It is accordingly not necessary for purposes of this judgment to repeat the analysis that was performed in that case.

[44] In considering the meaning of the phrase “an instrumentality of an offence referred to in Schedule 1”,⁴⁹ this Court adopted the interpretation accepted by the Supreme Court of Appeal in a trilogy of cases.⁵⁰ In the first of those cases, *Cook Properties*, Mpati DP and Cameron JA⁵¹ said that “[i]t is clear that in adopting this definition the Legislature sought to give the phrase a very wide meaning.”⁵² They held, however, that in order to ensure that application of the forfeiture provision does not constitute arbitrary deprivation of property in violation of section 25(1) of the Constitution:

“... 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. By this we mean that the property must play a reasonably direct role in the commission of the offence. In a real or substantial sense the property must facilitate

⁴⁷ See para [14] above.

⁴⁸ Above n 10 at paras 55-57.

⁴⁹ Section 1 of POCA defines an “instrumentality of an offence” 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” See also sections 38(2)(a) and 50(1)(a) of POCA.

⁵⁰ *Cook Properties* above n 19 at para 6-32; *Prophet* above n 27 at paras 10-17; *National Director of Public Prosecutions v Parker* 2006 (3) SA 198 (SCA); [2006] 1 All SA 317 (SCA).

⁵¹ Scott, Nugent and Lewis JJA concurring.

⁵² Above n 19 at para 12.

or make possible the commission of the offence. As the term ‘instrumentality’ itself suggests . . . the property must be instrumental in, and not merely incidental to, the commission of the offence. For otherwise there is no rational connection between the deprivation of property and the objective of the Act: the deprivation will constitute merely an additional penalty in relation to the crime, but without the constitutional safeguards that are a prerequisite for the imposition of criminal penalties.”⁵³

In other words, the determining question is:

“ . . . whether there is a sufficiently close link between the property and its criminal use, and whether the property has a close enough relationship to the actual commission of the offence to render it an instrumentality.”⁵⁴

[45] The applicants in this Court did not challenge this interpretation. Instead, they sought to distinguish the present case on the facts from *Prophet*,⁵⁵ arguing that there was not sufficient involvement of the property in the offences to justify its forfeiture; thus, that it did not constitute an instrumentality for the purposes of POCA. According to the applicants, the essence of their offences was in fact the conduct of gaming activity without a valid licence and the property was not integral to the commission of the offences. The fact that the unlawful activity took place on the property was, in itself, not sufficient to invoke the invasive provisions of Chapter 6 of POCA. As held by Stegmann J in *National Director of Public Prosecutions: In re Application for Forfeiture of Property in terms of sections 48 and 53 of the Prevention of Organised Crime Act, 1998 (Act No 121 of 1998)*:

⁵³ Id at para 31.

⁵⁴ Id at para 32.

⁵⁵ Above n 10.

“The mere fact that a particular offence was committed on a particular property would not necessarily entail the consequence that the property was ‘concerned in the commission’ of the offence, or that the property had become an ‘instrumentality of an offence’. It seems to me that evidence of some closer connection than mere presence on the property would ordinarily be required in order to establish that the property had been ‘concerned in the commission’ of the offence.”⁵⁶

[46] The applicants also submitted that there was no direct causal connection between the property sought to be forfeited and the offences upon which the forfeiture application was founded. They based this submission on, inter alia, the following allegations: the criminal use of the property was not deliberate or planned, but rather fortuitous and incidental to the purpose of the property; it was acquired to pursue legitimate business interests and was used for this purpose during and after the illegal activity; the property was wholly irrelevant to the success of the illegal activity; the illegal activity commenced in 1998, during a period when it was legal and it was only later, in February 2000, that the KZN Gambling Act was amended⁵⁷ to criminalise this activity; neither the time duration nor the spatial extent of the illegal activity was reliably established, but it could be safely accepted that the illegal activity occupied a

⁵⁶ (WLD) Case No 2000/12886, 7 July 2000, unreported at para 12. Stegmann J at fn 10 went on to point out that:

“In particular, an ‘instrumentality of an offence’ is only liable to forfeiture in terms of section 50(1)(a) of the Prevention Act, 1998 when the offence is one referred to in Schedule 1 . . . Every [scheduled] offence must be committed on some piece of property. But it would be absurd to infer that the Legislature had intended every property on which such an offence had been committed to be liable to forfeiture to the State. A closer connection must be shown than mere presence. It must be established that the property was ‘concerned’ in the commission of the offence, and not merely that the offence was committed on the property.”

See also *National Director of Public Prosecutions v Patterson* 2001 (2) SACR 665 (C) at 667d-h; [2001] 4 All SA 525 (C) at 527-528; *Cook Properties* above n 19 at paras 33-34 and 50.

⁵⁷ Presumably by the KwaZulu-Natal Gambling Amendment Act 2 of 2000, which came into operation on 11 February 2000.

smaller section of the building, which primarily was used as a glass and aluminium factory.

[47] These contentions do not bear scrutiny. The present application concerns an unlawful casino.⁵⁸ It is common cause that Mr Mohunram used the property – and that Shelgate “allowed” him to do so – for the purposes of operating a casino while neither he nor Shelgate had the requisite licence in terms of the KZN Gambling Act. In operating this casino,⁵⁹ Shelgate and Mr Mohunram, respectively, contravened sections 3(3)(a) and 44 of the KZN Gambling Act. Both offences are listed in Schedule 1 of POCA.⁶⁰

[48] Section 3(3)(a) prohibits the owner of premises from using or allowing another person to use *any premises* for gambling activities without a licence. Section 44, read with the definition of “casino” in section 1, also prohibits the use of *any premises* for operating a casino without a licence.⁶¹ In short, the essence of both section 3(3)(a) and section 44 is directed at the manner in which premises are used. As pointed out by the NDPP, the legislature has chosen to prohibit the use of premises for gambling purposes rather than the activity of gambling itself, which is regulated by other statutory provisions.

⁵⁸ As indicated above n 2, a “casino” is defined in section 1 of the KZN Gambling Act as “any premises upon which casino games, bingo and gaming machines may be played under the authority of a casino licence issued by the Board in terms of this Act”.

⁵⁹ The trading name of which was “AJ’s Entertainment Centre”.

⁶⁰ Item 10 of Schedule 1 refers to “any offence under any legislation dealing with gambling, gaming or lotteries”.

⁶¹ For the wording of section 3(3)(a), section 44 and the definition of “casino” in section 1(1), see above n 4, n 3 and n 2, respectively.

[49] It follows that the use, or allowing the use, of the property was a necessary part of the offences the applicants committed. It was not possible to commit the offences without using the property. In the language of *Cook Properties*, the property was “employed . . . to make possible or facilitate the commission of the offence”.⁶² Thus, the causal connection between the property and the offences was certainly a direct one. The offences themselves pivoted on the use of the property for gambling purposes. It is common cause that neither applicant had the requisite licence. That was, however, not the essence of their crimes. The essence was that the applicants used the property or allowed it to be used as an illegal casino. The property was thus integral to the commission of the relevant offences.

[50] Even if an *exclusive* emphasis on the wording of the statutory provisions creating the offences in question is regarded as unduly formalistic, it can easily still be said that the property in this case was the instrumentality of the offences committed. The property was specifically adapted in various ways to operate as a casino. Mr Mohunram had partitioned the property for this use. The windows of the building housing the casino had been tinted in order to make it difficult to see into the building from the outside. It contained 57 gambling machines, arranged in rows, and a cashier’s booth had been constructed on the property to facilitate gambling activities. To use the words of Nkabinde J in the *Prophet* case, the property had been

⁶² Above n 19 at para 34.

“appointed, arranged, organised, furnished and adapted or equipped to enable or facilitate the applicant’s illegal activities.”⁶³

[51] The property was also used to commit a series of offences over an extended period of time. This is another indicator of instrumentality. As was stated by the Cape High Court in *National Director of Public Prosecutions v Engels*:

“In order to prove this point [that the property is an instrumentality of an offence], the NDPP cannot be confined to an isolated incident of criminal conduct; on the contrary, the more such incidents that can be established, the more easily the inference may be drawn that the property in question is indeed an instrumentality of an offence.”⁶⁴

[52] In *National Director of Public Prosecutions v Parker*,⁶⁵ the Supreme Court of Appeal held that repeated use of immovable property for criminal purposes may serve to render that property an “instrumentality of an offence” even if it has not been adapted specifically for criminal purposes. In the present case, as in *Parker*, there is “a pattern of sustained activity that reveals the use to which the premises were put and their instrumental character in the crimes committed there.”⁶⁶ On the applicants’ own version, the property was used as an illegal casino over an extended period of time. There is accordingly no merit in the applicants’ contention that the criminal use of the property was fortuitous and incidental to the purpose of the property. On the contrary, it was deliberate and planned.

⁶³ Above n 10 at para 57. This language was “borrowed” from the judgment of the Supreme Court of Appeal in *Cook Properties* above n 19 at paras 34 and 49.

⁶⁴ 2005 (3) SA 109 (C); 2005 (1) SACR 99 (C); [2004] 4 All SA 250 (C) at para 13.

⁶⁵ Above n 50.

⁶⁶ Id at para 42 (Cameron JA concurring).

[53] On the specific meaning of “instrumentality of an offence” for the purposes of POCA, the LRP submitted that property can come within this concept only if it is “criminal property” within the contemplation of the preamble to the Act. Thus, property could only be the instrumentality of an offence if it is inherently tainted with the quality of crime and cannot be used for any lawful purpose. According to the LRP, Shelgate’s property does not have this quality.

[54] If this argument were accepted, almost no property would qualify for forfeiture (which could hardly have been the intention of the legislature). Many things that are used for unlawful purposes can and very often do have a lawful use. The interpretation contended for by the LRP would mean that any item of property that might *notionally* be used for lawful purposes would not be susceptible to forfeiture, even though it had *in fact* been used for unlawful purposes. Not only would this interpretation give rise to glaring absurdities, it would also totally undermine the purpose of the Act. The fact that the property can be, and perhaps is, used for a lawful purpose does of course weigh in the proportionality enquiry.

[55] To conclude on this issue, in the light of the circumstances discussed in detail above, I am satisfied that the Supreme Court of Appeal was quite correct in its finding that Shelgate’s property was indeed an instrumentality of the offences committed by it and by Mr Mohunram.

Proportionality

[56] Turning now to the question of proportionality, the purpose of the proportionality enquiry is to determine whether the grant of a forfeiture order would amount to an arbitrary deprivation of property in contravention of section 25(1) of the Constitution. The interpretation of POCA (and more particularly of “instrumentality of an offence”) as reaching beyond the ambit of “organised crime” and applying to cases of individual wrongdoing⁶⁷ could result in situations of clearly disproportionate (and hence constitutionally unacceptable) forfeiture, and courts must always be sensitive to and on their guard against this.⁶⁸

[57] The proper application of a proportionality analysis weighs the forfeiture and, in particular, its effect on the owner concerned, on the one hand, against the purposes the forfeiture serves, on the other. The broader societal purposes served by civil forfeiture under Chapter 6 of POCA have been held to include:

- removing incentives for crime;⁶⁹
- deterring persons from using or allowing their properties to be used in crime;
- eliminating or incapacitating some of the means by which crime may be committed; and
- advancing the ends of justice by depriving those involved in crime of the property concerned.⁷⁰

⁶⁷ See above at paras [21]-[34].

⁶⁸ “Courts should be vigilant to ensure that the statutory provisions in question are not used *in terrorem* and that there has been no overreaching and abuse.” (per Ponnann JA in *Prophet* above n 27 at para 45).

⁶⁹ This purpose will be particularly relevant where one is dealing with the forfeiture of the proceeds of unlawful activities and may rarely be applicable in the context of the forfeiture of the instrumentalities of offences.

[58] As was stated by the Supreme Court of Appeal in *Cook Properties*:

“We agree that property owners cannot be supine. In particular, we endorse the notion that the State is constitutionally permitted to use forfeiture, in addition to the criminal law, to induce members of the public to act vigilantly in relation to goods they own or possess so as to inhibit crime. In a constitutional State law-abiding property-owners and possessors must, where reasonably possible, take steps to discourage criminal conduct and to refrain from implicating themselves or their possessions in its ambit. And the State is entitled to use criminal sanctions and civil forfeitures to encourage this. Here constitutional principle recognises individual moral agency and encourages citizens to embrace the responsibilities that flow from it.

We therefore agree that the Act requires property owners to exercise responsibility for their property and to account for their stewardship of it in relation to its possible criminal utilisation. But the pursuit of those statutory objectives cannot exceed what is constitutionally permissible. Forfeitures that do not rationally advance the interrelated purposes of Chapter 6 are unconstitutional.”⁷¹ (Footnote omitted.)

[59] There are of course limits as to how far the “deterrence element” of civil forfeiture may go. But it is important to remember that behind this deterrence element is a message that is clearly justifiable from a constitutional, moral and social point of view. Section 25, the “property clause” in the Constitution, must be interpreted and applied in a manner which:

“seeks to establish a balance between the need to protect private property, on the one hand, and to ensure that property serves the public interest, on the other.

....

⁷⁰ *Cook Properties* above n 19 at para 18.

⁷¹ *Id* at paras 28-29.

In approaching the property clause we must therefore recognise the constitutional value of property, and the importance of protecting it, while recognising that it is not absolute.’⁷²

[60] One’s right to property carries with it important duties to use, manage or look after it in a responsible manner. The recognition of these duties is one of the ways in which the common law notion of property is rendered compatible with the values underpinning a Constitution that promotes the rule of law and other values of social significance. In the words of Professor AJ van der Walt:

“[T]o say that section 25 protects property does not mean that the protection of private property is the main or the only purpose of the property clause, or that it entrenches existing property rights in the sense of insulating them from any state interference, or in the sense of ‘freezing’ the status quo as far as existing property holdings are concerned, or that it enables the courts to frustrate legitimate state limitation of property through unjustified substantive second-guessing of government policy. The spirit and values of the Bill of Rights indicate that this cannot be the case and that the aim of section 25 is to establish a just and equitable balance between the protection of private property and the promotion of the public interest. In other words, it is argued here that section 25 can be seen as a property guarantee without necessarily falling foul of the typically libertarian view that the main function of the Bill of Rights is to insulate private property from state interferences and transformation programs, and also without making the error of opening the door on unjustified and purely obstructive judicial activism. The assumption in this book is that section 25 does protect and indeed guarantee property, but then in a way that is characteristic of the new constitutional order in general and of the Bill of Rights in particular.’⁷³

⁷² *Mkontwana v Nelson Mandela Metropolitan Municipality and Another; Bissett and Others v Buffalo City Municipality and Others; Transfer Rights Action Campaign and Others v MEC for Local Government & Housing in the Province of Gauteng and Others (KwaZulu-Natal Law Society and Msunduzi Municipality as Amici Curiae)* 2005 (1) SA 530 (CC); 2005 (2) BCLR 150 (CC) at paras 81-82.

⁷³ Van der Walt *Constitutional Property Law* (Juta, Cape Town 2005) at 31. See also para [86] below.

[61] This Court has held in *Prophet* that the proportionality enquiry requires a general approach of:

“ . . . 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.”⁷⁴

[62] In *Prophet*, reference was made to the judgment of Ackermann J, writing for a unanimous Court, 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*.⁷⁵ In that case, Ackermann J held that a deprivation of property is “arbitrary” within the meaning of section 25(1) when the “law of general application” referred to in that section does not provide sufficient reason for the particular deprivation in question or is procedurally unfair.⁷⁶ For the validity of a deprivation, the Court held that:

“ . . . 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.”⁷⁷

⁷⁴ Above n 10 at para 58.

⁷⁵ 2002 (4) SA 768 (CC); 2002 (7) BCLR 702 (CC).

⁷⁶ Id at para 100.

⁷⁷ Id at para 98.

[63] Ackermann J listed a number of factors which are relevant to establishing “sufficient reason” for the deprivation in question.⁷⁸ Importantly for purposes of the present case, he held that:

“Generally speaking, where the property in question is ownership of land or a corporeal movable, a more compelling purpose will have to be established in order for the depriving law to constitute sufficient reason for the deprivation than in the case when the property is something different . . .”⁷⁹

The proportionality enquiry in respect of the forfeiture of immovable property will often pose particular challenges, not only because of the value of such property and of its often indivisible nature, but because of the fact that it may be “home” to a number of people.⁸⁰

[64] In the *Prophet* case, whilst acknowledging that the standard for establishing arbitrariness is different to the standard of proportionality, Nkabinde J nonetheless adopted the following factors as some of those which would be relevant to the proportionality enquiry:

- 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 respondent;

⁷⁸ Id at para 100.

⁷⁹ Id.

⁸⁰ See *Parker* above n 50 at paras 35-38.

- the nature and use of the property;⁸¹ and
- the effect on the respondent of the forfeiture of the property.⁸²

[65] As indicated above, the nature and extent of any other penalties, including criminal penalties, which have already been meted out to the respondent should also be taken into consideration. Moreover, the fact that the legislature has made provision for a range of penalties for a specific offence, while clearly not dispositive, is certainly a significant factor to be taken into consideration in the proportionality exercise.

[66] Turning to the facts of the matter at hand, the applicants did not raise proportionality as an issue in their affidavits, at the hearing in the High Court or in their heads of argument in the Supreme Court of Appeal “as was their duty”.⁸³ The matter was, however, properly argued before the Supreme Court of Appeal which dealt with this issue, concluding that “there does not appear to be any merit in the argument that forfeiture would have been disproportionate to the crimes involved.”⁸⁴ Counsel for the NDPP pointed out that the applicants, in their heads of argument before this Court, have now for the first time pertinently raised the issue of proportionality. The NDPP objected to this course of conduct, contending that as a result of the applicants’ failure to plead their complaint about proportionality when they should have done so, the NDPP has not had an opportunity to adduce evidence on

⁸¹ Particularly in the case of immovable property, the question whether, in addition to being “an instrumentality of an offence”, the property is also used as a residence.

⁸² Above n 10 at para 63.

⁸³ See the judgment of the Supreme Court of Appeal above n 1 at para 5.

⁸⁴ Id at para 8.

the issue. To allow the applicants to raise their complaint at this late stage, argued the NDPP, will deprive it of its fundamental right to be afforded a fair opportunity to present its side of the case. In view of the conclusion to which I have come with regard to the issue of proportionality, it is not necessary to deal with this objection any further.

Significant disproportionality?

[67] Before considering the proportionality of the forfeiture on the facts of this case, I consider it desirable to attempt to clarify some confusion that has emerged in recent judgments on the “standard of proportionality” applicable to the assessment of the relationship between the nature and value of the property subject to forfeiture, the nature and gravity of the crime involved and the role the property played in the commission of the crime.

[68] In the majority judgment of the Supreme Court of Appeal in *Prophet*, Mpati DP held that:

“A mere sense of disproportionality should not lead to a refusal of the [forfeiture] order sought. To ensure that the purpose of the law is not undermined, a standard of ‘significant disproportionality’ ought to be applied for a court to hold that a deprivation of property is ‘arbitrary’ and thus unconstitutional, and consequently refuse to grant a forfeiture order. And it is for the owner to place the necessary material for a proportionality analysis before the court.”⁸⁵

⁸⁵ Id at para 37. Streicher, Mthiyane and Cloete JJA concurring.

According to the majority, this approach was needed to “guard against the danger of frustrating the lawmaker’s purpose for introducing the forfeiture procedure in the Act”, namely:

“ . . . the realisation by the Legislature that there was rapid growth, both nationally and internationally, of organised criminal activity and the desire to combat these criminal activities by, *inter alia*, depriving those who use property for the commission of an offence of such property.”⁸⁶

[69] In a minority judgment, Ponnann JA rejected the benchmark of “significant disproportionality” as being “too strict an evaluative norm”,⁸⁷ and held that “[t]he draconian effect of the Act would be exacerbated . . . were the elevated benchmark ‘significantly disproportionate’ to be applied.”⁸⁸ As the learned judge pointed out:

“It is for a court, in the exercise of its discretion, against the backdrop of the full factual matrix of the case, to determine whether there is an appropriate relationship between means and end. The imposition of a higher minimum threshold tips the scales in favour of the former, unduly fetters the discretion of the court that has to undertake the enquiry and disturbs the equilibrium sought to be achieved by the exercise. Courts should be vigilant to ensure that the statutory provisions in question are not used *in terrorem* and that there has been no overreaching and abuse.”⁸⁹

[70] On appeal in *Prophet*,⁹⁰ this Court found it unnecessary to decide whether there is a material difference between the test formulated by the majority in the Supreme Court of Appeal and that formulated by Ponnann JA. The question of the incidence of

⁸⁶ Id.

⁸⁷ Id at para 42.

⁸⁸ Id at para 47.

⁸⁹ Id at para 45. See also the remarks of Nkabinde J in *Prophet* above n 10 at para 61.

⁹⁰ Above n 10 at para 69.

the onus as regards the proportionality issue was also left open by this Court in *Prophet*.⁹¹

[71] The approach of the majority of the Supreme Court of Appeal in *Prophet*⁹² may lead to unnecessary complexity. In the subsequent judgment of that court in *Van Staden*, where the offence under discussion was drunken driving, Nugent JA⁹³ referred to the majority view in *Prophet* and stated the following:

“Incursions upon conventional liberties that are justified by the particular difficulties encountered in the detection and successful prosecution of organised crime are not similarly justified in cases of ordinary crime that do not present those difficulties. I do not think that it is permissible to look to one threat that the Act aims at combating (the threat posed by organised crime) in order to justify its application in relation to a quite different threat (the threat that is posed, for example, by drunken driving) that does not present the same challenges. It must be borne in mind that drunken driving, which does not ordinarily result from organised illicit activity, and presents no special difficulties to detect and prosecute, can attract substantial penalties, and the ordinary criminal law ought to be the first port of call to combat the evil. For the Act exists to supplement criminal remedies in appropriate cases and not merely as a more convenient substitute.”⁹⁴

[72] I agree that it would be wrong for POCA to be utilised in a manner which blurs the distinction between the purposes and the methods of criminal law enforcement, on the one hand, and those of civil law, on the other. There is no justification for resorting to the remedy of civil forfeiture under POCA as a *substitute* for the effective

⁹¹ Id at para 70.

⁹² Above n 85.

⁹³ Cameron JA, Malan, Theron and Cachalia AJJA concurring.

⁹⁴ Above n 28 at para 7.

and resolute enforcement of “ordinary” criminal remedies. In addition to the factors listed by this Court in *Prophet*⁹⁵ – the nature and gravity of the offence in question, the extent to which ordinary criminal law measures (when properly enforced) are effective in dealing with it, its public impact and potential for widespread social harm and disruption – are all factors that should also weigh in the enquiry as to whether a forfeiture order would be unconstitutionally disproportionate.

[73] However, the learned judge in *Van Staden* goes on to state that:

“... I do not think that in cases of drunken driving there is justification for imposing the higher standard of ‘significant’ disproportionality referred to in *Prophet*. To avoid an order for forfeiture in such cases being arbitrary, and thus unconstitutional, a court must be satisfied that the deprivation is not disproportionate to the ends that the deprivation seeks to achieve. In making that determination the extent to which the deprivation is likely to afford a remedy for the ill sought to be countered, rather than merely being penal, will necessarily come to the fore, bearing in mind that the ordinary criminal sanctions are capable of serving the latter function.”⁹⁶

[74] As pointed out above, it may be very difficult to draw a clear distinction in many cases between “organised crimes”, on the one hand, and “ordinary crimes”, on the other. This being so, it is potentially problematic to link a yardstick of “significant disproportionality” with the former type of crime and that of “disproportionality simpliciter” with the latter type. To my mind, there should be only one evaluative standard applicable to all the offences that fall within the ambit of the forfeiture provisions of POCA. That standard simply involves asking the question whether the

⁹⁵ See para [64] above.

⁹⁶ Above n 28 at para 8.

forfeiture of the property concerned is, in all the circumstances of the case (including the nature and seriousness of the offence), disproportionate in the sense discussed above. Adding labels and qualifiers to the degree of “disproportionality” required can only give rise to unnecessary confusion. The organised crime element, while significant in assessing whether a forfeiture order should be made in a particular case, is not necessarily decisive. The criminal activities of an efficient and energetic individual miscreant may well have a more extensive reach and a greater negative social impact. So, for example, an individual drug dealer selling “tik” (the drug being manufactured in *Prophet*⁹⁷) through city schools may well have a larger client base and more outlets than a drug syndicate.

[75] It is the task of the court to ensure that the deprivation of property that will result from a forfeiture order is not arbitrary. The proportionality assessment is a *legal* one, based on an evaluation of all the relevant factors in the full factual matrix of the particular case. The onus of establishing that all the requirements for a forfeiture order in terms of section 50 of POCA – including that of proportionality – have been met, rests on the NDPP throughout. However, as some of the factual material relevant to the proportionality analysis will often be peculiarly within the knowledge of the owner of the property concerned, the owner who is faced with a *prima facie* case established by the NDPP would in the usual course be well-advised to place this material before the court.⁹⁸ This does *not*, however, shift the onus of proof to the

⁹⁷ Above n 10.

⁹⁸ As Innes J said in *Union Government (Minister of Railways) v Sykes* 1913 AD 156 at 173-174:

owner in question; it merely places on the owner an evidentiary burden or, as it is sometimes called, a burden of adducing evidence in rebuttal.⁹⁹

Was the forfeiture of Shelgate's property disproportionate?

[76] The main argument advanced by the applicants in respect of proportionality is that the forfeiture order made is disproportionate and hence not constitutionally justifiable considering the following circumstances: the nature and gravity of the offences in question;¹⁰⁰ the fine paid by Mr Mohunram and the forfeiture by him of monies found on the premises and of the gaming machines; the absence of any direct causal connection between the property and the offences on which the forfeiture application was based; and the fact that the illicit activity only occupied a portion of the premises in question.

“The important point is that less evidence will suffice to establish a *prima facie* case where the matter is peculiarly within the knowledge of the opposite party than would under other circumstances be required.”

⁹⁹ In *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd* 1977 (3) SA 534 (A) at 548, Corbett JA described the difference between the onus of proof and the evidential burden as follows:

“As was pointed out by Davis A.J.A. in *Pillay v Krishna and Another* 1946 A.D. 946 at 952-3, the word *onus* has often been used to denote, *inter alia*, two distinct concepts: (i) the duty which is cast on the particular litigant, in order to be successful, of finally satisfying the court that he is entitled to succeed on his claim or defence, as the case may be; and (ii) the duty cast upon a litigant to adduce evidence in order to combat a *prima facie* case made by his opponent. Only the first of these concepts represents *onus* in its true and original sense. In *Brand v Minister of Justice and Another* 1959 (4) SA 712 (AD) at p.715, OGILVIE THOMPSON, J.A., called it ‘the overall *onus*’. In this sense the *onus* can never shift from the party upon whom it originally rested. The second concept may be termed, in order to avoid confusion, the burden of adducing evidence in rebuttal (‘weerleggingslas’). This may shift or be transferred in the course of the case, depending upon the measure of proof furnished by the one party or the other.”

See further on the distinction between the onus of proof and the evidentiary burden in both civil and criminal cases, Zeffertt, Paizes & Skeen *The South African Law of Evidence (formerly Hoffmann and Zeffertt)* 5 ed (LexisNexis Butterworths, Durban 2003) at 121-124; Schmidt & Rademeyer *Bewysreg* 4 ed (Butterworths, Durban 2000) at 24ff; Schwikkard & Van der Merwe *Principles of Evidence* 2 ed (Juta, Cape Town 2002) at Chapters 31 and 32.

¹⁰⁰ See para [10] above.

[77] The strict regulation of gambling activities is, in part, a legislative recognition of the fact that gambling can have a major negative public and social impact. Illegal gambling is a serious offence. This is made clear by the sanctions envisaged in section 94 of the KZN Gambling Act. As first-time offenders, Mr Mohunram was liable to a maximum period of ten years' imprisonment without the option of a fine,¹⁰¹ or to a fine not exceeding R2 million or a period not exceeding ten years' imprisonment,¹⁰² while Shelgate risked a fine of R2 million.¹⁰³ The penalties provided for may be imposed in addition to "any competent forfeiture contemplated in" section 94(4).¹⁰⁴

[78] The potentially harmful social and economic consequences of gambling and the necessity of regulation to protect the public was acknowledged by this Court in *Magajane v Chairperson, North West Gambling Board and Others*, where Van der Westhuizen J, writing for a unanimous Court, stated the following:

"The Preamble of the Act [the North West Gambling Act] makes clear that the Act aims to protect the public confidence and trust and the health, safety, general welfare and good order of the inhabitants of the province through the strict regulation of institutions and individuals involved in the gambling industry. The importance of this general purpose is beyond question gambling is an activity that could pose a threat to individuals' psychological, financial and even physical health, as well as those of their families and communities. Regulation is essential to protect participants in the gambling industry and the general public. The gambling industry

¹⁰¹ If convicted of "performing any licensable act appertaining to gambling without a valid licence" see section 94(2)(a) of the KZN Gambling Act.

¹⁰² If convicted of "any other offence", see section 94(3) of the KZN Gambling Act.

¹⁰³ Id.

¹⁰⁴ Above n 7.

is a pervasively regulated industry. Schedule 4 Part A of the Constitution of the Republic of South Africa, 1996 lists gambling as a functional area of concurrent national and provincial legislative competence, and the provisions of the National Gambling Act 7 of 2004 and the North West Gambling Act show that both national and provincial legislation regulate the industry. The preambles of both statutes proclaim the necessity of regulation to safeguard the public.”¹⁰⁵ (Footnotes omitted.)

[79] According to the preamble to the National Gambling Act 7 of 2004:

“It is desirable to establish certain uniform norms and standards, which will safeguard people participating in gambling and their communities against the adverse effect of gambling, applying generally throughout the Republic with regard to casinos, racing, gambling and wagering, so that –

- gambling activities are effectively regulated, licenced, controlled and policed;
- members of the public who participate in any licenced gambling activity are protected;
- society and the economy are protected against over-stimulation of the latent demand for gambling; and
- the licensing of gambling activities is transparent, fair and equitable.”

[80] A perusal of this Act and of the KZN Gambling Act makes it clear that there are very stringent requirements for the issue of a casino license and equally stringent controls once a license is issued. This is not surprising. Prior to the promulgation of the National Gambling Act, a Lotteries and Gambling Board was created in terms of the Lotteries and Gambling Board Act 210 of 1993 and mandated to investigate the gambling industry in South Africa and, in particular, the manner in which gambling activities should be regulated. As stated by Selikowitz J in *Soundprop 1239 CC t/a 777 Casino v Minister of Safety and Security and Others*:

¹⁰⁵ 2006 (10) BCLR 1133 (CC); 2006 (5) SA 250 (CC); 2006 (2) SACR 447 (CC) at paras 81-82.

“[I]t is significant to note that the Board, after an extensive examination both here and abroad, concluded that in an open and democratic society there was room for gambling provided that such gambling be strictly controlled. The controls are needed for the protection of the gamblers, for the protection of society and in order to properly regulate the industry. In the report of what is known – after its chairperson – as the Wiehahn Committee, there is a detailed examination of the types of controls that are needed and recommendations for the implementation of such controls.”¹⁰⁶

These recommendations¹⁰⁷ gave rise to the promulgation of the National Gambling Act which came into operation on 1 November 2004.

[81] It is significant that, among the reasons for the necessity of controlling the gambling industry given, in *Soundprop*, by the Minister responsible for the control of gambling were:

“. . . that one must be aware of the fact that the cash flow generated by gambling lends itself to money laundering and to targeting by crime syndicates . . .”¹⁰⁸

This is in accordance with international experience. So, for example, various royal commissions and enquiries in Australia “have revealed that there are strong connections between organised crime and illegal gambling in Australia” and have also “documented connections between illegal casinos and money laundering”.¹⁰⁹

¹⁰⁶ 1996 (4) SA 1086 (C) at 1093C-E.

¹⁰⁷ Id at 1093E-G. See also *Gaming Association of South Africa (KwaZulu-Natal) and Others v Premier, KwaZulu-Natal, and Others (No 1)* 1997 (4) SA 494 (N) at 499F-501A. In the latter case, Levinsohn J pointed out (at 504A-B) that “[e]ven though gambling is now no longer labeled as *per se* immoral or illegal it is nonetheless an activity which, if not properly controlled, can spawn a great deal of social evil.”

¹⁰⁸ Above n 106 at 1093H-1094B.

¹⁰⁹ Pinto and Wilson *Gambling in Australia trends and issues in crime and criminal justice* (Australian Institute of Criminology No 24), (July 1990) at 3-4, <http://www.aic.gov.au/publications/tandi/ti24.pdf>, accessed on 23 March 2007.

Similarly, close links between illegal gambling operations and organised crime have been documented in the United States of America.¹¹⁰

[82] Looking at the circumstances of this case as a whole, the crimes committed on the property involved the conducting of an illegal casino for profit. As discussed above, these are serious offences which can have very negative social, economic and other impacts. Thus, measures which serve effectively to deter people from using or allowing their property to be used for the commission of these offences certainly promote the interests of justice. It has already been pointed out that the property was integral to the commission of the offences under the KZN Gambling Act; it is not a case where the property could be said to be “incidental” to the criminal endeavour. The use of the property in the commission of the offences was not a once-off thing; on the contrary, it was a continuous sustained use for more than a year subsequent to the casino operation becoming illegal.

[83] In addition, as pointed out by the Supreme Court of Appeal in its judgment,¹¹¹ the subject of the forfeiture application is property belonging to Shelgate, not to Mr Mohunram. Mr Mohunram has paid admission of guilt fines totalling R88 500 and has suffered forfeiture or loss of monies and equipment amounting to approximately R287 000, but Shelgate has to date lost nothing due to its illegal activities. While Mr Mohunram is admittedly the sole member of Shelgate, that does not alter the fact that

¹¹⁰ See for example *United States v Sacco* 491 F 2d 995, 999-1001 (9th Cir 1974) and *United States v Wall* 92 F 3d 1444, 1450-1451 (6th Cir 1996).

¹¹¹ Above n 1 at para 7.

Shelgate has a separate corporate personality. Mr Mohunram and Shelgate have enjoyed the advantages of their separate legal personalities and must also bear the consequences thereof.

[84] The admission of guilt fines paid by Mr Mohunram related to his contravention of section 95(2) and of section 3(4)(b) of the KZN Gambling Act.¹¹² He does not appear to have been charged with a contravention of section 44, although it was common cause on the papers before us that he had indeed contravened that section by operating his casino without the requisite licence. This offence would seem to fall under section 94(2) of the KZN Gambling Act so that, had Mr Mohunram been charged with and convicted of this offence, he would have been liable to imprisonment for a maximum period of 10 years without the option of a fine.¹¹³ We do not know why he was *not* charged with a contravention of section 44, nor do we know why Shelgate was *not* charged with a contravention of section 3(3)(a).¹¹⁴

[85] One possible reason why we do not have this information on record is that, as already pointed out, the proportionality point was not raised by the applicants in any of their affidavits, in the hearing before the High Court or in their heads of argument in the Supreme Court of Appeal. So we are faced with a situation where *neither* Mr Mohunram has been penalised for his contravention of section 44 of the KZN

¹¹² See para [6] above.

¹¹³ See above n 101 and accompanying text.

¹¹⁴ See above n 4. This offence would seem to fall under section 94(3) of the KZN Gambling Act and, had Shelgate been charged with and convicted of this offence, it would have been liable to a maximum fine of R2 million (see above n 101-102 and accompanying text).

Gambling Act, *nor* has Shelgate been penalised for its contravention of section 3(3)(a). Because of the manner in which the proceedings were conducted, it cannot be said with any degree of confidence that the effect of the forfeiture order in the present matter would indeed be to give the NDPP “a second bite at the cherry”, to use the words of Sachs J in his judgment in this case, or that the forfeiture of the property would amount to a “duplication of punishment” for the same offence(s).

[86] As pointed out by Van der Walt:

“[T]he property rights of those who were actually involved in crime may be lost through forfeiture, but by and large this is not necessarily unjust or unreasonable, as such loss would mostly be justifiable in the normal way by describing the forfeiture as an exercise of the police power that merely has to satisfy the requirements in section 25(1) in establishing a proper balance between the public purpose of the deprivation and the interests of the affected person.”¹¹⁵

[87] It appears from the evidence that Mr Mohunram’s profit from the casino amounted to approximately R30 000 per month. From February 2000 at the latest to April 2001, the casino operated illegally, thus producing an illicit income for Mr Mohunram totalling about R420 000. Thus, even if one were notionally to disregard Shelgate’s separate legal personality and take into consideration the fact that Mr Mohunram has incurred criminal penalties amounting to about R365 000, the applicants are still left with “net illicit profits” of approximately R55 000. This must obviously also be borne in mind when determining the question of proportionality in this case.

¹¹⁵ Above n 73 at 195.

[88] As for the effect of forfeiture on the applicants, the property is owned by Shelgate and is its only asset. Mr Mohunram has a 100 percent member's interest in Shelgate. Since the property is not used for residential purposes, its forfeiture will have no effect on the living arrangements of the applicants. It will merely deprive them of an asset that has some financial value to them. According to the NDPP's calculations, which were not really gainsaid by the applicants, the loss which they will suffer is as follows. The property was bonded in favour of NBS Bank in an amount of R600 000. The balance outstanding on the bond was approximately R477 000 at the time of the preservation order proceedings. In other words, the applicants have paid off approximately R123 000 of the capital amount of the bond. If a forfeiture order were to be granted, the proceeds of the sale of the property would be used in the first instance to settle the indebtedness under the bond. What the applicants will "lose", therefore, is the amount (if any) by which the value of the property exceeds the value of the bond.

[89] The applicants did not adduce any evidence regarding the value of the property, save to state that "it is unlikely that the value of the outstanding bond will be realised should the state elect to sell the property". The figures are in dispute, the respondent believing that there is value for the state in a forfeiture order while the applicants disagree. According to Mr Mohunram, the property market in Vryheid at the relevant time was "severely depressed" and he thought that it was unlikely that the outstanding bond would be realised should the property be sold. What this means is that, on the

applicants' own version, the value of the property is less than R477 000. It follows that, if forfeiture were to be ordered, the applicants would not "lose" anything in the form of a notional amount by which the value of the property exceeds the value of the bond. They would simply lose the R123 000 that they have already paid off on the capital amount of the bond. It should be noted that Mr Mohunram's affidavits dealing with this point were deposed to in 2001 and the position with regard to the value of the property may well have changed since then.

[90] As indicated above, the evidence shows that the profits from the casino amounted to some R30 000 per month. The illicit income from the gambling operation would accordingly have totalled about R420 000 during the 14 months (February 2000 to April 2001) when Mr Mohunram continued to run the operation after an amendment to the KZN Gambling Act that made it clearly illegal. Therefore, according to the NDPP, the applicants have earned more from the illegal casino than they stand to lose if the property is forfeited. In the circumstances of this case, the NDPP submits, there is no disproportionality (far less "significant disproportionality").

[91] If the financial effect of the criminal penalties incurred by Mr Mohunram is also taken into consideration as part of the proportionality enquiry,¹¹⁶ then the overall effect on the applicants of a forfeiture of the property is an immediate financial loss of about R68 000, viz less than the admission of guilt fines paid by Mr Mohunram. In

¹¹⁶ See paras [41] and [64] above.

addition to this financial loss, however, other premises will have to be found for the legitimate glass and aluminium business being conducted on the property and this will obviously have considerable financial implications. It must also be borne in mind that Mr Mohunram stood surety vis-à-vis NBS Bank for Shelgate's liability under the bond so that, if a sale of property does not realise the outstanding bond amount, then Mr Mohunram as surety could possibly be held liable by NBS Bank for the shortfall.

[92] A note of caution must be sounded. It is certainly not *necessary* for a court, in considering whether or not a forfeiture order applied for will be disproportionate, to undertake the kind of "financial exercise" set out in the four preceding paragraphs. However, as the figures were available in this case and were referred to by the applicants and the NDPP, it is useful to take them into consideration in the present matter.

[93] The applicants further contended that forfeiture of the property would be disproportionate since the illegal casino *only* occupied a portion of the building in question. They point out that a portion of the property was used for conducting a glass and aluminium business.

[94] It is clearly not a requirement for the grant of a forfeiture order that the whole of the property must have been used as the instrumentality of an offence. As the

Supreme Court of Appeal pointed out in its judgment in this case,¹¹⁷ “property” is defined in section 1 of POCA:

“to include any ‘immovable’ thing and immovable property is identified with reference to its cadastral description, ie it is the property described in the deeds office. It is highly unlikely that the whole of an immovable property can ever be used in the commission of a crime and the restriction would make the provision meaningless.”
(Footnote omitted.)

[95] The relevant question for purposes of the proportionality enquiry is therefore not whether the *whole* of the property was used in furtherance of the crime. It is whether forfeiture of the whole property would be disproportionate to the seriousness of the crimes committed and the benefits derived from those crimes. In this regard, it has to be borne in mind that the total area of the sectional title property is 542 square metres. Although Mr Mohunram did conduct a legitimate business on part of the property, there is no evidence before us as to the respective sizes of the two areas. However, as pointed out by the Supreme Court of Appeal, bearing in mind that the illegal casino had 57 gaming machines and a cashier’s booth, the area occupied by the casino operation could not have been insignificant. This is borne out by the fact that, after the casino was closed down, Mr Mohunram subdivided the casino area and let out the two separate portions.

[96] The NDPP pointed out that, in any event, it would not be feasible to order forfeiture of part of the property. In *National Director of Public Prosecutions v Cole*

¹¹⁷ Above n 1 at para 4.

and Others,¹¹⁸ Willis J held that it is not possible to order forfeiture of part of immovable property unless there is evidence that subdivision is feasible:

“The intractable difficulty is that immovable property, unlike various other kinds of assets of which money is perhaps the best example, is usually indivisible. Subdivision of this immovable property would, in any event, require the approval of the local municipality which is not a party to these proceedings. Besides, nothing was put before me to suggest that this solution would be desirable, and, if so, possible.”

A similar difficulty exists in the present circumstances, where the forfeiture involves a sectional title unit.¹¹⁹ The applicants have not adduced any evidence to establish that it would be possible to order forfeiture of part of the sectional title unit.

[97] In their written submissions, the applicants state that “[n]either the time duration nor the spatial extent [of the illegal activities] was reliably established”. In my view, however, there was enough evidence to show that a substantial portion of the property was used as an illegal casino for an extended period of time. The applicants’ contentions to the contrary are not convincing.

[98] The applicants alleged that Mr Mohunram was given an assurance that upon payment of substantial fines and destruction of the relevant gambling machines, he would face no further penalty. They contended that the forfeiture application was launched in contravention of the agreement with the first applicant. In support of this

¹¹⁸ Above n 19 at para 20.

¹¹⁹ Subdivision of a section is regulated by sections 21 and 22 of the Sectional Titles Act 95 of 1986. Subdivision of a section can only occur where a certificate is issued by the local authority. See section 21(2)(a) read with section 7(2) of the Sectional Titles Act.

contention, the applicants refer to certain passages in their affidavits, but these passages fall well short of proving an assurance that Mr Mohunram would pay no further penalty. The only entity who could have given such an assurance (or who could have entered into such an agreement) was the office of the NDPP, and the applicants do not suggest that it did so. There is thus no factual basis for the applicants' complaint that the forfeiture application was launched in violation of an assurance or undertaking that the matter had been brought to finality when the admission of guilt fine was paid. The contentions of the applicants in this regard are without merit.

[99] On the question of proportionality, the LRP submitted that the forfeiture provisions of POCA are intended to be preventive, not punitive. According to the LRP, the forfeiture of the instrumentalities of an offence can tenably have a place in civil law only in order to prevent the repetition of the offence by the use of that property. In consequence, property can only be declared forfeit if the NDPP shows that it will probably be used to repeat the crime which will follow only if it is property that, like "tik", can never have a lawful use, or that can have no lawful use in the hands of the lawbreaker (like, for example, gaming machines in the hands of a person who has no licence to use them). The forfeiture of the Shelgate premises does not satisfy this test.

[100] As illustrated above, the LRP's interpretation is inconsistent with the jurisprudence of this Court and of the Supreme Court of Appeal. It would require the

NDPP to “show” that the property will be used to repeat the crime. To impose such an onus of proof on the NDPP would undermine the purpose of POCA and might render it an unworkable instrument in the fight against crime.

[101] In conclusion, it should be emphasised that, while the forfeiture of the property in this case will undeniably have a punitive effect on the applicants, it will also serve the very important purpose of deterring both the applicants and other people from using or allowing their property to be used for illegal gambling, with all its potentially harmful consequences.

[102] In view of the above, I conclude that there is no merit in the applicants’ contention that the forfeiture order is disproportionate. The appeal must therefore be dismissed.

Costs

[103] As regards costs, it must be borne in mind that, until *Prophet* was decided in September 2006, the issues of constitutional principle raised by the applicants had, by and large, not been addressed by this Court. It would have made little sense for the applicants not to proceed with their application after this Court’s decision in *Prophet*. Thus, although the NDPP has asked for costs on appeal, I am of the view that it would not be appropriate to accede to this request.

[104] The NDPP also submitted that, as the LRP had in several respects made common cause with the applicants in these proceedings, the LRP should be ordered to pay the NDPP's costs occasioned by its intervention as *amicus curiae*.

[105] Rule 10(10) of the Constitutional Court Rules provides that “an order of Court dealing with costs may make provision for the payment of costs incurred by or as a result of the intervention of an *amicus curiae*.” As has been pointed out by this Court in previous cases, however, the intervention by an *amicus curiae* does not ordinarily result in an order for costs either for or against the *amicus*.¹²⁰ In the words of Ngcobo J, writing for a unanimous court, in *Hoffmann v South African Airways*:

“An *amicus* joins proceedings, as its name suggests, as a friend of the Court. It is unlike a party to litigation who is forced into the litigation and thus compelled to incur costs. It joins in the proceedings to assist the Court because of its expertise on or interest in the matter before the Court. It chooses the side it wishes to join unless requested by the Court to urge a particular position. An *amicus*, regardless of the side it joins, is neither a loser nor a winner and is generally not entitled to be awarded costs.”¹²¹

[106] It is true that the LRP did make common cause with the applicants to a considerable extent. However, the arguments it advanced were also of a more general application and I am not persuaded that there is sufficient reason for departing from the general rule that no costs order be made either in favour of or against an *amicus*.

Order

¹²⁰ See for example *Minister of Justice v Ntuli* 1997 (3) SA 772 (CC); 1997 (6) BCLR 677 (CC) at para 43.

¹²¹ 2001 (1) SA 1 (CC); 2000 (11) BCLR 1211 (CC) at para 63.

In the circumstances, I would have granted the application for leave to appeal, but dismissed the appeal with no order as to costs.

Langa CJ, Madala J, Van der Westhuizen J and Yacoob J concur in the judgment of van Heerden AJ.

MOSENEKE DCJ:

[107] I have had the benefit of reading the compelling judgment prepared by my colleague van Heerden AJ. She concludes that the application for leave to appeal should be granted but that the appeal be dismissed with no order as to costs. Regrettably, I am unable to support this outcome. In my view, and also as Sachs J concludes, the appeal should succeed with costs.

[108] I do not propose to rehash the facts and the history of litigation because these are admirably captured in the judgment of van Heerden AJ. I may also add that I agree with the manner in which she has characterised the issues that fall to be decided and these are: (a) whether the property concerned was an instrumentality of an offence; (b) what is the meaning of “offence” in the context of civil forfeiture

authorised by Chapter 6 of the Prevention of Organised Crime Act¹ (“POCA”) and (c) whether the forfeiture sought in this case is disproportionate.

[109] I am constrained to take a view different from that of van Heerden AJ in relation to issues (b) and (c).

Instrumentality of an offence

[110] I dispose of the issue of instrumentality of an offence first. Both the applicants and the Law Review Project (“the LRP”), the amicus curiae, sought to persuade us that the fixed property that is the target of the civil forfeiture was not shown to be an instrumentality of an offence of operating a casino without a valid licence in contravention of section 44² of the KwaZulu-Natal Gambling Act³ (KZN Gambling Act) and a contravention of section 3(3)(a)⁴ of the same Act, namely being the owner of a building that allows any other person to conduct gambling activities therein or thereon without a licence. For the reasons that van Heerden AJ advances, I respectfully agree that the fixed property owned by Shelgate, the second applicant, was indeed an instrumentality of the offences committed by it and Mr Mohunram.

¹ Act 121 of 1998.

² Section 44 states:

“No person may operate or attempt to operate a casino unless he or she is in possession of a valid casino license issued by the Board in terms of this Act.”

³ Act 10 of 1996.

⁴ Section 3(3)(a) states:

“The owner of any building, dwelling, structure or premises of any other nature whatsoever shall not use such building, dwelling, structure or premises of any other nature whatsoever for gambling purposes or allow any other person to conduct any gambling activity therein or thereon unless he or she or the person conducting the gambling activity in or on such building, dwelling, structure or premises, is in possession of a licence issued in terms of this Act or the Regulation of Racing and Betting Ordinance, 1957 (Ordinance No. 28 of 1957).”

The meaning of offence in the context of Chapter 6 of POCA

[111] The LRP and both applicants have made it clear that they do not, in these proceedings, contest the constitutional validity of the civil forfeiture provisions found in Chapter 6 of POCA. However, the kernel of their submission is that gambling per se is not an “offence” for which forfeiture under POCA is competent. They elaborate that POCA has been construed by the Supreme Court of Appeal in a manner that has improperly brought gambling within the compass of the Act and that, as a result, the forfeiture provisions of POCA have unwarrantedly been brought to bear on the property that has been declared forfeit.

[112] The offences for which forfeiture is potentially competent, the LRP submits, are limited to those created by POCA. These are racketeering under Chapter 2, money laundering under Chapter 3 and criminal gang activities under Chapter 4. They may collectively be termed “organised crime offences” and the rest may conveniently be called “ordinary crimes.” The LRP further argues that since unlicensed gambling, without more, is not an organised crime offence, no order of forfeiture can competently be made under POCA on the basis of the provisions providing for the forfeiture of the instrumentalities of such an offence. They urged us to interpret the phrase “instrumentality of an offence referred to in Schedule 1” in section 50(1)⁵ of

⁵ Section 50(1) of POCA states:

“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—

- (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.”

POCA as requiring that the offence should not only be a Schedule 1 offence but also an organised crime offence created by Chapters 2, 3 and 4 of POCA. On this reasoning, although gambling offences appear in Schedule 1, they will attract civil forfeiture only if they are also organised crime offences.

[113] Van Heerden AJ rejects these submissions as unconvincing. In essence, she holds that because POCA has been amended to make it clear that it applies to offences committed before and after its commencement, it has a wider ambit than offences that were created by the POCA. She also finds fortification in two prior decisions of the Supreme Court of Appeal which in effect hold that the provisions of POCA “are designed to reach far beyond organised crime and apply also to cases of individual wrongdoing.”⁶

[114] I am unable to hold without more that the construction of section 50(1) of POCA advanced by the LRP is without merit.⁷ Happily, I do not have to resolve, in this case, the intractable interpretive challenges on the proper reach of Chapter 6 of POCA and section 50(1) in particular. This is so for several reasons. First, the conclusion I reach on proportionality does not compel a decision on the argument

⁶ *National Director of Public Prosecutions v Van Staden and Others* 2007 (1) SACR 338 (SCA) at para 1; *National Director of Public Prosecutions v (1) RO Cook Properties (Pty) Ltd; (2) 37 Gillespie Street Durban (Pty) Ltd and Another; (3) Seevnarayan* 2004 (8) BCLR 844 (SCA); 2004 (2) SACR 208 (SCA) at para 65. See also *National Director of Public Prosecutions v Mohunram and Others* 2006 (1) SACR 554 (SCA) and *Prophet v National Director of Public Prosecutions* 2006 (1) SA 38 (SCA); [2006] 1 All SA 212 (SCA).

⁷ There are ample lessons to learn on the latent risk of unfairness and breach of fundamental freedoms lurking in any civil asset forfeiture system. In the USA, the federal system of civil forfeiture of assets has been roundly condemned and criticised by the judiciary, academic commentators and the media as requiring a “modicum of sanity.” See for example *Degen v United States* 517 US 820 (1996) cited in Loughlin PJ, *Does the Civil Asset Forfeiture Reform Act of 2000 bring a modicum of sanity to the federal civil forfeiture system?* (no date available), http://www.malet.com/does_the_civil_asset_forfeiture_.htm, accessed on 15 March 2007; Bell RE, *Civil Forfeiture of Criminal Assets* (1999), <http://www.iap.nl.com/forfeit.html> accessed on 15 March 2007.

advanced by the LRP but not by the applicants themselves. Second, in this case the proper scope of civil forfeiture in Chapter 6 and particularly the proper scope of section 50(1) and the attitude of the Supreme Court of Appeal on these matters were not debated before the High Court or the Supreme Court of Appeal. They were raised for the first time in this Court. Third, although the LRP takes the stance that its argument is at an interpretative level and is not meant to be an attack on the validity of Chapter 6 of POCA, in my view, at the very least, it constitutes an indirect or collateral constitutional challenge.⁸ In *Democratic Party Yacoob J* warned that:

“... considerable difficulties stand in the way of the adoption of a procedure which allows a party to obtain relief which is in effect consequent upon the invalidity of a provision of an Act of Parliament without any formal declaration of the invalidity of that provision.”⁹

[115] One will do well to remember that the LRP contends that if the meaning given to ‘offence’ runs wide and well beyond organised crime in a way that includes all the acts of individual wrongdoing listed in Schedule 1,¹⁰ it would be inconsistent, not only with the purpose and text of the statute, but more importantly with the prohibition against unlawful and arbitrary deprivation of property set by section 25(1)¹¹ of the

⁸ On the attitude of this Court to a collateral challenge to the constitutional validity of a statute, see *Ingledeu v Financial Services Board and Others: In re Financial Services Board v Van der Merwe and Another* 2003 (4) SA 584 (CC); 2003 (8) BCLR 825 (CC) at para 22; *MEC for Development Planning and Local Government, Gauteng v Democratic Party and Others* 1998 (4) SA 1157 (CC); 1998 (7) BCLR 855 (CC) at para 13.

⁹ *Democratic Party* above n 8 at para 61.

¹⁰ The offences in Schedule 1 contain a vast collection of common law and statutory crimes ranging from murder, public violence and terrorism on the one end to any offence in terms of which the punishment may be a period of imprisonment exceeding one year without the option of a fine.

¹¹ Section 25(1) states:

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

Constitution. It would also constitute disproportionate and irrational punishment not permitted by section 12(1)(e)¹² of the Bill of Rights.

[116] It must be said that neither this Court¹³ nor the Supreme Court of Appeal,¹⁴ has had occasion to decide the constitutional validity of the relevant civil forfeiture provisions of POCA.

[117] I am left with no choice but to decline the invitation to decide a matter so grave on the basis of a belated showing of the LRP. What is more, if the interpretive complaint of the LRP were to lead to a conclusion that the relevant provision is inconsistent with the Constitution, an additional obstacle will confront this Court, being that the Minister of State who administers this legislation has not been joined as a party to these proceedings. I specifically leave open the decision whether the scope of the Act is designed to reach beyond racketeering, money laundering and criminal gang activities and apply to cases of individual wrongdoing.

Proportionality

¹² Section 12(1)(e) states:

“Everyone has the right to freedom and security of the person, which includes the right not to be treated or punished in a cruel, inhuman or degrading way.”

¹³ In *National Director of Public Prosecutions and Another v Mohamed NO and Others* 2002 (4) SA 843 (CC); 2002 (9) BCLR 970 (CC); 2002 (2) SACR 196 (CC), this Court remitted confirmation proceedings to the High Court for a decision on the constitutional validity of Chapter 6 of POCA. In *National Director of Public Prosecutions and Another v Mohamed NO and Others* 2003 (4) SA 1 (CC); 2003 (5) BCLR 476 (CC), this Court was not invited to deal with the constitutional validity of Chapter 6 of POCA, save for the procedural provisions of section 38(1) of POCA. In *Prophet v National Director of Public Prosecutions* 2007 (2) BCLR 140 (CC); 2006 (2) SACR 525 (CC) the constitutional validity of certain provisions of Chapter 6 were raised but not pressed on.

¹⁴ In *Cook Properties, Mohunram, Prophet and Van Staden* above n 6, the constitutional validity of the civil forfeiture provisions was indeed not called into question.

[118] Statutory civil forfeiture of assets is meant to pursue worthy and noble objectives aimed at curbing serious crime. And yet there is no gainsaying that, in effect, it is draconian. It is premised on the notion that it is a civil remedy and that the prosecution or the state has to show only on a balance of probabilities that the property may be seized and forfeited to the state. The criminal standard of proof does not come into it. When the state seeks civil forfeiture of assets that were used in the commission of a crime, it is not required to show that the owner has been convicted of the offence or that the owner performed an unlawful act with a criminal intent. The initial and central enquiry in asset forfeiture is whether the property is an instrumentality of an offence. If it is, the property is liable to be declared forfeit to the state.¹⁵

[119] Warning of the inherent dilemma of civil forfeiture in the US context, an academic writer, PJ Loughlin, observes that:

“[W]hile the Department of Justice and federal prosecutors were busy striking devastating financial blows against organised crime, money launderers and drug traffickers, too many innocent owners of property were caught up in a net cast too wide.”¹⁶

[120] Civil asset forfeiture constitutes a serious incursion into well-entrenched civil protections particularly those against arbitrary and excessive punishment and against

¹⁵ This fixation with “instrumentality of an offence” may be traceable to jurisdictions that recognise *in rem* forfeitures. Unlike *in personam* jurisdiction that seeks to hold the defendant personally accountable, *in rem* jurisdiction is based on the legal fiction that the thing or inanimate object or property is treated as the guilty party.

¹⁶ Loughlin above n 7 at 2.

arbitrary confiscation of property. Courts in this country¹⁷ and elsewhere¹⁸ have generally been astute to the fact that forfeiture of the instrumentalities of crime can produce arbitrary and unjust consequences. In the words of the minority judgment of Ponnau JA in *Prophet v National Director of Public Prosecutions*:

“courts should be vigilant to ensure that the statutory provisions in question are not used *in terrorem* and that there has been no overreaching and abuse.”¹⁹

[121] This vigilance is no less appropriate in relation to civil asset forfeiture of the instrumentalities of crime embraced by section 50(1), read together with Schedule 1 of POCA. It is indeed so that section 50(1) is couched in peremptory terms. It provides that a court “shall” make a forfeiture order if it finds on the civil standard of balance of probabilities that the property sought to be forfeited is an instrumentality of an offence. Textually, once the instrumentality threshold has been met, courts must authorise forfeiture. However, courts have consistently interpreted “shall” to mean “may”. They have correctly held all requests by state prosecutors for civil forfeiture to the standard of proportionality which amounts to no more than that the forfeiture should not constitute arbitrary deprivation of property or the kind of punishment not permitted by section 12(1)(e) of the Constitution.²⁰

¹⁷ *Van Staden* above n 6 at paras 7-8; *Prophet* above n 13 at paras 46 and 61; *Mohamed* (2002) above n 13 at para 22; *Mohamed NO and Others v National Director of Public Prosecutions and Another* 2002 (2) SACR 93 (W) at para 21.

¹⁸ *Normand Martineau v Minister of National Revenue and Attorney General of Ontario and Attorney General of Quebec* [2004] 3 R.C.S.; *United States v Hosep Krikor Bajakajian* 524 US 321 (1998); *Calero-Toledo v Pearson Yacht Leasing Co.* 416 US 663 (1974). For a discussion on civil forfeiture generally, see Liberty (The National Council for Civil Liberties), *Proceeds of Crime: Consultation on Draft Legislation* (May 2001), <http://www.liberty-human-rights.org.uk/pdfs/policy01/jun-proceeds-crime-draft.pdf>, accessed on 19 March 2007.

¹⁹ Above n 6 at para 45.

²⁰ See *Cook Properties, Van Staden* and *Prophet* above n 6.

[122] In *Prophet* this Court was at pains to find and strike the appropriate balance between the laudable societal quest to combat organised crime, on the one hand, and unwarranted interference with individual rights to property as against arbitrary punishment. Nkabinde J, writing for a unanimous Court, warned that:

“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”.²¹

[123] Nkabinde J re-emphasised the proportionality standard laid down by this Court in *FNB v Commissioner, SARS*²² that the forfeiture must be weighed against the purpose it serves. And in order to arrive at an appropriate answer one has to determine whether the property is closely associated with the commission of the crime; whether the forfeiture will prevent further wrongdoing; the nature and use of the property and the effect of the forfeiture on the owner of the property.

[124] It seems to me that if the forfeiture sought occurs within the context of POCA, additional and countervailing considerations come into the proportionality analysis. The nature of the crime must be probed keeping in mind the predominant purpose of POCA. This is a self-evident proposition. The forfeiture must advance the purpose

²¹ Above n 13 at para 61.

²² *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* 2002 (4) SA 768; 2002 (7) BCLR 702 (CC) at para 98.

that POCA proclaims. Otherwise, the forfeiture, being the means, will be misaligned with the predominant ends pursued by POCA.

[125] The objects of POCA are carefully considered in a unanimous judgment of this Court in *Mohamed*. I can do no better than cite generously from it:

“The Act’s overall purpose can be gathered from its long title and preamble and summarised as follows: The rapid growth of organised crime, money laundering, criminal gang activities and racketeering threatens the rights of all in the Republic, presents a danger to public order, safety and stability, and threatens economic stability. This is also a serious international problem and has been identified as an international security threat. South African common and statutory law fail to deal adequately with this problem, because of its rapid escalation and because it is often impossible to bring the leaders of organised crime to book, in view of the fact that they invariably ensure that they are far removed from the overt criminal activity involved. The law has also failed to keep pace with international measures aimed at dealing effectively with organised crime, money laundering and criminal gang activities. Hence the need for the measures embodied in the Act.

It is common cause that conventional criminal penalties are inadequate as measures of deterrence when organised crime leaders are able to retain the considerable gains derived from organised crime, even on those occasions when they are brought to justice. The above problems make a severe impact on the young South African democracy, where resources are strained to meet urgent and extensive human needs. Various international instruments deal with the problem of international crime in this regard and it is now widely accepted in the international community that criminals should be stripped of the proceeds of their crimes, the purpose being to remove the incentive for crime, not to punish them. This approach has similarly been adopted by our legislature.”²³ (Footnote omitted.)

²³ *Mohamed* (2002) above n 13 at paras 14-15.

[126] In my view, it must follow that, in deciding whether or not forfeiture of property would be proportionate, the question whether the instrumentality of the offence is sufficiently connected to the main purpose of POCA must be considered. I join Sachs J in emphasising that the more remote the offence in issue is to the primary purpose of POCA, the more likely it is that forfeiture of the instrumentality of the crime is disproportionate. In other words, when ordinary crime is in issue, the sharp question should be asked whether it is a crime that renders conventional criminal penalties inadequate. Is it a crime that requires extraordinary measures for its detection, prosecution and prevention? Is it a crime that warrants the extraordinary measures akin to those appropriate to organised crime as envisaged in POCA? Is it a crime that has some rational link, however tenuous, with racketeering, money laundering and criminal gang activities? If the answers to these questions were in the negative, this would be an important indication that forfeiture may be disproportionate.

[127] An additional consideration that enters the equation in the proportionality analysis must be whether the crime in relation to which the “criminal property” was used is subject to asset forfeiture provisions. If it is, it is a relevant and important factor whether the forfeiture provisions are exhaustive so as to render forfeiture under POCA redundant or doubly punitive. This is particularly so if the offence in question has resulted in a criminal conviction and the operative law provides for confiscation. In the present case, the LRP argued with considerable force that, in framing the provisions of the KZN Gambling Act, the legislature: (a) made specific provision for

forfeiture in section 94(4) thereof; and (b) in so doing signified an intention that the forfeiture regime so created would suffice to meet the mischief sought to be cured by the enactment.

[128] Ordinarily, it may be accepted that, when the legislature designates a set of remedies to combat a specified crime, the remedies are intended to be effective and exhaustive. This is particularly so in the present case. The KZN Gambling Act was passed well ahead of POCA. Therefore, it cannot be inferred that the KZN legislature intended that the provisions of POCA would supplement those of the KZN Gambling Act. The legislature created adequate remedies, which do not encompass the forfeiture of immovable property on which an unlawful casino is situated.

[129] I have read the persuasive analysis of van Heerden AJ on proportionality. On balance, however, I take the view that the forfeiture of the property of the second applicant is not proportional to the purpose it is meant to achieve. Additional to the factors which are set out in the judgment of Sachs J, I am satisfied that no link, however remote, has been shown to exist between the offence that the instrumentality served and the purpose POCA has set for itself. Of course, unlawful gambling is a serious offence and may have adverse social and economic consequences. However, the seriousness of the offence of conducting an unlicensed casino cannot be measured as a generic social malady within a vacuum. For purposes of civil forfeiture, the seriousness must be set against the broad objectives of POCA. I can find no suggestion, still less any proof, that Mr Mohunram, being the sole member of the

close corporation Shelgate, pursued any wrongdoing connected directly or indirectly to organised crime as envisaged in POCA. His motive seems to have been profit. He appears to have been moved by financial greed and for that he incurred significant criminal sanctions and the not-so-inconsiderable stigma of criminal conviction. His conduct does not warrant the forfeiture of the immovable property on which the unlawful casino was conducted.

[130] Much has been made by the National Director of Public Prosecutions (“NDPP”) of the fact that the applicants did not raise proportionality as a defence before the High Court or the Supreme Court of Appeal. The NDPP seeks to suggest that, had the applicants pleaded proportionality, his office would have adduced evidence on the issue. I do not think there is merit in this submission. I have intimated earlier that proportionality is not a statutory requirement but an equitable requirement that has been developed by the courts to curb excesses of civil forfeiture. Put otherwise, the requirement of proportionality is a constitutional imperative. It is imposed not by the relevant statute but by constitutional disdain for arbitrary dispossession of property and unwarranted or excessive punishment. It would be entirely inappropriate to lumber a person facing forfeiture proceedings under section 48 of POCA with the burden to plead the defence of proportionality. In my view, the NDPP itself, when initiating proceedings under section 48, should place before the court adequate facts that will allow the court to adjudicate properly on an application for forfeiture under section 50(1), and in particular, on whether the forfeiture sought is constitutionally proportionate.

[131] Therefore, I am unable to accept that the NDPP has been deprived of a fair opportunity to present its side of the case. As I have said before, the office of the NDPP, as applicant for forfeiture, bears the initial duty to disclose all relevant facts within its knowledge to the court hearing the asset forfeiture application if arbitrary forfeitures are to be avoided. I may add that, in terms of section 48(1) read together with section 0(1) of POCA, the NDPP bears the onus to establish on a balance of probabilities that the forfeiture sought is justified. Naturally, the respondent in forfeiture proceedings will have to adduce evidence if she or he hopes to disturb or rebut the facts that the NDPP relies upon in the founding depositions.

[132] However, it is an entirely different matter to hold that it could ever be justified to non-suit any person facing forfeiture proceedings on the basis that he or she has not raised proportionality. Proportionality assessment is a matter of law and it is based on a careful weighing of all the facts of a particular case. Therefore, the NDPP must always anticipate that the court will enquire into proportionality and must always place sufficient facts before the court to enable it to make the requisite proportionality assessment.

[133] I return to facts which point to the disproportionate nature of the forfeiture order in this case. In regard to the financial impact of the forfeiture, the NDPP argued that the forfeiture will deter people from using or allowing their property to be used for the commission of the offence and would, in that way, promote the interests of

justice. In *Mohamed* this Court, with reference to various international instruments, made the point that it is now widely accepted in the international community that the purpose of civil forfeiture is to remove the incentive for crime, not to punish the offender.²⁴ Ackermann J further makes the point that this is the approach that has been adopted by our legislature in enacting POCA.²⁵

[134] It thus seems to me that the proper approach to be adopted in reviewing the relevant criminal sanction already imposed is not whether it constitutes adequate punishment, but whether the civil asset forfeiture is properly related to the purpose of removing the incentives for crime and whether the forfeiture will serve as adequate deterrence to the offender and to the broader community. On the facts of this case, besides the stigma of a criminal conviction, Mr Mohunram paid a fine of R88 500 and suffered forfeiture of monies and equipment to the value of R287 000. He appears to have made illicit income of R420 000 over several months with a resultant “profit” of R55 000 before accounting for his operating expenses, about which little is known.

[135] On the other hand, the immovable property is bonded in favour of NBS Bank Ltd, the second respondent, for R600 000. The balance of the bond stood at approximately R470 000 at the time of the preservation order. On the applicants’ showing, it appears as if the property had a value less than the balance owing on the bond. I recognise that, given the passage of time, these property values may have increased significantly. Alluding to this arithmetical calculation, the NDPP argued

²⁴ See *Mohamed* (2002) above n 13 at fn 6 for international conventions which support civil forfeiture.

²⁵ *Id* at para 15.

that Mr Mohunram would lose virtually nothing but for R123 000 that Shelgate had paid in reduction of the capital amount of the mortgage. If it is in fact so, what legitimate purpose other than additional punishment will the forfeiture serve? I hasten to add, however, that the additional punishment may be more severe than we now understand. There are no facts on the impact the forfeiture would have on the glass and aluminium business of Mr Mohunram and on all those that the business employs.

[136] Another compelling consideration is the fact that not the whole property was used to advance the crime. It is common cause that part of the property was utilised by Mr Mohunram to conduct a legitimate business. The NDPP argued that the forfeiture order must nonetheless encompass the entire property because the portion that was used to conduct the illicit casino is indivisible from the portion which served as a legitimate business. In my view, the very fact that the property is immovable and incapable of subdivision, except through intricate bureaucratic approvals, in itself, suggests that the forfeiture order extends beyond a legitimate reach. Ordinarily, this should also be a weighty consideration in deciding whether a forfeiture is proportional.

Conclusion

[137] I hold that the forfeiture order made under section 50(1) of POCA against the first and second respondents is disproportionate and, in the result, the appeal must be upheld. I can find no reason in this case why costs should not follow the event.

Order

[138] In the circumstances I would make the following order:

1. The application for condonation and for late filing of the record is granted.
2. The application for leave to appeal is granted.
3. The appeal is upheld with costs, including the costs of two counsel.
4. The order of the Supreme Court of Appeal is set aside and replaced with the following order:

“The application for an order in terms of section 50(1) of the Prevention of Organised Crime Act 121 of 1998, declaring forfeit to the State the property described as section 2 on sectional plan no SS 577/96 in the scheme known as the Malapin Centre, in respect of the land and building situate at 244 Utrecht Street, Vryheid, and the undivided share in the common property in the scheme apportioned to the said section, is dismissed with costs.”

5. The National Director of Public Prosecutions is ordered to pay the costs of the application in the High Court which costs shall include the costs of two counsel.

Mokgoro J and Nkabinde J concur in the judgment of Moseneke DCJ.

SACHS J:

[139] If the only issue in this matter were whether the property in this case could be considered an instrumentality of the crime, then I would feel no need to write separately. I agree with most of the reasoning contained in the comprehensive, forceful and clearly articulated judgment by van Heerden AJ. The property concerned was manifestly an instrument central to the commission of the crime. It not only housed the gambling machines but provided a fixed place where users could drop in to use the slot machines as they pleased. Though the precise area was not established, it is clear that a substantial portion of the building was occupied by these machines.

[140] Furthermore, as van Heerden AJ observes, the issue of whether the processes of forfeiture provided for by Chapter 6 of the Prevention of Organised Crime Act¹ (“POCA”) meet with constitutional standards, is not before us. No challenge was made to its constitutionality and we are obliged to apply the provisions on the assumption that they are constitutional. I agree that no bright lines can be drawn between organised crime and private criminal activities. For the purposes of this judgment I will assume that there is no obligatory jurisdictional requirement that the instrument of an offence be shown to have a connection with organised crime, and once a criminal offence is literally covered by the schedule, and the property concerned is proved to be an instrument in its commission, a forfeiture order in terms of Chapter 6 becomes permissible.

¹ Act 121 of 1998.

[141] To say that forfeiture in a particular matter will be constitutional, however, is not to imply that it is constitutionally permissible. If the forfeiture would amount to arbitrary deprivation of property it would, in terms of section 25 of the Constitution, be unconstitutional. Accordingly the factors raised without success by Mr Mohunram in an attempt to exempt the property from forfeiture under Chapter 6 of POCA, are highly relevant in relation to whether or not the deprivation of his property was arbitrary. It is in this setting that the principle of proportionality becomes all important. And it is in respect of the application of the proportionality principle, rather than with regard to any question of interpretation of POCA, that I find myself parting ways with the judgment of van Heerden AJ.

[142] Although the concept of proportionality is not expressly mentioned in POCA, this Court² and the SCA have accepted that proportionality is a governing principle imposing limits on how the powers granted under POCA may be exercised. In general terms, what proportionality loses in categorical determinacy it makes up for in jurisprudential flexibility and constitutional aptness. By its nature, it requires decisions that are highly contextualised and strongly congruent with the constitutional and other public interests at stake.

[143] In approaching the question of proportionality in relation to the forfeiture of an instrumentality of an offence, it is necessary to weigh the purpose of the legislation against the effect of the forfeiture on the affected person. The purpose of the

² *Prophet v National Director of Public Prosecutions* 2007 (2) BCLR 140 (CC); 2006 (2) SACR 525 (CC) at para 58.

legislation is primarily deterrent. In relation to the instrumentalities of an offence, it seeks to prevent people from using their property or allowing it to be used for the commission of offences.³ The closer one gets to the prevention of organised crime, which is the primary rationale underlying POCA, the greater the importance of the purpose becomes.

[144] The adoption of POCA was a legislative response to the conjunction of two phenomena. In the first place, the rapid growth of organised crime, money laundering, criminal gang activities and racketeering had become a serious international problem and security threat from which South Africa had not been immune. It was often impossible to bring the leaders of organised crime to book because they were able to ensure that they were far removed from the overt criminal activity involved.⁴ Secondly, both South Africa's common and statute law had failed to keep pace with international measures aimed at dealing effectively with these problems.⁵ As Ackermann J stated in *Mohamed (1)*:

“It is common cause that conventional criminal penalties are inadequate as measures of deterrence when organised crime leaders are able to retain the considerable gains derived from organised crime, even on those occasions when they are brought to justice. The above problems make a severe impact on the young South African democracy, where resources are strained to meet urgent and extensive human needs. Various international instruments deal with the problem of international crime in this regard and it is now widely accepted in the international community that criminals should be stripped of the proceeds of their crimes, the purpose being to remove the

³ Id.

⁴ *National Director of Public Prosecutions and Another v Mohamed NO and Others (1)* 2002 (4) SA 843 (CC); 2002 (9) BCLR 970 (CC); 2002 (2) SACR 196 (CC) at para 14.

⁵ Id.

incentive for crime, not to punish them. This approach has similarly been adopted by our legislature.”⁶ (Footnote omitted.)

[145] One may say in principle, then, that 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 to make such an order appropriate. Furthermore, any determination of proportionality should take into account the extent to which the common law and statutes prove (or threaten to be) inadequate in the circumstances.

[146] The primary purpose of POCA in relation to the instrumentality of an offence is to deter people from using property for crime. However, that purpose cannot legitimate the forfeiture of every instrumentality of an offence. Deterrence as a law enforcement objective is constrained by the principle that individuals may not be used in an instrumental manner as examples to others if the deterrence is set at levels beyond what is fair and just to those individuals. To do otherwise would be to breach the constitutional principle of dignity. In each case, therefore, care needs to be taken to ensure that the purpose of deterrence that the legislation serves does not produce a disproportionate impact on the owner of the forfeited property. It is for this reason that the deterrent purpose of the legislation must be weighed against the effect on the individual owner, in light of the relevant offence. In this respect, the extent to which the forfeiture manifestly is directed towards preventing organised crime will be highly

⁶ Id at para 15.

relevant. The disjuncture between the basic purposes of POCA and the effect on the individual concerned should never be too great.

[147] These considerations animated the decision of this Court in *Prophet*.⁷ In that matter, this Court held that the forfeiture of a house used for the manufacturing of tik was not disproportionate and therefore not arbitrary. The facts in that case demonstrated 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 could not be separated. Nkabinde J pointed out that:

“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.”⁸

[148] Thus, a particularly noxious substance was involved. The distribution of tik requires a network of dealers. It is a notorious fact that gangs in the Cape Town area

⁷ *Prophet* above n 2.

⁸ *Id* at para 68.

are heavily involved in controlling the drug trade. Furthermore, on the facts of that particular case, the manufacturer had escaped any form of criminal liability because of the trial court's findings that the search warrants employed had been invalid.

[149] The central facts in the present case are quite different. The use of gambling machines on the premises was not initially prohibited. The operation only became criminal when at a certain stage it became necessary for their use to be subjected to a regime of regulation. Unlike tik, the use of which was in itself unlawful and medically and socially devastating, the use of gambling machines was not regarded by the law as inherently harmful. The legislatively-perceived harm flowed from the lack of regulation, not from the nature of the activity itself. Furthermore, Mr Mohunram was in fact successfully prosecuted. His machines were confiscated and, weighing up all the relevant factors, the fine of R88 500 was deemed appropriate. The effect of the forfeiture order in the present matter, then, is to give the National Director of Public Prosecutions a second bite of the cherry, which would seem to be constitutionally problematic.

[150] I have difficulty in accepting that, in the circumstances of this case, imposing a forfeiture order on top of the penalties imposed was not disproportionate.⁹ Though one can accept that historically speaking gambling has come to be linked in the public mind with gangsterism and money laundering, there does not appear to be any

⁹ I should add that I agree with Moseneke DCJ at para [135] that the fact that the glass factory on the premises would be closed, with consequent effect on the livelihood of Mr Mohunram and the employees, could be a further weighty factor against forfeiture.

evidence on the record that Mr Mohunram was subterraneously linked to any gangs, and his down-market casino would hardly have served as a meaningful agency for laundering money.

[151] At the same time, the Act under which he was prosecuted provides for very severe penalties.¹⁰ It was a relatively recent piece of legislation passed in terms of the concurrent competence to regulate gambling given to the provincial legislature in our new constitutional dispensation. If the prosecution felt that Mr Mohunram should not end up with a profit from his illicit activities it could have motivated for a fine of up to

¹⁰ Section 94 provides—

- “(1) Any person who contravenes any provision of this Act or any rules of the Board shall, if such contravention is not elsewhere in this Act declared to be an offence, be guilty of an offence.
- (2) Any person convicted of performing any licensable act appertaining to gambling without a valid licence issued in terms of this Act or the Regulation of Racing and Betting Ordinance, 1957 (Ordinance No. 28 of 1957) shall, on conviction and in addition to any competent forfeiture contemplated in subsection (4), be liable to—
- (a) in the case of a first conviction, imprisonment for a period not exceeding ten years without the option of a fine; and
- (b) in the case of a second or subsequent conviction, imprisonment for a period not exceeding twenty years without the option of a fine:
- Provided that a juristic person shall be liable, by virtue of the provisions of section 332(2)(c) of the Criminal Procedure Act, 1977 (Act No. 51 of 1977), to a fine commensurate with the period of imprisonment contemplated herein and provided for in the Adjustment of Fines Act, 1991, (Act No. 101 of 1991).
- (3) Any person convicted of any other offence in terms of this Act shall, on conviction and in addition to any competent forfeiture contemplated in subsection (4), be liable to—
- (a) in the case of a first conviction, a fine not exceeding two million rands or imprisonment for a period not exceeding ten years; and
- (b) in the case of a second or subsequent conviction, a fine not exceeding four million rands or imprisonment for a period not exceeding twenty years or to such imprisonment without the option of a fine.
- (4) In addition to any penalty contemplated in this section—
- (a) all monies, coins, notes, chips, cheques, any documents acknowledging debt or other articles used for securing the payment of money, any other documents, books and records relating to the gambling activity in question found in or at the place where such contravention occurred shall be forfeited to the Provincial Administration of the Province for disposal, including destruction, at the discretion of the Minister; and
- (b) any gaming equipment or gaming machines found in or at the place where such contravention occurred shall be destroyed forthwith.
- (5) In addition to any other penalty contemplated in this section, a person convicted of performing an act contemplated in subsection (1) or who is convicted of contravening or failing to comply with sections 3(1), 4, 74, 75, 76 and 77 shall pay for the benefit of the Provincial Revenue Fund, such amount as the Secretary for Finance determines is equal to the tax payable in terms of this Act: Provided that such amount does not exceed five hundred thousand rands.”

R2 million, the payment of which would have necessitated selling the property. If in the circumstances the prosecution sought a severely deterrent remedy, it could have framed charges carrying a prison sentence of up to ten years. If the trial proceeded and the prosecuting authorities came to the conclusion that any penalty imposed was shockingly inadequate, it could then have asked for a stiffer sentence on appeal.

[152] In my view, POCA was not adopted with a view to providing either a substitute for, or a top-up of, ordinary forms of law enforcement. It has its own rationale and its own objectives, which should be jealously guarded. The point is that the prosecution, aware of all the relevant facts, opted for the proceedings actually adopted, and decided that the penalties imposed were proportional to the offences. Whether or not there were formal or informal bargains over the plea need not be determined here. The prosecution was in a position to determine the nature of the charges and the penalties to be sought. Had it followed a more aggressive course, Mr Mohunram might well have offered a more vigorous defence.

[153] This point was forcefully, and I believe appropriately, highlighted by Nugent JA in *Van Staden*.¹¹ In that matter the central issue was whether a motor car that had been driven by someone under the influence of liquor could be considered the instrumentality of the offence of drunken driving. Having held that it could be so considered, and as such be liable for forfeiture, Nugent JA went on to leave open the question of whether it would in fact be appropriate for the Asset Forfeiture Unit

¹¹ *National Director of Public Prosecutions v Van Staden and Others* 2007 (1) SACR 338 (SCA).

(“AFU”) to succeed in obtaining a forfeiture order. After pointing to the potential of the provisions concerned to intrude on the constitutional guarantee against arbitrary deprivation of property, he stated:

“Incursions upon conventional liberties that are justified by the particular difficulties encountered in the detection and successful prosecution of organised crime are not similarly justified in cases of ordinary crime that do not present those difficulties. I do not think it is permissible to look to one threat that the Act aims at combating (the threat posed by organised crime) in order to justify its application in relation to a quite different threat (the threat that is posed, for example, by drunken driving) that does not present the same challenges. It must be borne in mind that drunken driving, which does not ordinarily result from organised illicit activity, and presents no special difficulties to detect and prosecute, can attract substantial penalties, and the ordinary criminal law ought to be the first port of call to combat the evil. For the Act exists to supplement criminal remedies in appropriate cases and not merely as a more convenient substitute.”¹²

[154] These words are apt in the present matter. The offence appears to be relatively far from the heartland of organised crime, while the ordinary criminal penalties seem to have been quite appropriate to deal with it. Though this may well be a borderline case, I believe on balance that the forfeiture is disproportionate. On this limited basis, I would uphold the appeal and support the order made by Moseneke DCJ.

[155] I should add that nothing stated above should be taken as suggesting a view favouring an interpretation that would reduce the capacity of the AFU to fulfil the mandate given to it by POCA. On the contrary, if it is to accomplish the important functions attributed to it, it should not unduly disperse the resources it has at its

¹² Id at para 7.

command. Its manifest function as defined by statute is to serve as a strongly-empowered law enforcement agency going after powerful crooks and their multitude of covert or overt subalterns. The danger exists that if the AFU spreads its net too widely so as to catch the small fry, it will make it easier for the big fish and their surrounding shoal of predators to elude the law. This would frustrate rather than further the objectives of POCA.

Kondile AJ and O'Regan J concur with the judgment of Sachs J.

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