THE CONSTITUTIONAL APPLICATION OF THE PREVENTION OF ORGANISED CRIME ACT 121 OF 1998

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Abstract

Chapter 6 of the Prevention of Organised Crime Act 121 of 1998 ('POCA') presents a means for forfeiture of property to the state which was either instrumental to an offence, or the proceeds of unlawful activity, without necessarily proving criminal wrongdoing beyond reasonable doubt. At the advent of POCA the consensus amongst legal commentators was that it *could* be constitutional, provided that courts remain alive to statutory and common law safeguards to prevent the unconstitutional use of POCA by the state.

Over twenty years since POCA's enactment, it appears from a review of its case law that it still sits on the precipice of unconstitutionality. This thesis identifies the key constitutional issues which have arisen in the application of Chapter 6 of POCA.

The premise which underlies Chapter 6 of POCA, that a criminal wrongdoer should not be allowed to benefit from their crime, cannot be faulted. What appears from the enquiry that follows is that POCA's use is wider than this premise. That is, POCA's application has gone beyond simply preventing criminals from benefitting from their crimes. In this regard, victims of crime and innocent parties are being subjected to forfeiture in terms of POCA and POCA is being used as a means of civil recovery (even where there is not criminal wrongdoing). What makes this wide use particularly problematic is the fact that POCA makes various inroads into certain Constitutional rights, as are discussed below, on the justification that these limitations of rights are in the pursuance of fighting crime. When these rights are limited for purposes other than fighting crime, the justification falls away.

Given POCA's wide use in this regard, its interpretation and application in the future needs to be more narrowly interpreted and constrained, to ensure that individual rights are not unjustifiably infringed.

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1. Introduction

This thesis sets out to ascertain how the Prevention of Organised Crime Act of 1998 ('POCA'),[1] has been applied by South African Courts and to determine whether POCA is being applied in a constitutionally consistent manner. As will be demonstrated below, POCA is a piece of draconian legislation in that it imposes various obstacles for a respondent to overcome in order to prevent the forfeiture of their property. As will be shown below, because these obstacles are being put before all accused persons, some of whom may be innocent persons, POCA has the potential to result in an unfair deprivation of property and various infringements of constitutional rights or obligations, such as the paramountcy principle of the child, the right to privacy, the right to a fair public hearing and the right to remain silent.

The purpose of this thesis is not to establish that POCA is unconstitutional. As will become apparent, when POCA was enacted it was accepted be capable of a constitutionally consistent interpretation, provided that Courts are astute to potential constitutional right infringements. What is argued in this paper is that courts are not being sufficiently astute.

I have adopted a desktop study for my thesis, engaging with the primary piece of legislation and other statutes where necessary, and relevant case law. I also engage with secondary literature relevant to the subject.

I have entered into this research with some background knowledge in the topic, having practiced in this area of law as a legal practitioner. That background knowledge has helped orientate my approach to this research, but what follows is substantiated by research done specifically for this paper, and the authorities are, of course, provided.

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[1] Act 121 of 1998.

Crime in South Africa is notorious and rampant and should, accordingly, be dealt with effectively. Criminals' deprivation of their ill-gotten gains is a critical part of what ought to be contained in the state's response to crime (to what extent this serves as a deterrent is another issue). POCA governs how criminals are supposed to be deprived of their ill-gotten gains and it takes certain departures from what would normally be required in legal proceedings to justify the deprivation of one's property, specifically in regard to the right not to be deprived of one's property, the right to be heard and the right to privacy. Where people are subjected to POCA who are not criminals (because, for example, they are falsely accused) these departures become problematic in a constitutional dialogue. Little has been done recently, in assessing to what extent POCA's application is consistent with the Constitution. This thesis accordingly attempts to make that contribution and the findings are of concern – POCA is not being applied in a manner consistent with the Constitution, as is argued below.

The research of this thesis is limited, primarily, to an analysis of written judgments which have been published in the public domain. This thesis accordingly does not asses the application of POCA in matters which are unreported or unpublished. Court rolls in South Africa often feature a handful of applications in terms of POCA which proceed on an unopposed basis and which obtain orders of court without written judgments being provided. To what extent these matters are being considered in a constitutionally consistent manner is an issue which this thesis does not address (although such an issue is probably worth of research).

This thesis topic arises from the writer's experience with asset forfeiture matters. There are certain recurring themes in the writer's interaction with litigation in asset forfeiture. The National Director of Public Prosecutions (NDPP) bring applications in terms of POCA through the use of standardised applications or *pro forma* precedents. Applications in terms of POCA are accordingly often very similar and largely the same issues can arise. The issues that regularly arise in asset forfeiture matters include the issues that respondents normal rights in litigation are somewhat limited (in respect of onus and rights to be heard), the issues of what renders property to be linked to crime in question and the issues of to what extent the respondent should be linked to the crime in question.

The above issues are similarly common in reported decisions. In some respect of issues they are well responded to in case law and in respect of other issues they have had little airtime in reported decisions and intellectual invigoration. This thesis accordingly set outs to analyse courts' response to these various issues and to what extent these responses are sufficient.

This thesis is divided into the following chapters:

1. Chapter 2 provides an introductory overview to POCA, by explaining the structure of POCA, the purpose of POCA and the differences between proceedings in terms of Chapter 5 and Chapter 6 of POCA (this thesis focuses on the application of Chapter 6 proceedings);
2. Chapter 3 provides a literature review pertaining to POCA and what the general consensus of the constitutionality of POCA has been thus far;
3. Chapter 4 provides an account of which Constitutional rights are limited by POCA and what constitutional challenges have been brought against POCA (and the results thereof) and a discussion of the rights limitation analyses conducted by South Africa courts thus far. Chapter 3 concludes by highlighting eight issues which require further scrutiny to the extent that they have either not been decided by South African courts or to the extent that they have been decided incorrectly;
4. Chapter 5 proceeds to engage with the six common themes of controversy in POCA; and finally
5. Chapter 6 provides a conclusion.

2. The structure of POCA

POCA is divided into 8 chapters and has three schedules. Chapter 1[2] provides for the definitions that apply to the Act. Under section 1 of chapter 1[3], some relevant terms are defined, like 'instrumentality of an offence', 'proceeds of unlawful activities' and 'unlawful activity'. These definitions are, however, largely insufficient and in order to define them one has to have regard to case law on the topics as our courts have narrowed and clarified the definitions. These definitions and their developments are discussed later.

Chapters 2 to 4[4] are concerned, primarily, with criminal offences, specifically in regard to racketeering, gang activity and syndicates. Often cases which involve criminal charges deriving out of these chapters come along with forfeiture applications in terms of the later chapters. Nevertheless, the criminal charge chapters are not directly relevant to this study.

Chapter 5 includes sections 12 to 36[5]. This chapter relates largely to asset forfeiture brought in connection with criminal charges. That is, asset forfeiture directly related to a criminal trial and conviction. Chapter 6, which this study focuses on, concerns asset forfeiture where there may be no criminal charges pending. The differences between the two chapters are explained in detail below.

Chapter 5, from a broad scope, relates to asset forfeiture which can only be brought against property that is held by a person who has been criminally charged (so prosecution is pending,

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[2] of POCA.
[3] *Ibid*.
[4] *Ibid*.
[5] *Ibid*.

but not necessarily convicted yet), or property held by a third party where that property was provided to the third party, as a gift,[6] by the person criminally charged.[7]

Chapter 5 then provides for the following forfeiture procedures: section 18 confiscation and section 26 restraint[8]. A section 18[9] confiscation occurs where the property owner (or the provider of the gift) is convicted of the offence they were charged with and the benefit that that person derived from their criminal offence (as proven) is confiscated and forfeited to the state. Notably the property which is confiscated need not be the actual property derived from the criminal activity, but rather need only be equal to the value of the benefit. A Section 26[10] restraint generally precedes a section 18[11] confiscation order. Section 26[12] provides for what amounts to a seizure order, whereby an order is made prohibiting any person from dealing with the property. A section 26[13] order is applicable where the property owner or provider of the gift has been criminally charged and there are reasonable grounds to believe that a section 18 confiscation order will be made.[14]

The remainder of Chapter 5[15] relates to procedural matters regarding restraint and confiscation orders such as, the manner of realising such property, appointment of *curator bonis*, appeal procedures and so on.

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[6] A gift is defined in Section 16 as a transfer where the consideration for the *merx* is 'significantly' less that than the value of the *merx*.
[7] Section 14 of POCA.
[8] of POCA.
[9] *Ibid*.
[10] *Ibid*.
[11] *Ibid*.
[12] *Ibid*.
[13] *Ibid*.
[14] Section 25 of POCA.
[15] of POCA.

Chapter 6[16] begins, critically, with Section 37[17] specifying that all proceedings under Chapter 6 are civil proceedings and not criminal proceedings. Section 27[18] goes on to specify that the rules of evidence in civil proceedings apply to Chapter 6, while the rules of criminal procedure, in respect of evidence, do not apply.

Section 38[19] then follows by providing for a preservation of property order ('preservation order'). Section 38 provides that the National Director of Public Protections (this basically means the NPA, herein after referred to as the NDPP), may by way of an *ex parte* application, apply to a High Court for an order prohibiting any person, subject to specified conditions and exceptions, from dealing in any manner with any property. The requirements for such an order are:[20]

> The High Court has reasonable grounds to believe that the property concerned is:
> 1. An instrumentality of an offence referred to in schedule 1;
> 2. The proceeds of unlawful activities; or
> 3. Is property associated with terrorist activities.

It is important to note that Section 38[21] is concerned with the property, not with the possessor or owner of the property. This means that if property is the proceeds of unlawful activities, that the possessor acquired possession lawfully is irrelevant at this stage.

Section 48,[22] read with Section 50[23] provides for an application for a forfeiture order ('forfeiture order'). The requirements of a forfeiture order are:[24]

> The High Court finds on a balance of probabilities that the property concerned is:
> 1. An instrumentality of an offence referred to in schedule 1;
> 2. The proceeds of unlawful activities ; or

[16] of POCA.
[17] *Ibid*.
[18] *Ibid*.
[19] *Ibid*.
[20] Section 38 of POCA.
[21] of POCA.
[22] *Ibid*.
[23] *Ibid*.
[24] Section 48 and 50 of POCA.

3. Is property associated with terrorist activities.

Section 54[25] provides for exclusions of interest in forfeited property. That is, Section 54 allows for an order which excludes a portion of the property from a forfeiture, despite that portion satisfying the requirements for a forfeiture order. An exclusion of interest may be ordered where:[26]

> The High Court finds on a balance of probabilities that a person:
> 1. Acquired their interest in the property legally;
> 2. that there were not reasonable grounds to suspect (or actual knowledge) that the property in which the interest is held is the proceeds of unlawful activities, or instrumental to the relevant offence; and
> 3. In the case of proceeds of unlawful activity, acquired their interest in the property for consideration not significantly less than the value of the interest; or
> 4. In the case of instrumentality, that where the offence was occurred before the commencement of POCA, the person has taken all reasonable steps to prevent the use of the property to be used as an instrument for the relevant offence.

There are various other sections in Chapter 6[27] dealing with procedural issues, appointments of *curators*, appeal processes and so on. The above three portions are the fundamental substantive considerations in forfeiture itself, however.

In the case of preservation and forfeiture, the High Court has no discretion, according to the Act. Sections 50 and 38 of POCA both provide that a High Court shall (in the prescriptive sense) order for preservation or forfeiture where the one of the three requirements is satisfied. Contrastingly, in the case of exclusion of interests, the High Court has a discretion. Section 54 of POCA provides that a High Court may (in the non-compulsory sense) order an exclusion of interest if the requirements of Section 54 of POCA are satisfied.

In summary, Chapter 6 of POCA provides a 2 step process for forfeiture of property (with a sub-step in between): first, preservation is sought (in terms of Section 38[28]), thereafter

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[25] of POCA.
[26] Section 54 of POCA.
[27] of POCA.
[28] *Ibid*.

forfeiture is sought (in terms of Section 50[29]) and potentially at the same time, an exclusion of interest in the forfeiture order is sought (in terms of Section 54[30]).

2.1. Differences between restraint & confiscation *versus* preservation and forfeiture

The fundamental difference between chapter 5 and chapter 6 of POCA is that Chapter 5 concerned with asset forfeiture incidental to a criminal trial. In other words, for chapter 5 proceedings to be instituted there either must be a pending criminal trial related to the same facts that lay the basis for the restraint, or the Court has to be satisfied that the respondent is going to be charged in a criminal trial related to the same facts.

In Chapter 6[31] proceedings, however, there need not be any criminal processes related to the property, although there needs to be proof on a balance of probabilities of, at least, unlawful activities.

Chapter 5[32] proceedings are furthermore concerned with the benefit of criminal activity, rather than instrumentality or proceeds of criminal activity. This means that chapter 5 proceedings can go wider than chapter 6 proceedings because they can encompass benefits of criminal activity which may nevertheless have been lawfully obtained. A final confiscation order, in terms of Chapter 5, is premised on a criminal conviction and therefore must have been proven beyond reasonable doubt.

Chapter 6 proceedings are concerned with the proceeds and the tools of unlawful activity, and unlawful activity is distinguishable from crime, as is discussed below.[33] Exactly what

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[29] of POCA.
[30] *Ibid*.
[31] *Ibid*.
[32] *Ibid*.
[33] This aspect is dealt with under chapter 5.1 below.

constitutes a proceed of unlawful activity is debatable (and is discussed below)[34]. In broad terms, however, there must be a causal and unlawful link between the proceeds sought to be obtained by the NDPP and the unlawful activity. What is instrumental to an offence is concerned with the tools that gave rise to the offence. Chapter 6 proceedings accordingly are more narrowly focused than chapter 5 proceedings because there must be a clear link between the property concerned and the unlawful activity/offence. A final forfeiture order, in terms of Chapter 6 is, however, easier to obtain because the NDPP need only prove their case on a balance of probabilities, rather than beyond reasonable doubt.

Chapter 5 proceedings generally incorporate the proceedings of the trial, and evidence of oral testimonies (and cross-examination) is accordingly considered by the Court. Chapter 6 proceedings entitle one to provide oral testimony, but they are generally decided on paper, by way of affidavits, in motion proceedings. While a court can weigh the probabilities of factual disputes in view of cross-examination and the general performances of witnesses, the resolution of disputes of fact in Chapter 6 proceedings are not so simple.

Normally, in motion procedure, one is concerned with interim or final orders. For a final order, one follows the approach where the facts of the Applicant which are admitted by the Respondent, together with the facts of the Respondent which are not clearly untrue are taken to be the facts of the matter. For an interim order, one follows the approach that the facts of the applicant are accepted along with the facts of the respondent which the applicant cannot dispute, and if the applicant *could* obtain relief on these facts, the relevant order is granted. How these approaches are applicable to POCA proceedings is discussed below.[35]

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[34] This aspect is dealt with under chapter 5.1 below.
[35] This aspect is discussed under Chapter 5.5.1 below.

In summary, the differences between Chapter 5 and Chapter 6 proceedings revolve primarily around the fact that Chapter 5 proceedings are incidental to criminal proceedings. Out of this difference the following notable differences arise:

Chapter 5 Proceedings	**Chapter 6 Proceedings**
Wider and concerned with 'benefit'	Narrower and concerned with 'proceeds' and 'instrumentality'
Harder to prove and require proof beyond reasonable doubt	Easier to prove and require proof on a balance of probabilities
Factual disputes generally resolved with regard to *viva voce* evidence, through a criminal trial	Factual disputes generally dealt with on affidavit, in motion proceedings

2.2. The purpose of POCA

The purpose of POCA is set out in the preamble to the Act[36]. In order to avoid repeating it *verbatim*, it is summarised as follows:

- To combat organised crime (in various aspects);
- To provide for the recovery of the proceeds of unlawful activity (in various aspects);
- To provide for the forfeiture of property used to commit an offence; and
- To establish a Criminal Assets Recovery Account

There were a few attempts by litigators to define the unlawful activity that could lead to forfeiture or confiscation as activity only in relation to organised crime activity (gangs, terrorism, racketeering and so on). These attempts were unsuccessful and are discussed in more detail later.[37]

[36] of POCA.
[37] As will be set out in this chapter.

In respect of Chapter 5[38], restraint and confiscation orders are said to be for the purposes of preventing the use, concealment and dissipation of proceeds of crime.[39] Van Zyl J, for the Cape High Court, described such provisions as being to prevent criminals from 'plucking the fruits of their ill-gotten gains and deriving benefit from their nefarious activities'.[40]

In one of the first high-profile asset forfeiture cases, the NDPP sought a restraint order (in terms of Chapter 5) against Wouter Basson. Although Wouter Basson is most notorious for his role in the apartheid Government's biological warfare program,[41] Basson in this matter was facing charges of fraud and theft.[42] In this regard, Basson was accused of misappropriating some R45 million of state funding for a military project to a web of private companies under his control.[43] On an *ex parte* basis, the restraint order was granted. When Basson received notice of the order, it was set aside at the return date and his property released from restraint. The NDPP took the matter on appeal to the Supreme Court of Appeal. One of the foremost reasons for setting aside the order pertained to the fact that the offences had occurred prior to POCA's enactment. The Supreme Court of Appeal in this regard said that:[44]

> If the imposition of a confiscation order upon a convicted person constitutes a punishment as envisaged by Section 35(3)(n) of the Constitution . . . we might for that reason alone be enjoined by Section 39(2) to construe section 18(1) of the Act so as to operate only prospectively, in order to promote the spirit, purport and object of the Bill of Rights.

The Court did not, however, determine whether a confiscation order was a punishment, because it determined that POCA does not operate retrospectively, based simply on the text of POCA.[45]

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[38] of POCA.
[39] *DPP: Cape of Good Hope v Bathgate* 2000 (2) SA 535 (C).
[40] *Ibid*, par 87.
[41] See for example the Truth and Reconciliation Commission Report on South Africa's Chemical and Biological Warfare program headed by Basson on behalf of the apartheid government – TRC Report, Volume 2, Chapter 6, pg. 510, available at https://www.justice.gov.za/trc/report/finalreport/Volume%202.pdf.
[42] *National Director of Public Prosecutions v Basson* [2002] 2 All SA 255 (A) 258E.
[43] *Ibid,* 258G-H.
[44] *Ibid,* 259I-J.
[45] *Ibid,* 260J – 261A.

This, however, marked the beginning of an enquiry by South African courts into whether confiscation constituted punishment or not.

In the case of *Mcasa*,[46] the court emphasised that notwithstanding what was said in *Basson*, the provisions of chapter 5 are not penal. In authority for this position, the court cited the case of *Gilligan v Criminal Assets Bureau and Others*[47] where the Irish High Court stated, in regard to similar laws:

> It is true that money or property may be removed from the possession or control of a respondent, but if this money or property can be shown to the satisfaction of the Court to be the proceeds of crime, its removal could well be viewed in the light of reparation rather than punishment or penalty.

The full bench of the Transkei High Court accordingly found that restraint orders are merely to reverse benefits which the criminal had no legal entitlement to, in any event.

That the provisions of Chapter 5[48] are not meant as a punishment has been repeated a number of times, and appears to be settled law.[49] This is a point of nuance, however. In the case of *NDPP v Mohamed*[50] Ackerman J, for the Constitutional Court held as follows: [51]

> 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.

This is a clear indication by the Constitutional Court that POCA is intended to *disincentivise* crime rather than to punish criminals. A few years later, in the Supreme Court of Appeal case

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[46] *National Director of Public Prosecutions v Mcasa and another* 2000 (1) SACR 263 (TkH) at par 8.
[47] *Gilligan v Criminal Assets Bureau and Others* (unreported judgment of the High Court of Ireland delivered on 26 June 1997).
[48] of POCA.
[49] See *National Director of Public Prosecutions v Philips and others* 2002 (1) BCLR 41 (W).
[50] *National Director of Public Prosecutions and another v Mohamed NO and others* 2002 (9) BCLR 970 (CC).
[51] *Ibid,* 978A-C.

of *NDPP v RO Cook Properties*,[52] the SCA court indicated that it had been 'urged to characterize ch 6 as 'penal' and for this reason to construe its provisions restrictively'.[53] The SCA responded to this as follows: [54]

> The interrelated purposes of ch 6 therefore seem to us to include: (a) removing incentives for crime; (b) deterring persons from using or allowing their property to be used in crime, (c) eliminating or incapacitating some of the means by which crime may be committed ('neutralising', as counsel put it, property that has been used and may again be used in crime); and, we would add, (d) advancing the ends of justice by depriving those involved in crime of the property concerned. At least (b) and (d) embody a palpably penal aspect; but the statutory objectives transcend the merely penal. We accordingly agree the provisions must be restrictively interpreted, though not for the narrow reasons counsel advanced.

Cook and *Mohammed* are not in contradiction with one another. Notwithstanding the clear move away from POCA being penal in *Mohammed,* the SCA seemed to accept some nuance in this position in that, clearly, there is a penal character to asset forfeiture, although punishment is not the sole object of asset forfeiture. Whether POCA is penal has been revisited a few times since this decision, as is discussed in Chapter 4. The SCA's summary of the purposes of Chapter 6[55] are however an accurate interpretation of the intention of Chapter 6. It is important to note here, however, that Chapter 6's purpose is in regard to crime, rather than unlawful activity (which may be unlawful in the civil sense, but not the criminal sense).

Having summarised a broad overview of what POCA and Chapter 6 of POCA entail I now proceed to Chapter 3 wherein a literature review is conducted, concerning the constitutionality of POCA.

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[52] *National Director of Public Prosecutions v RO Cook Properties (Pty) Ltd; National Director of Public Prosecutions v 37 Gillespie Strees Durban (Pty) Ltd and another; National Director of Public Proseuctions v Seevnarayan* [2004] 2 SACR 208 (SCA).
[53] *Ibid,* 225B.
[54] *Ibid,* 225F – H.
[55] of POCA.

3. The general consensus in the literature on the constitutionality of POCA's introduction

3.1. The initial academic engagement with POCA

While the title of POCA refers to the prevention of organised crime, its use was clearly aimed at all levels of crime. POCA was largely borrowed from the American legislation 'the Racketeer Influenced and Corrupt Organisations Act of 1970' otherwise known as RICO. POCA was assented to within two years of the introduction of the final South African Constitution.[56] There was support for the enactment of POCA due to, as Van Der Walt argued, South Africa's majority supporting 'extreme crime-fighting techniques, including criminal and civil forfeiture', in light of violent crime dominating public awareness in South Africa.[57]

Despite public opinion favouring what Van Der Walt called 'extraordinarily intrusive crime fighting measures,'[58] Van Der Walt engaged in whether POCA's crime fighting measures were acceptable by engaging in an assessment of POCA's justiciability in light of Constitutionally enshrined property rights. Van der Walt highlighted what he perceived to be the most concerning aspects of POCA as the provisions which allowed the forfeiture of property held by so-called 'innocent owners'.[59] Van der Walt proposed four means to counter the potential for POCA to become unconstitutional:[60]

a. The guilty-property fiction should be abandoned;
b. Mandatory forfeiture powers should be distinguished from discretionary forfeiture powers and the exercise of mandatory forfeiture powers should be subject to constitutional review unless there is some measure of blameworthiness to be attached to the owner of the property;
c. Although forfeiture is referred to as 'civil', courts should not lose sight of the fact that forfeiture is criminal in effect; and

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[56] Constitution of South Africa, 1996.
[57] A Van Der Walt, 'Civil Forfeiture of Instrumentalities and Proceeds of Crime and the Constitutional Property Clause,' *South African Journal on Human Rights* 16, no. 1 (2000): 1-45, pg. 6, footnote 24.
[58] *Ibid,* pg. 6.
[59] *Ibid,* pg. 35.
[60] *Ibid,* pg. 36.

d. Only the really fundamentally criminal-justice protections in the Bill of Rights should be excluded in civil forfeiture cases.

The guilty-property fiction, or what this thesis refers to as the *in rem* fiction, is the phenomenon of a court concerning itself with the criminal taint of the property concerned and not having regard to the presence of criminality of the owner. Van der Walt describes the fiction as: [61]

> 'a misleading and mystified perspective on civil forfeiture, in which the position of the owner and of other affected parties is carefully screened from view and bracketed out of the discussion.'

The problems associated with the *in rem* fiction are explored in more detail below.

As regards the mandatory forfeiture powers, these relate to instances where a court is compelled to forfeit property, without being afforded a discretion or proportionality enquiry. In short, what Van der Walt was arguing, is that there must be a reasonable connection between blameworthiness for a crime and the property that is forfeited. If there is no such connection, the forfeiture would be unconstitutional as Van der Walt seems to suggest.[62] The justification for this argument is that where property is shown to be associated with criminal activities and thereby forfeited without recourse to an enquiry into whether the affected owner had anything to do with the crime is *prima facie* unfair and arbitrary to the affected owner.

In highlighting the distinction between civil and criminal effect of asset forfeiture, Van der Walt was making reference to an article by Cheh, from 1991, who was writing on the asset forfeiture laws employed in the United States of America.[63] Cheh argued that asset forfeiture laws were collapsing the distinction between civil law and criminal law which had implications on fundamental rights in regard to criminal justice in regard to rules of procedure, burdens of

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[61] A Van Der Walt, 'Civil Forfeiture of Instrumentalities and Proceeds of Crime and the Constitutional Property Clause,' *South African Journal on Human Rights* 16, no. 1 (2000): 1-45, pg. 37.
[62] *Ibid,* pg. 37.
[63] M Cheh, 'Constitutional Limits on Using Civil Remedies to Achieve Criminal Law Objectives: Understanding and Transcending the Criminal-Civil Law Distinction' (1991) 42 *Hastings LJ*, pp 1325 – 1413.

proof, rules of discovery, investigatory practices, and modes of punishment.[64] Van der Walt echoed Cheh's claim that:[65]

> 'cases may be regarded as criminal or penal even when labelled civil when the punishment imposed so dramatically expresses societal disapproval that its imposition only can be legitimated through the ceremony of a criminal conviction.'

Notwithstanding the fact that asset forfeiture remains civil in form, its effect is criminal. The rules of process applied in asset forfeiture proceedings are, however, civil. This means that the civil proceedings are premised on an 'interest-balancing test' aimed at ensuring an accurate and rational remedial finding.[66] Asset forfeiture, however, goes further than this, and arguably higher burdens of proof, more restrictive rules of discovery and investigatory practices, and constitutionally compliant modes of punishment should then be applied. While in some cases this can be remedied by how certain sections of the Act are read or applied (such as the *ex parte* procedure discussed below), Cheh proposed that the constitutional review of asset forfeiture proceedings should take account of the cumulative, aggregate unfairness caused by the blurring of civil and criminal proceedings.[67]

Van der Walt concluded by arguing for a proportionality enquiry being employed by South African Courts to ensure sufficient nexus between property being forfeit and the wrongdoing of the owner.[68] The substance of such an enquiry is explored in detail below.[69]

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[64] M Cheh, 'Constitutional Limits on Using Civil Remedies to Achieve Criminal Law Objectives: Understanding and Transcending the Criminal-Civil Law Distinction' (1991) 42 *Hastings LJ* 1325 – 1413, pg. 1325.
[65] A Van Der Walt, 'Civil Forfeiture of Instrumentalities and Proceeds of Crime and the Constitutional Property Clause,' *South African Journal on Human Rights* 16, no. 1 (2000): 1-45, pg. 38.
[66] *Ibid*, pg. 39.
[67] M Cheh, 'Constitutional Limits on Using Civil Remedies to Achieve Criminal Law Objectives: Understanding and Transcending the Criminal-Civil Law Distinction' (1991) 42 *Hastings LJ* 1325 – 1413, pg. 1398.
[68] A Van Der Walt, 'Civil Forfeiture of Instrumentalities and Proceeds of Crime and the Constitutional Property Clause,' *South African Journal on Human Rights* 16, no. 1 (2000): 1-45, pp 41 – 43.
[69] Dealt with in Chapter 5.2 and 5.3.

In 2000, Redpath published an article in which she claimed that at face value POCA contained sufficient checks and balances 'under a benevolent government'.[70] However, Redpath, questioned, did POCA have sufficient checks and balances under a government which was not benevolent? Redpath pointed out that despite POCA forfeiture being civil in nature (as opposed to criminal law in nature), the 'state' is the applicant. This means, she argued, the applicant has all the resources of the state, including police and prosecution services, funded by the public purse, at its disposal in pursuing the claim.[71] She went on to point out that to obtain a preservation order the state need only establish 'reasonable grounds' to believe the property is either proceeds or an instrumentality of crime, similar to the bar of 'probable cause' in the United State of America.

Redpath was of the opinion that South African asset forfeiture legislation had avoided the worst of the asset forfeiture legislation in the United States of America. This was so, she claimed, in that South Africa placed the onus to prove on the State, had an 'innocent owner defence', and granted the right of appeal.

Redpath never answered her question, as to whether POCA did contain sufficient checks and balances under a government which was not benevolent.

In 2002 Deepak Gupta published his Bill of Rights analysis of POCA.[72] Gupta's opinion was that POCA could be constitutional, provided that the jurisprudence that would develop around the Act would be careful to ensure the constitutional application of the act. In other words, POCA had the potential to be unconstitutional, but provided its application were cautious, it

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[70] J Redpath, 'Forfeiting rights? Assessing South Africa's asset forfeiture laws,' *African Security Studies*, 9:5 - , 15 – 23.
[71] *Ibid,* pg. 18.
[72] D Gupta, 'Republic of South Africa's Prevention of Organised Crime Act: A Comparative Bill of Rights Analysis,' *Harvard Civil Rights-Civil Liberties Law Review* 37, no. 1 (Winter 2002), pp 159-184

could be constitutional. Gupta makes this argument on *inter alia* the premise that taking the profits out of criminal activity gives society a 'powerful weapon' with which to combat sophisticated criminal activities.[73] This premise is dealt with in more detail later in this paper.

Gupta considered the jurisprudence of POCA in the USA, to predict how South African courts might handle POCA. One of the central themes of POCA in the USA is the so-called *in rem fiction*, which is where proceedings are brought against the property rather than the owner. Under this *in rem fiction* property may be forfeited without necessarily showing any culpability on the part of the owner.[74] This *in rem fiction*, Gupta explains, has led to problematic law, particularly given that it can allow a court to close its eyes to the constitutional rights of the owner, by focusing only on the property. Gupta accordingly warns that the South African Constitutional Court should downplay the *in rem fiction* and 'focus instead on doctrinal arguments that illuminate POCA's constitutionality'.[75]

Gupta distinguishes between a constitutional justification of the forfeiture of property which is the proceeds of unlawful activity, and property which is instrumental to unlawful activity. Gupta was distinguishing between 'proceeds of unlawful activity' and 'property instrumental to a crime'. The key differences between these two concepts is discussed more fully in Chapter 5.1 and 5.2.

According to Gupta, the forfeiture of unlawful proceeds is justified because the property is in any event acquired through a wrongful act and therefore constitutes unjustified enrichment.

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[73] D Gupta, 'Republic of South Africa's Prevention of Organised Crime Act: A Comparative Bill of Rights Analysis,' *Harvard Civil Rights-Civil Liberties Law Review* 37, no. 1 (Winter 2002), pg. 160.
[74] *Ibid*, pg. 164.
[75] *Ibid,* pg. 165.

The forfeiture of property which is instrumental to unlawful activity is justified, according to Gupta, by three premises, as paraphrased below:[76]

1. It is remedial in the sense that it removes a link in the chain of criminal activity;
2. It is justified because the owner was negligent with their property; and
3. It is a fair approximation of the proceeds of unlawful activity.

Gupta notes the issue with the fact that there is no proportionality enquiry into the forfeiture of property which is instrumental to a crime. That is, no matter the degree or seriousness of the guilt or crime, whatever property which was instrumental can be forfeited, no matter how great the value. The USA courts ended up with a paradox of where in one case,[77] an *owner* of an autobody shop could not have his entire shop forfeited on the basis of instrumentality because two grams of cocaine was found at the shop and would have been distributed from the shop. The rationale for this was that it would amount to an excessive fine. In the other case,[78] an innocent wife, who had a half share ownership of a car lost her car to forfeiture on the basis that her husband had obtained the services of a prostitute from the car. Gupta accordingly cautioned that South African courts need to be aware of these paradoxical cases and determine whether a proportionality enquiry into the forfeiture of instrumental property is necessary or not.

In 2014, Basdeo published 'The Law and Practice of Criminal Asset Forfeiture in South African Criminal Procedure: A Constitutional Dilemma'. In this piece, Basdeo argued *inter alia* that the NDPP does not have to prove a threat of dissipation of property to obtain an order of restraint, and the restraining of lawfully acquired property from the innocent owner (because

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[76] D Gupta, 'Republic of South Africa's Prevention of Organised Crime Act: A Comparative Bill of Rights Analysis,' *Harvard Civil Rights-Civil Liberties Law Review* 37, no. 1 (Winter 2002), pg. 168.
[77] *Austin, v. United States*, 509 U.S. 602, 615 (1993).
[78] *Bennis v Michigan* 516 US. 442, 443.

of an unlawful origin, unbeknown to the innocent owner) is an arbitrary deprivation of property and therefore constitutionally questionable. Basdeo, however, mainly dealt with forfeiture in terms of chapter 5 of POCA. He notes, however, that the burden of proof of 'reasonable grounds' appears to be lower than that resting upon an applicant in normal motion proceedings which is balance of probabilities.

Basdeo went on to interrogate whether a proportionality enquiry should apply to the forfeiture of property, with reference to the cases of *Prophet v NDPP*[79] and *Mohunram v NDPP*[80]. In both cases, the Constitutional Court confirmed the importance of a proportionality assessment, by 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 offence. Basdeo accordingly argues that the proportionality inquiry is a constitutional imperative. Basdeo furthermore argued that the *in rem* fiction needs to be 'played down' in light of the problems it gave rise to in the USA.

In summary, the academic literature leads one to the following conclusions:

1. POCA is borrowed from asset forfeiture laws from the United States of America. Asset forfeiture laws in the USA are the subject of much criticism and ought to be signs of warning to South Africa.
2. POCA has some checks and balances contained in the text, but without South African Court's paying close attention to its application, it could be used unfairly and unconstitutionally.

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[79] *Prophet v NDPP* 2007 (2) BCLR 140 (CC).
[80] *Mohunram and Another v NDPP and Another* 2007 (2) SACR 145 (CC).

3.2. The absence of up-to-date academic engagement with POCA

Surprisingly little has been published on Asset Forfeiture law in South Africa, since Basdeo's 2014 publication, and even before then, South Africa-specific academic literature on this topic was sparse. Occasionally, a column on the dangers of asset forfeiture may crop up, but few peer-reviewed articles are making their way into publication. In 2017 *Daily Maverick* published a short piece by Ivo Vegter,[81] where he argued *inter alia* that asset forfeiture was a revenue generator, or a business for the state, rather than a crime-busting tool. In other words, POCA was being used by the state to generate an additional income rather than to fight crime. This arises where property is being forfeited to the state as a means of generating profit without real regard being had as to what extent that forfeiture has the effect of 'busting' or fighting crime.

It is not clear, however, that asset forfeiture is a revenue generator or a crime-busting tool. Little research has been done (and little primary evidence is publicly available) on how much revenue asset forfeiture provides to the State. Orders for preservation and forfeiture are reported on, but it is unclear how much money actually finds its way to the Criminal Asset Recovery Account (CARA). In 2013 a Department of Justice report indicated that around R30 000,00 per year was earned into CARA through forfeiture and confiscation orders between 2011 and 2013. While big numbers are currently being reported on in the initial stages of corruption fighting, where R1.6 billion, 1.72 billion, 1.4 billion and R284 million have been 'frozen' in the corruption cases regarding Mckinsey and Trillion, the Koornfontein Mines Rehabilitation Fund, Eskom and Tubular and the Estina Dairy farm respectively,[82] it seems that

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[81] I Vegter, 'Civil asset forfeiture is a dangerous tool', *Daily Maverick*, 24 October 2017, accessed June 2022 at https://www.dailymaverick.co.za/opinionista/2017-10-24-civil-asset-forfeiture-is-a-dangerous-tool/

[82] PMG report, NPA cases: National Director progress report, 14 March 2018, https://pmg.org.za/committee-meeting/26013/ and K Cowan, S Masondo, and A Karrim, 'THE ESKOM FILES | Anatomy of Kusile kickbacks: How big contractors funded Eskom execs' 'schools', 'churches'', *News24*, 20 May 2021, accessed June 2022 at

none of these amounts have found their way into the Criminal Asset Recovery Account yet, whether because the cases are not finalised or because the NPA did not succeed in their case.[83] It may well be that asset forfeiture is a revenue generator for the state, but further research is required to determine if this is indeed the case, taking into account the cost of asset forfeiture to the state, which, when cases get taken through appeals processes must come with a hefty legal bill to the state when private advocates are employed to represent the NDPP, which is quite common given a reading of the counsel who appear in such reported decisions.

As for asset forfeiture's utility in crime-fighting, there is also little empirical evidence to prove its effectiveness. In an article published in 2016, Greg Warhol and Michael Harrington investigated the illegal abalone trade in South Africa.[84] They noted that in the industry of illegal abalone trade, where asset forfeiture was rife (particularly of the expensive boats used for poaching), the lucrative nature of the trade allowed for poachers to simply buy the equipment they needed again. In 2009 an American study delved into the effectiveness of asset forfeiture laws in the war against drugs.[85] This study found that asset forfeiture had no discernible effect on drug arrest rates, while drug sales were at an upward trend. In 2008 it was recorded that very little empirical research exists on the possible benefits of civil asset forfeiture laws and,

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https://www.news24.com/news24/southafrica/investigations/eskomfiles/the-eskom-files-anatomy-of-kusile-kickbacks-how-big-contractors-funded-eskom-execs-schools-churches-20210520.
https://www.news24.com/news24/southafrica/investigations/eskomfiles/the-eskom-files-anatomy-of-kusile-kickbacks-how-big-contractors-funded-eskom-execs-schools-churches-20210520

[83] See, for example, the Estina Dairy Farm matter, G Quintal, 'Victory for Guptas as court frees assets', *Business Live*, 28 May 2018, accessible at https://www.businesslive.co.za/bd/national/2018-05-28-victory-for-guptas-as-court-releases-assets-related-to-estina-matter/.

[84] G Warhol, M Harrington, 'Exploring the dynamics of South Africa's illegal abalone trade via routine activities theory', *Trends Organ Crim*, 19, 21 – 41 (2016).

[85] S Bishop, J Worall, 'Do state asset forfeiture laws explain the upward trend in drug arrests?', *Journal of Crime & Justice*, 32, 2 (2009), pp 117 – 138.

to the author's knowledge, no research considers a systematic comparison of their costs and benefits.[86]

Asset forfeiture proceedings are a common tool in attempts to root out corruption. Asset forfeiture proceedings are now engaging with billions of rands of state funds lost to corruption. Given this magnitude, asset forfeiture ought to be receiving closer academic scrutiny.

What follows next is an investigation into whether South African courts have been paying close attention to the application of POCA and whether its use has been fair and constitutional or not. What transpires is that despite some of the proposals above having been taken heed of (such as the proportionality enquiry advocated for by van der Walt), POCA is not being applied in a constitutionally consistent manner.

4. The blaring constitutional issues and a limitations analysis

On the face of it, POCA appears to at least limit a number of Constitutional Rights and these limitations have been engaged with by South African courts. Rights contained in the Bill of Rights can be limited.[87] In terms of Section 36 of the Constitution,[88] rights in the Bill of Rights may be limited in terms of a 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;

(b) The importance and purpose of the limitation;

(c) The nature and extent of the limitation;

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[86] E Baumer, (2008), 'Evaluating the balance sheet of asset forfeiture laws: towards evidence-based policy assessments', *Criminology & Public Policy*, Vol. 7, pp 245-256.
[87] Chapter 2 of the Constitution of South Africa, 1996.
[88] Constitution of South Africa, 1996.

(d) The relation between the limitation and its purpose; and

(e) Less restrictive means to achieve the purpose.'[89]

As was explained in the seminal case of *Ex Parte Minister of Safety and Security,*[90] to determine whether a right has been justifiably limited in terms of Section 36 of the Constitution[91] one is required to engage in a two-stage approach:[92]

> First, there is the threshold enquiry aimed at determining whether or not the enactment in question constitutes a limitation on one or other guaranteed right. This entails examining (a) the content and scope of the relevant protected right(s) and (b) the meaning and effect of the impugned enactment to see whether there is any limitation of (a) by (b). Subsections (1) and (2) of section 39 of the Constitution give guidance as to the interpretation of both the rights and the enactment, essentially requiring them to be interpreted so as to promote the value system of an open and democratic society based on human dignity, equality and freedom. If upon such analysis no limitation is found, that is the end of the matter. The constitutional challenge is dismissed there and then.
>
> If there is indeed a limitation, however, the second stage ensues. This is ordinarily called the limitations exercise. In essence this requires a weighing-up of the nature and importance of the right(s) that are limited together with the extent of the limitation as against the importance and purpose of the limiting enactment. Section 36(1) of the Constitution spells out these factors that have to be put into the scales in making a proportional evaluation of all the counterpoised rights and interests involved.

What follows is an enquiry into how courts have engaged in such a limitations analysis with certain rights contained in the Bill of Rights, being the right to property, the rights to privacy and dignity, and the paramountcy principle of the child. There are other potential rights infringements which are not considered. For example, the right to a fair public hearing and the right to remain silent. The right to a fair public hearing will not be discussed under its own heading because it will be incidental to other sections in this thesis and will accordingly be discussed throughout. Regarding the right to remain silent, in the matter of *Bathgate* the court found that the right to remain silent was not infringed.[93] This is because, so the court argued,

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[89] Section 36 of the Constitution of South Africa, 1996.

[90] *Ex Parte Minister of Safety and Security and others: In Re: S v Walters and another* 2002 (7) BCLR 663 (CC).

[91] Constitution of South Africa, 1996.

[92] *Ex Parte Minister of Safety and Security and others: In Re: S v Walters and another* 2002 (7) BCLR 663 (CC) 677F – 678D.

[93] *DPP: Cape of Good Hope v Bathgate* 2000 (2) SA 535 (C) 559E.

the Proceeds Act does not compel the respondent to disclose his defence or to respond to the allegations made by the applicants – it remains his choice to answer the NDPP's case. This potential right infringement is not delved into further given the relatively satisfactory response in *Bathgate* and the fact that Section 35(3) rights in the Constitution[94] are for those criminally charged, which in the context of Chapter 6 proceedings, is not necessarily the case.[95]

4.1. The right to property

Section 25 of the Constitution[96] provides for certain protections against the deprivation of property. POCA results in the deprivation of property and to the extent that POCA limits the rights contained in Section 25, these limitations have, on more than one occasion, been found to be justified.[97] These findings are discussed below, first, however, the contents Section 25 of the Constitution are set out below.

Section 25 of the Constitution, which prescribes the constitutional right to property, comes with it an internal limitation, in that while it starts off by saying that 'no one may be deprived of property' it caveats this right with 'except in terms of law of general application and no law may permit arbitrary deprivation of property'. This means that provided that a law of general application does not arbitrarily deprive someone of their property, it may deprive someone of their property without limiting the right conferred by Section 25 of the Constitution.

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[94] Constitution of South Africa, 1996.
[95] There is, however, concern that when a respondent to Chapter 6 proceedings is also criminally charged the right to remain will silent could be infringed, but this aspect will not be considered in this thesis.
[96] Constitution of South Africa, 1996.
[97] See for example the cases of *NDPP v Carolus* 1999 162/99 SCA; *DPP: Cape of Good Hope v Bathgate* 2000 (2) SA 535 (C); *Prophet v NDPP* 2007 (2) BCLR 140 (CC).

With regard to what constitutes an arbitrary deprivation of property, the Constitutional Court, per Ackermann J, has set out the following test: [98]

> Having regard to what has gone before, it is concluded that a deprivation of property is 'arbitrary' as meant by section 25 when the 'law' referred to in section 25(1) does not provide sufficient reason for the particular deprivation in question or is procedurally unfair. Sufficient reason is to be established as follows:
>
> > (a) It is to be determined by evaluating the relationship between means employed, namely the deprivation in question, and ends sought to be achieved, namely the purpose of the law in question.
> >
> > (b) A complexity of relationships has to be considered.
> >
> > (c) In evaluating the deprivation in question, regard must be had to the relationship between the purpose for the deprivation and the person whose property is affected.
> >
> > (d) In addition, regard must be had to the relationship between the purpose of the deprivation and the nature of the property as well as the extent of the deprivation in respect of such property.
> >
> > (e) Generally speaking, where the property in question is ownership of land or a corporeal moveable, 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, and the property right something less extensive. This judgment is not concerned at all with incorporeal property.
> >
> > (f) Generally speaking, when the deprivation in question embraces all the incidents of ownership, the purpose for the deprivation will have to be more compelling than when the deprivation embraces only some incidents of ownership and those incidents only partially.
> >
> > (g) Depending on such interplay between variable means and ends, the nature of the property in question and the extent of its deprivation, there may be circumstances when sufficient reason is established by, in effect, no more than a mere rational relationship between means and ends; in others this might only be established by a proportionality evaluation closer to that required by section 36(1) of the Constitution.
> >
> > (h) Whether there is sufficient reason to warrant the deprivation is a matter to be decided on all the relevant facts of each particular case, always bearing in mind that the enquiry is concerned with 'arbitrary' in relation to the deprivation of property under section 25.

These eight factors proposed by Ackerman J to determine when a deprivation is arbitrary became pivotal in justifying asset forfeiture, as will be discussed below, with specific reference to the *Prophet* case[99]. Before getting to the *Prophet* case, the first principle to consider is

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[98] *First National Bank v Commissioner For SARS; First National Bank v Minister Of Finance* 2002 (7) BCLR 702 (CC) 740A-H.
[99] *Prophet v NDPP* 2007 (2) BCLR 140 (CC).

whether it is true that Section 25 of the Constitution[100] does not protect property acquired through illegal gains. This claim was made by Farlam AJA in the Supreme Court of Appeal as far back as 1999, quoting authorities from the United States of America.[101] The justification for this claim is, essentially, that Section 25 of the Constitution only protects lawfully acquired property. If this is correct, then POCA does not limit the rights contained in Section 25 of the Constitution (although this thesis argues that this is not correct).

A year after Farlam AJA's remarks, Van Zyl J, for the Cape High court, dealt with the same issue in *Bathgate*.[102] In *Bathgate*, Van Zyl J seemed to take it for granted that Section 25 was infringed, and proceeded to conduct a limitations analysis in terms of Section 36 of the Constitution[103] which he found in favour of POCA.[104]

The point that Section 25 was unjustifiably limited by POCA was raised substantively (but, with respect, incorrectly) in the Constitution Court in the matter of *Prophet*.[105] *Prophet* was an appeal of an order of the Supreme Court of Appeal, but sought to introduce, on appeal, a new and substantive application concerning the constitutionality of the forfeiture. This meant that the arguments advanced were being heard by a court for the first time – they had not previously been raised in the Court *a quo* or subsequent appeals courts. Here Chapter 6 was challenged for being unconstitutional in light of its violating the applicant's rights to dignity, privacy, fair trial, silence, be presumed innocent, and not be arbitrarily deprived of property.[106] Because these challenges were raised in the Constitutional Court for the first time, the Court decided

[100] Constitution of South Africa, 1996.
[101] *NDPP v Carolus* 1999 162/99 SCA par 48.
[102] *DPP: Cape of Good Hope v Bathgate* 2000 (2) SA 535 (C).
[103] Constitution of South Africa, 1996.
[104] *DPP: Cape of Good Hope v Bathgate* 2000 (2) SA 535 (C) paras 68, 70 and 113.
[105] *Prophet v NDPP* 2007 (2) BCLR 140 (CC).
[106] *Ibid*, 157A-C.

that it was not in the interests of justice to determine this challenge and the rights infringements were not pronounced upon.[107]

The Constitutional Court in *Prophet* did, however, engage with whether the interference with the applicant's property amounted to arbitrary deprivation. Nkabinde J endorsed the test, with regard to the eight factors mentioned above as set out in the *FNB v Commissioner for SARS* matter, and proceeded to engage in an enquiry into arbitrariness and proportionality, which is discussed in chapter 5.4 below. In this case the applicant's wrongdoing was substantial – on the facts, the deprivation was not arbitrary because the property in question, a residential house, had been turned into a home laboratory for the purposes of manufacturing illegal drugs.[108] The court accordingly did not engage with a theoretical or principled enquiry into whether POCA arbitrarily deprived property because on the facts of this matter the forfeiture was clearly not arbitrary.

Subsequently, in the case of *Mazibuko v NDPP*,[109] the SCA was presented with the scenario of an innocent owner who was at risk of having her property forfeited. Bosielo AJA, referred to the case of *Prophet* and emphasised that: [110]

> [T]here is an ever-present threat of a serious conflict between the right to property as provided for in section 25(1) of the Constitution of the Republic of South Africa, 1996 and an order for the forfeiture of property under section 50(1) of POCA which can result in far-reaching consequences if not managed with care.

The court went on to engage with the justifiability of a forfeiture order against the innocent owner. The court proposed four issues in this regard:[111]

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[107] *Prophet v NDPP* 2007 (2) BCLR 140 (CC) 158B.
[108] *Ibid,* 161D.
[109] *Mazibuko v NDPP* [2009] 3 All SA 548 (SCA).
[110] *Ibid,* 554E.
[111] *Ibid,* 555C.

1. How would forfeiture of the innocent owner's interest in the property advance the main purposes of POCA?
2. What public interest would the forfeiture of the innocent owner's interest in the property serve?
3. How is the forfeiture of the innocent owner's interest in the farm rationally connected to the purpose to be attained by POCA?
4. What justification is there for depriving the innocent owner of her interest in the farm?

The court proceeded to apply the test set out in *First National Bank v Minister of Finance*[112] and found that 'Clearly the deprivation of her interest in the farm is constitutionally indefensible and therefore arbitrary as there is no sufficient reason for the deprivation'.[113] The court went on to make the following comment:[114]

> In addition, section 39(1) of the Constitution requires our courts, when interpreting the Bill of Rights, to promote the values that underlie an open and democratic society based on human dignity, equality and freedom. Undoubtedly this places a duty on every court which has to consider possible forfeiture of property to be careful not to make orders which may exceed the proper and legitimate objectives striven for by POCA. A failure to do so may result in orders which may be unduly invasive of the rights of innocent owners and which may amount to an abuse which is not constitutionally defensible.

The settled position is that Chapter 6 of POCA does not infringe the right to property, provided that a proportionality enquiry is adopted and there is a sufficient link between the property to be forfeited and the wrongdoing of the owner. This was clearly set out in the case of *Khosana* where Kruger J made reference to *Prophet* and said, simply, 'By bringing the proceedings for a preservation order where criminal proceedings are pending, there is no breach of the Bill of

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[112] *First National Bank v Commissioner For SARS; First National Bank v Minister Of Finance* 2002 (7) BCLR 702 (CC).
[113] *Mazibuko v ND*PP [2009] 3 All SA 548 (SCA) 555D.
[114] *Ibid,* 556B-C.

Rights'.[115] Kruger J seemed to be making this statement in regard to a multitude of rights including those contained at Section 25 of the Constitution.[116] Whilst POCA proceedings may not breach Section 25 of the Constitution, there is more controversy concerning whether it breaches other rights.

4.2. The right to privacy and dignity

Section 42 of POCA provides for the appointment of a *curator bonis* to assume control of property under preservation, administer the property, take care of the property and manage the property. Section 26(7) of POCA (which falls under chapter 5) provides for a court to order that any defendant being subject to a restraint order must disclose facts relating to any property or the location of such property. A preservation order may allow for living or legal expenses to be paid from the preserved property (generally via a *curator bonis*) provided that the person affected discloses all interests in the property and has provided a sworn and full statement of all of their assets and liabilities. As is demonstrated below, these provisions have been challenged for being an unjustified limitation of the rights to dignity and privacy.

As with the case of the right to property, the court in *Bathgate* dealt with a limitations analysis of POCA's predecessor, the Proceeds of Crime Act 76 of 1996, infringing the rights to dignity, privacy and remain silent.[117] In regard to the rights to privacy and dignity, the affected person claimed that the *curator bonis*, who was a complete stranger, had taken control of all his assets and financial records and 'for that matter, of his life'.[118] The DPP in this matter conceded that

[115] *Khosana and others v NDPP* 2012 (1) SACR 176 (FB) 183F.
[116] Constitution of South Africa, 1996.
[117] *DPP: Cape of Good Hope v Bathgate* 2000 (2) SA 535 (C) 543A.
[118] *Ibid,* 543B.

the relevant provisions of the Proceeds Act limited the respondent's right to privacy, but proceeded to argue that the limitation was justified.

The court found that the proceeds 'curtail certain fundamental rights',[119] being subject to the control of a *curator bonis* constitutes an 'invasion of the right to dignity',[120] and 'having one's home or property searched constitutes a serious inroad into one's right to privacy'.[121] Having found that these rights were limited, the court proceeded to engage with whether the limitations were justified. The court's limitations analysis was comprehensive:

First, the court engaged with the nature of the limited rights and referred to the rights to privacy and dignity as being 'perhaps the most important and fundamental of human rights when viewed in its peculiarly South African context'.[122]

Second, the court engaged with the importance and purpose of the limitation. The court found that there was 'not the slightest doubt' that the Proceeds Act had an important purpose in assisting in fighting crime in South Africa.[123] The court went on to emphasise the importance of a bold, if not ruthless, policy against drug-related crime.[124] The court emphasised the purpose of the Proceeds Act, namely that it is to prevent criminal for 'plucking the fruits of their ill-gotten gains and deriving benefit from their nefarious activities'[125] and to prevent the concealment or dissipation of such proceeds. The court furthermore took cognisance of the fact that the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substantices (1988), otherwise known as the Vienna Convention, had provided a model for the

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[119] *DPP: Cape of Good Hope v Bathgate* 2000 (2) SA 535 (C) 559A-B.
[120] *Ibid,* 559C.
[121] *Ibid,* 559D.
[122] *Ibid,* 559H-I.
[123] *Ibid,* 560B.
[124] *Ibid,* 560C.
[125] *Ibid,* 560E.

confiscation of property derived from and imposed an obligation on South Africa to enact measures aimed at such restraint and confiscation.[126] The court furthermore took account of the South African common law maxim *nemo ex suo delicto meliorem suam condicionem fecere potest*, which provides that no one can by their own wrongful act improve their position.[127] The court concluded this step of the limitations analysis with the finding that although measures such as restraint and confiscation encroach upon fundamental rights, they are 'both equitable and morally justified'.[128]

The court then engaged with the nature and extent of the limitation. The court found that the scope and ambit of a confiscation order was eminently reasonable.[129] The court pointed out that there were ameliorations on the effects of restraint order, in that courts could provide for reasonable living and legal expenses from the restrained property.[130] As for orders to compel disclosure, the court found that the court holds a discretion to make such an order, taking into account fairness and reasonableness and therefore such a power was not objectionable.[131] The court furthermore took account of the fact that the appointment of a *curator bonis* to take control of property of someone else was not an uncommon phenomenon it is a common tool employed where a person is incapable of managing their own affairs.[132] The court concluded by associating itself with the considerations proposed by the DPP at the time, being that the limitation of the rights was no more than was reasonable necessary in the circumstances.[133]

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[126] *DPP: Cape of Good Hope v Bathgate* 2000 (2) SA 535 (C) 560H.
[127] *Ibid,* 561A.
[128] *Ibid,* 561F.
[129] *Ibid,* 562B.
[130] *Ibid,* 563A.
[131] *Ibid,* 563D.
[132] *Ibid,* 564B.
[133] *Ibid,* 564J – 565A.

In line with the court's findings on the aforementioned leg, the court was satisfied that the means of the Act justified the ends and there were accordingly not less restrictive means.[134] No alternative means of achieving the purpose of the Act was suggested and on this basis the court accepted that the Act was fair, reasonable, logical and practicable.[135]

Subsequently, in the matter of *NDPP v Mohamed*,[136] the Constitutional Court reversed a judgment of the Witwatersrand High Court which found Section 38 of POCA to have unjustifiably infringed the right to privacy.[137] The Constitutional Court did not engage in this regard with the merits of the limitation of the right to privacy on the basis that it contended that the High Court had misinterpreted Section 38 of POCA. There has since been little attention paid to the limitation of the rights to privacy and dignity by Chapter 6 of POCA.

4.3. Paramountcy principle of the child

Section 28 of the Constitution[138] of South Africa provides, in addition to a number of specific rights that children hold, that in all matters in which a child is concerned, the child's best interests are of paramount importance.

In the case of *Van der Burg v NDPP,*[139] the Constitutional Court was presented with a set of facts in which the home of certain minor children was forfeited to the state because that home was also used by the children's parents as an illegal shebeen. The Centre for Child Law sought to join the case (as an objective party and 'friend of the court') to make the argument that prior to forfeiture, the court had to properly consider the effect of a forfeiture on the children in light

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[134] *DPP: Cape of Good Hope v Bathgate* 2000 (2) SA 535 (C) 565F.
[135] *Ibid,* 565G.
[136] *NDPP and another v Mohamed NO and others* 2003 (5) BCLR 476 (CC).
[137] *Ibid,* 493C.
[138] Constitution of South Africa, 1996.
[139] *Van der Burg and another v NDPP (Centre for Child Law as Amicus Curiae)* 2012 (8) BCLR 881 (CC).

of Section 28 of the Constitution. More specifically it was argued that forfeiture should not be granted until and unless a *curator ad litem* was appointed to represent the children's interests.[140] The court, when engaging with the proportionality analysis said that the possible homelessness of *inter alia* the children was a relevant factor which could not be overlooked.[141] The court, however, did not, on the evidence, accept that the children would be rendered homeless. The court said: [142]

> The applicants' bald allegation of homelessness does not seem to be borne out by the facts. As found by the Full Court, the applicants have not shown that their monthly income is insufficient to lease another home while supporting their children. In any event, the possibility of losing a home is certainly a consequence worth considering when one persistently uses it for a criminal business venture.

Notwithstanding this rather harsh approach from the Court, the court went on to say that:[143]

> In all matters concerning children, including applications for the forfeiture of property which provides a home or shelter to children, it is the duty of the court to consider the specific interests of the children. In this, officers of the court like the NDPP are expected to assist the court to the best of their ability with all relevant information at their disposal. The failure of parents to emphasise the interests of their children, or the possible manipulation of the children's situation to suit the objectives of parents, may not be held against the children.

The Court went on to find that neither the applicants nor the *amicus curiae* could advance any hypothetical facts that would impact on the forfeiture order and there was accordingly no need for the appointment of a *curator*.[144]

Subsequently, in the matter of *Brooks v NDPP,*[145] the SCA was asked to consider whether the High Court had properly considered the interests of the child in its proportionality analysis in granting forfeiture. The minority, per Shippers AJA in *Brooks* referred to the matter of *Van der Burg* but then went on to say the following:

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[140] *Van der Burg and another v NDPP (Centre for Child Law as Amicus Curiae)* 2012 (8) BCLR 881 (CC) 889D.
[141] *Ibid,* 898B.
[142] *Ibid,* 898C.
[143] *Ibid,* 900F-G.
[144] *Ibid,* 902A-B.
[145] *Brooks v NDPP* [2017] 2 All SA 690 (SCA).

> Whilst it is true that the onus of establishing the requirements of a forfeiture order in terms of section 50 of POCA, including proportionality, rests on the NDPP, some factual material relevant to the proportionality analysis will often be peculiarly within the knowledge of the owner of the property concerned; and where the NDPP establishes a prima facie case, the owner bears an evidentiary burden to place material before the court to rebut that case.[146]

The majority, per Ponnan AJ, however, differed in its approach when it said that the critical question was whether the information before the court was sufficient to consider the interests of the children and where there was insufficient information about the children the court may need to appoint a *curator* to conduct an independent assessment of the children's interests.[147] Ponnan AJ found that 'there was no investigation of any kind pertaining to the children'[148] and that despite the NDPP also holding a duty to present evidence about the impact on the children the NDPP had failed in its duty to do so.[149] The order of forfeiture was accordingly set aside and the application dismissed.

The next case to deal with the effect on a child of an order in terms of Chapter 6 of POCA was the matter of *NDPP v PDP*.[150] In the matter of *PDP* a car, driven by the first respondent was stopped at a roadblock, and drugs were found in the car. The car, however, was owned by a six-year old child. As the court said:[151]

> It is very unusual and highly suspicious that a motor vehicle could be registered in the name of a 6 year old child. The child was of an age where she could not drive a car or acquire a driver's licence. The registration in the child's name therefore seems to have been done for sinister motives. Be that as it may, a court cannot act on suspicions, even if such suspicions are strong. The first respondent must therefore be given the benefit of the doubt.

The court went on to find that *inter alia* because a *curator ad litem* had not been appointed as was required in *Brooks* and the forfeiture would be 'inimical' to the child's best interests.

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[146] *Brooks v NDPP* [2017] 2 All SA 690 (SCA) 706D.
[147] *Ibid,* 716D.
[148] *Ibid,* 717C.
[149] *Ibid,* 720G-H.
[150] *NDPP v PDP and others* 2017 (2) SACR 577 (NCK).
[151] *Ibid,* 582C-D.

Courts are generally sensitive to the interests of children in most matters. In the matter of *Jooste v Botha,*[152] the Van Dijkhorst J said:[153]

> s 28(2) has a much wider formulation. Its wide formulation is ostensibly so all-embracing that the interests of the child would override all other legitimate interests of parents, siblings and third parties. It would prevent conscription or imprisonment or transfer or dismissal by the employer of the parent where that is not in the child's interest. That can clearly not have been intended. In my view, this provision is intended as a general guideline and not as a rule of law of horizontal application. That is left to the positive law and any amendments it may undergo

Sachs J, writing for the constitutional court expanded on the comments in *Jooste* as follows:[154]

> While section 28 undoubtedly serves as a general guideline to the courts, its normative force does not stop there. On the contrary, as this court has held in De Reuck, Sonderup and Fitzpatrick, section 28(2), read with section 28(1), establishes a set of children's rights that courts are obliged to enforce. I deal with these cases later. At this stage I merely point out that the question is not whether section 28 creates enforceable legal rules, which it clearly does, but what reasonable limits can be imposed on their application.

The interests of the child do not provide an insurmountable obstacle in attaining a forfeiture order for the state. Rather, the interests of the child must be *considered* and favourably so. That courts are willing to not consider applications when *curators* have not been appointed to properly present the court with the potential effects of a forfeiture order is a progressive and encouraging phenomenon.

<u>4.4. The issues which require further scrutiny</u>

Having considered the above, six common themes of controversy are discussed below bearing in mind the courts' approach thus far to the various Constitutional rights affected. These six themes are:

1. The definition of proceeds of unlawful activity;
2. The definition of instrumentality;

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[152] *Jooste v Botha* 2000 (2) SA 199 (T).
[153] *Ibid,* 210C-D.
[154] *M v S (Centre for Child Law Amicus Curiae)* 2007 (12) BCLR 1312 (CC) 1320F – 1321B.

3. The proportionality enquiry;
4. The *ex parte* procedure;
5. The onus of proof; and
6. The innocent owner defence.

5. Common themes of controversy in POCA

5.1. The definition of 'proceed of unlawful activity'

'Proceeds of unlawful activity' is defined in POCA as:[155]

> 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.

'Unlawful activity' is defined in POCA as:[156]

> 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.

As will become apparent, 'unlawful activity' is ascribed a broad scope – unlike the requirement of instrumentality making reference to offences listed in schedule 1, 'unlawful activity' does not even limit itself to crime – 'contravene any law' could, potentially, mean any number of trivial contraventions of the law, even if completely unrelated to crime.

In the matter of *NDPP v Seevnarayan*,[157] Griesel J, for the Western Cape High Court, was concerned that the what constituted proceeds of unlawful activity had to be interpreted restrictively to 'avoid the potentially disproportionate results of a asset forfeiture'.[158] The facts in *Seevnarayan* were that the respondent had invested his lawfully acquired funds with Sanlam,

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[155] Section 1 of POCA.
[156] *Ibid.*
[157] NDPP v Seevnaryan 2003 [1] All SA 240 (C).
[158] *Ibid,* 254i.

but had used a fictitious name to avoid paying tax – despite the fact that the source of the funds was lawful, their use in this unlawful activity rendered the entirety of the funds tainted. Griesel J, accordingly made reference to the preamble of POCA, which provides for a 'triad of social evils': organised crime, money laundering and criminal gang activities. Griesel J said, in regard to the matter before him:[159]

> Not only is there no apparent trace of 'organised crime, money laundering and criminal gang activities' in the present scenario; but tax evasion and tax fraud is one area where South African statutory law actually does manage to deal quite 'effectively' with offenders through elaborate provisions and severe penalties in the Income Tax Act.

On this basis, Griesel J concluded that the matter at hand did not trigger the property constituting the proceeds of unlawful activities. What Griesel J had done is limited 'unlawful activity' to activity associated with the aforementioned triad.

The Supreme Court of Appeal did not agree with Griesel J's approach. In *NDPP v Cook Properties,*[160] Mpati DP and Cameron JA (as they then were) considered whether Griesel J had been correct. The SCA held that POCA is designed to reach far beyond the triad.[161] The Court did, however, restrict the interpretation of the words 'in connection with'.

In interpreting the words 'in connection with' the court made reference to an unreported decision of Stegman J, in which he said:[162]

> 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 an offence.

The SCA added to this:[163]

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[159] NDPP v Seevnaryan 2003 [1] All SA 240 (C) 256A.
[160] NDPP v RO Cook Properties 2004 (8) BCLR 844 (SCA).
[161] *Ibid,* 866G
[162] *Ibid,* 858B.
[163] *Ibid,* 858F.

> Either in its nature or through the manner of its utilisation, the property must have been employed in some way to make possible or to facilitate the commission of the offence. Examples include the cultivation of land for the production of drug crops; the appointment, arrangement, organisation, construction or furnishing of premises to enable or facilitate the commission of a crime.

Based on the above, the SCA decided that 'proceeds of unlawful activity' should be given its broad potential meaning, subject to the caveat above.[164]

In the matter of *NDPP v Salie,*[165] Breytenbach AJ proceeded to consider what this term meant. He made reference to the case of *Cook* and in which it was said that the property must be 'derived, received or retained' 'in connection with or as a result of' unlawful activities.[166]

The Court, however, proceeded to engage with an analyse this finding and said that *Cook*, read as a whole, requires a 'reasonably direct link between the crime committed and the property to be forfeited.'[167] The Court then went on to disagree with this finding. The Court argued:[168]

> the definition of 'proceeds of unlawful activities' makes it clear that the connection between the proceeds and the unlawful activities need not be direct. The proceeds for instance include benefits which someone legitimately acquired but retained by or as a result of his or her offences.

The Court was probably right on this score and this judgment seems to have been referred to by the Constitutional Court with approval.[169] The settled position is thus that proceeds of unlawful activity can include not just those proceeds directly from the commission of a crime, but those assets which are bought with the same proceeds.

5.2. The definition of 'instrumentality'

'Instrumentality of an offence' is defined in POCA at Section 1, as follows:

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[164] *NDPP v RO Cook Properties* 2004 (8) BCLR 844 (SCA) 866H.
[165] *NDPP v Salie and another* [2014] 2 All SA 688 (WCC).
[166] *Ibid,* 712B.
[167] *Ibid,* 712D.
[168] *Ibid,* 712E.
[169] See *NDPP v Botha NO and another* 2020 (6) BCLR 693 (CC) 710A-B.

> [I]nstrumentality of an offence' means 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.

Chapter 6 adds that the offence to which the property concerned must have been instrumental must, furthermore, be an offence listed in Schedule 1 of POCA ('unlawful proceeds' does not have the same reference to Schedule 1). Schedule 1 contains a fairly comprehensive list of offences. It has, however, been amended a number of times in 2004, 2007, 2013 and 2015. The schedule now includes a catch-all provision which refers to 'any offence the punishment wherefore may be a period of imprisonment exceeding one year without the option of a fine'.[170]

Cook Properties engaged with what this term meant and said:[171]

> The phrase must be interpreted independently of the guilt or innocence of the property-owner. Where a forfeiture order is sought the court thus undertakes a two-stage enquiry. In the first, it ascertains whether the property in issue was an 'instrumentality of an offence'. At this stage the owner's guilt or wrongdoing, knowledge or lack of it, are not the focus. The question is whether a functional relation between property and crime has been established. Only at the second stage, when (after finding that the property was an instrumentality) the court considers whether certain interests should be excluded from forfeiture, does the owner's state of mind come into play.

The Constitution Court in *Prophet* referred to this passage with approval.[172] Later on, the Constitutional Court provided further guidance in the case of *Mohunram*.[173] Here, Ven Heerden AJ engaged, with reference to *Cook*, with the following guiding factors:[174]

> 1. Whether there was a direct causal connection between the property and the offence;
> 2. Whether the property was integral to the commission of the offence;
> 3. Whether the property was specifically adapted for the commission of the offence (in that case, the house had been partitioned and the windows tinted to disguise an illegal casino operation); and
> 4. Whether the property was used to commit a series of offences over an extended or sustained period of time.

[170] Schedule 1 of POCA.
[171] *NDPP v RO Cook Properties* [2004] 2 All SA 491 (SCA) 501F.
[172] *Prophet v NDPP* 2007 (2) BCLR 140 (CC) 159A-C.
[173] *Mohunram and Another v NDPP and Another* 2007 (2) SACR 145 (CC).
[174] *Ibid,* 167B – 168B.

Van Heerden AJ furthermore rejected an argument that property is not instrumental when it is also used for a lawful purpose.[175] The majority of the Constitutional Court accepted Van Heerden AJ's analysis of instrumentality – although, the remainder of Van Heerden AJ's judgment, which dealt with proportionality was a minority dissenting judgment.

The factors set out in *Mohunram* entail balancing factors – one may weigh more than the other, and the absence of one is not necessarily dispositive of the enquiry. For example, in the case of *Cook Properties*, the Court found that 'the mere fact that drug dealers may frequent the hotel does not make it a 'drug shop''.[176] The SCA went on to hold that:[177]

> The hotel was merely the place where drug offences were committed. It was an enterprise whose business it was to rent out rooms to the public. That it so happens that some, or even most, of the tenants were drug dealers is on the facts before us incidental to the offences alleged to have taken place on its premises. In our view, the NDPP likewise failed to prove that the hotel was an instrumentality of an offence.

How these balancing factors are weighed is determined on a case by case basis, and the law has not changed substantially in this regard since *Mohunram*. What does, however, play a further dispositive enquiry is that of the proportionality enquiry, which is dealt with next.

<u>5.3. The proportionality enquiry</u>

Section 50 of POCA provides only two requirements for a court to order the forfeiture of property which is subject to a preservation order:

1. If the property is the instrumentality of an offence; or
2. If the property is the proceeds of unlawful activity.

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[175] *Mohunram and Another v NDPP and Another* 2007 (2) SACR 145 (CC) 168F.
[176] *NDPP v RO Cook Properties* [2004] 2 All SA 491 (SCA) 509J – 510A.
[177] *Ibid,* 510C.

As is discussed above, because asset forfeiture in terms of Chapter 6 is concerned only with the property itself, and not the perpetrator, there are no considerations in prescribed by POCA regarding the nature of the crime, the degree of harm the crime causes, or the quantity of the benefits of the crime (as there are in Chapter 4 asset forfeiture).

Nevertheless, our courts have, of their own accord, introduced a proportionality inquiry. The first reported appearance of the proportionality inquiry occurred in the case of *NDPP v Patterson,*[178] per Judge Foxcroft. Here, the Court drew on the jurisprudence of the United States of America, where two schools of thought were considered.[179]

The first school of thought was that when determining whether property satisfied the instrumentality test by a balancing of three factors:[180]

1. The nexus between the offence and the property and the extent of the property's role in the offence.
2. The role and culpability of the owner.
3. The possibility of separating the offending property from the remainder.

The Court then, with reference to the case of *United States v Chandler*[181] noted that the following points could be considered:[182]

1. Whether the use of the property was deliberate and planned or merely incidental and fortuitous.
2. Whether the property was important to the success of the illegal activity.
3. The time during which the property was illegally used and the spatial extent of its use.
4. Whether its illegal use was an isolated event or had been repeated.
5. Whether the purpose of acquiring, maintaining or using the property was to carry out the offence.

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[178] *NDPP v Patterson* [2001] 4 All SA 525 (C).
[179] *Ibid,* 528D – 529D.
[180] *Ibid,* 528G.
[181] *United States v Chandler* 36 F3d 358, 365 (4th Circuit, 1994).
[182] *NDPP v Patterson* [2001] 4 All SA 525 (C) 528H.

The second school of thought is a proportionality test which simply 'compares the value of the property forfeited with the severity of the crime committed'[183] and rejects the instrumentality inquiry adopted in *Chandler*.

The case of *Patterson* resulted in the NDPP not meeting its burden of proof and the matter was dismissed on that basis. Patterson, however, initiated the beginning of jurisprudence on this point.

In the case of *NDPP v Seevnarayan*[184] the court took note of the possible injustices that may occur where no proportionality enquiry occurs for the purposes of a forfeiture order. In this case, the NDPP claimed forfeiture of R4.1 million, while SARS claimed an additional R2.5 million (which was tax accrued from the money sought to be forfeited) and the respondent was facing imprisonment (or a very hefty monetary fine). A further complication (as the Court called it), was that the respondent was married in community of property and his wife had had no part to play in the unlawful activities (but half of the property being forfeited was hers). The court found that a forfeiture order on the these facts was too harsh to have been intended by Parliament.[185]

The court was constrained in avoiding the harshness of such an order by the Act – it noted that as soon as property is determined to be the proceeds of unlawful activities, the court *must* forfeit the property. The court, as a result, adopted a strict and narrow approach of what constituted 'proceeds of unlawful activities' and found that because the offences in question were not those mentioned in the preamble (organized crime, money laundering, and so on), they did not amount to 'unlawful' as envisioned in POCA.

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[183] *United States v 427 and 429 Hall Street*, 74F.3d 1165, 1170 (11th) Circuit 1996.
[184] *NDPP v Seevnarayan* [2003] 1 All SA 240 (C).
[185] *Ibid,* 254 C – D.

The Court went on to criticize POCA for not providing the Court with a discretion to order forfeiture, as Chapter 5 does (where guilt has been determined, rather than in Chapter 6, where the guilt of the respondent is largely irrelevant).

Seevnarayan was then joined to a string of cases being taken on appeal in the matter of Cook Properties II[186]. Cooke Properties was the combination of three different matters that the NDPP took on appeal to the Supreme Court of Appeal. They were the matter of *Seevnarayan*, as was discussed before, as well as the matters of *NDPP v RO Cook Properties Pty Ltd* ('Cook Properties I'),[187] and *NDPP v 37 Gillespie Street Durban (Pty) Ltd*.[188]

Cook Properties I concerned a sub-urban house which had been rented out to a third-party and a brothel had been run in the house. In this matter, the Johannesburg High Court had dismissed an application for forfeiture on the basis that (1) the NDPP failed to prove that the respondents were living off the proceeds or earnings of prostitution and (2) the Court interpreted Section 48 of POCA in a manner to find that the NDPP had failed to make out a case that the forfeiture was sufficiently proportional to the unlawful conduct of the respondent. On this second leg, Willis J interpreted POCA to protect those who may not own properties subject to forfeiture, but nevertheless have an interest in that property, and, more importantly, that Section 48[189], read with *inter alia* Section 25 of the Constitution,[190] required the person whose property was being forfeited to have at least be guilty of a serious offence in connection with the property[191]

[186] *National Director of Public Prosecutions v RO Cook Properties (Pty) Ltd; National Director of Public Prosecutions v 37 Gillespie Strees Durban (Pty) Ltd and another; National Director of Public Proseuctions v Seevnarayan* [2004] 2 All SA 491 (SCA).
[187] *NDPP v RO Cook Properties (Pty) Ltd* [2002] 4 All SA 692 (W).
[188] *NDPP v 37 Gillespie Street Durban (Pty) Ltd and another* 2012 (2) SACR 118 (KZP).
[189] of POCA.
[190] Constitution of South Africa, 1996.
[191] *NDPP v RO Cook Properties (Pty) Ltd* [2002] 4 All SA 692 (W) 700H.

– in this regard, for example, a person who breaks the speed limit in a sports car, should not have their sports car confiscated.

Willis J went on to find that there has to be some element of fault on the part of the person whose property was being confiscated – the innocent owner, for example, does not need to bring a separate application to exclude their interest in a property, and can rather oppose forfeiture on the basis that they had no fault in connection with the alleged unlawful activity.

Willis J concluded that it was clear to him that the provisions relating to forfeiture in POCA were penal in nature, despite the fact that Section 37 of POCA provided that the proceedings were civil and not criminal. Accordingly, he argued, it was 'wholly appropriate' to interpret the provisions of Section 48[192] read together with Sections 50[193] and 52[194], along with the definition of 'instrumentality of an offence' as requiring that. A person may not be deprived of property unless the person owning that property had a guilty state of mind in connection with the particular offence.[195]

The court *a quo*'s judgment in the matter of *NDPP v 37 Gillespie Street Durban* was not reported, but it was nevertheless summarized by the SCA in *Cook Properties II*. Here, the NDPP alleged that drug and prostitution offences were committed in the property in question. The owner was again an 'innocent owner', it seemed. The application was dismissed on the basis that the NDPP had failed to prove instrumentality.

In *Cook II*, the judgment per Mpati DP and Cameron JA (as they then were) first began with a fairly in-depth analysis of what 'instrumentality of an offence' meant. Thereafter, each of the

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[192] of POCA.
[193] *Ibid.*
[194] *Ibid.*
[195] *NDPP v RO Cook Properties* [2002] 4 All SA 692 (W) 703 at par 21.

three cases facts were applied to the courts findings on this point. Afterwards, the Court then engaged in a brief analysis of what was meant by ‘proceeds of unlawful activities’.

The SCA’s interpretation of ‘instrumentality of an offence’ was made under the guidance of the recent Constitutional Court’s judgment in *NDPP v Mohamed NO and others*,[196] which had given the constitutional-thumbs up to POCA, in light of the ‘internal protections’ contained in the Act, which included the innocent owner application/defence. The SCA accordingly found that the words ‘in connection with an offence’ to require a narrow interpretation because, firstly, it must be to prevent a person from benefitting from the fruits of unlawful activities, so as to be in line with the purpose of POCA and secondly, this would be in accordance with the application of Section 25 of the Constitution.[197] The Court here said that a literal application of the provisions of POCA could lead to an arbitrary deprivation of property and, accordingly, a more interpretation was necessary.[198]

The SCA went on to acknowledge that while POCA may have some remedial objectives, the fact that forfeiture operates as a punishment cannot be disguised. Despite this, however, the Court found that previous decisions that the fault of the owner was relevant in determining what constituted an ‘instrumentality of an offence’ was wrong. They based this finding on the fact that, as the Constitutional Court had recently confirmed, Chapter 6 of POCA was not focused on wrongdoers, but ‘on property that has been used to commit an offence or which constitutes the proceeds of crime’.[199] But this was not the end of the enquiry of the fault of owner. What the SCA said is that forfeiture requires a two-stage procedure. The SCA said that first, one determines whether the property in issue is instrumental or proceeds, and the only

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[196] *NDPP v Mohamed NO and others* 2002 (9) BCLR 970 (CC).
[197] Constitution of South Africa, 1996.
[198] *NDPP v Cook Properties* [2004] 2 All SA 491 (SCA) 499E-F.
[199] *Mohammed* (1) 2002 (4) SA 843 (CC) par 17, quoted in *NDPP v Cook Properties* [2004] 2 All SA 491 (SCA) 501C-E.

question is whether there is a functional relation between the property and the crime. This is the first stage. The second stage, the Court explained, is whether certain interests should be excluded from forfeiture and here the owner's mindset comes into play.

The Court noted that Section 52 of POCA burdens the innocent owner with an onus to prove facts on a balance of probabilities (that he did not know, or could not reasonably have known that the property was connected to the offence). The Court again, however, said that examples of untoward results that could be produced by a literal reading was proliferated in argument, however, because none of the cases had invoked the second stage of this enquiry, the SCA did not rule on the point. It did however note the argument that because of the onerous wording of Section 52[200], it did not create an 'innocent owner' defence but rather, an 'ignorant' owner defence. The SCA, in the end, provided no ruling on an interpretation of Section 52.

The Court concluded its analysis of what property could be forfeited by saying that while the Act requires property owners to exercise responsibility for their property and to account for their stewardship of it, the pursuit of the objectives of POCA cannot exceed what is constitutionally permissible and forfeitures that do not rationally advance the interrelated purposes of Chapter 6[201] are unconstitutional.[202]

The SCA accordingly endorsed the view that a proportionality enquiry must be undertaken in determining that the nature and value of the property to be forfeited must be assessed in relation to the crime involved and the role the owner played in the crime's commission may at the final stage of the forfeiture be appropriate.

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[200] of POCA.
[201] *Ibid.*
[202] *NDPP v Cook Properties* [2004] 2 All SA 491 (SCA) at par 29.

The SCA finished this enquiry off with a stylish nod to an old case of *S v Bissessue*[203] in which, an appellant and a co-accused had been convicted of fishing without a license, were cautioned and discharged, but their motor cars (with which they had travelled to the dam in question) had been forfeited because they had been used for the purpose of and in connection with the commission of an offence. Here, James JP and Kumleben J stated that:[204]

> to give [a similar phrase] the wide meaning subscribed to by the magistrate [in the court *a quo*] would lead to startling results. . . the illustration of an ardent and affluent fly fisherman using his aeroplane to fly to Himeville and thereafter his motor car to reach his favorite trout stream comes to mind. On such an interpretation both these 'things' . . . would be subject to confiscation . . . incidentally, in those parts one often sees a fly fisherman in a rapid at dusk anxiously attaching a fly to his trace, with the replaced one held between his teeth. If false dentures and a pair of spectacles were involved in this exercise they would be similarly susceptible to forfeiture. It is plain that a more reasonable and realistic meaning must be given to this phrase.

Based on the above reasoning, the SCA confirmed the decisions of all three matters in their respective courts *a quo*.

The considerations of the SCA in *Cook Properties II* in regard to the proportionality enquiry remain good law. There have been various cases in which the NDPP has managed to distinguish itself from *Cook Properties*, but the principles nevertheless remain authoritative.

In the case of *Prophet v NDPP*,[205] the Constitutional Court visited the requirement to engage in a proportionality enquiry. Prophet was the owner of an immovable property which was used for the production of drugs. The property owner was furthermore arrested and seemed to be aware of the use of the house for the production of drugs. Prophet made a number of challenges to POCA and travelled all the way through the High Court, the Supreme Court of Appeal and finally found its way into the Constitutional Court. The Supreme Court of Appeal found that forfeiture should fail only when the forfeiture is 'significantly disproportionate', which was a

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[203] *S v Bissessue* 1980 (1) SA 228 (N).
[204] *Ibid,* 229H-230A.
[205] *Prophet v NDPP* 2007 (2) BCLR 140 (CC).

threshold borrowed from the jurisprudence of the United States. The minority decision, per Ponnan JA, disagreed with this approach, and felt this threshold was too rigid and inflexible.

In the Constitutional Court, per Nkabinde J, the Court made reference, with seeming approval, to the case of *FNB v Commissioner, SARS*,[206] where the following considerations were determined to be important in the proportionality enquiry: [207]

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

The Court decided not to deal with the differences in the two tests postulated by the majority and the minority in the Supreme Court of Appeal.[208] This decision not to interrogate the threshold of proportionality required appears to be based on the fact that the Court find the forfeiture to be proportionate.

In the case of *Mohunram v NDPP*,[209] the Constitutional Court was presented with an immovable property on which an unlicensed casino had been operated. It seemed clear that the property was instrumental to the crime in question. The Constitutional Court followed the discussion engaged in in its earlier decision in *Prophet*. The Court, per Van Heerden AJ, engaged with whether the threshold required was that of 'significant disproportionality'. The Court then subtly proposed that in regard to the confusion raised in Prophet on this point, the

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[206] *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and another* 2002 (4) SA 768 (CC).
[207] *Prophet v NDPP* 2007 (2) BCLR 140 (CC) 160G – 161B.
[208] *Ibid,* 163C – D.
[209] *Mohunram and another v NDPP* 2007 (2) SACR 145 (CC).

only question that need to be asked ins whether the forfeiture of the property is, in light of the circumstances discussed and affirmed in Prophet disproportionate in the sense of various issues like to disincentivise crime.[210] Van Heerden AJ added that it was the task of the court to ensure that the deprivation of property that will result from a forfeiture order is not arbitrary.

Moseneke DCJ gave a dissenting judgment in which he contended that the question in a proportionality analysis is whether the instrumentality of the offence is sufficiently connected to the main purpose of POCA and the more remote the offence in issue is to the primary purpose of PCOCA, the more likely it is that the forfeiture is disproportionate.[211]

In the case of *NDPP v Botha N.O.*,[212] the Constitutional Court, per Victor AJ (as she then was) acknowledged and confirmed that once the threshold of establishing that the property is an instrumentality of an offence, a court must carry out a proportionality analysis to determine whether the forfeiture would be disproportionate.[213]

Here, the Constitutional Court argued that the net effect of the cases of *Mohunram* and *Prophet* were that the draconian effects of forfeiture were mitigated by the application of a proportionality analysis.[214] The Constitutional Court was, however, presented with the issue of whether a proportionality analysis is necessary when the property is the proceeds of unlawful activity, rather than instrumental to a crime.

The NDPP's argument was that the proceeds of unlawful activity do not constitute property in terms of Section 25 of the Constitution.[215] This argument was quickly dispensed with, by noting

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[210] *Mohunram and another v NDPP* 2007 (2) SACR 145 (CC) 174E.
[211] *Ibid,* 189C – E.
[212] *NDPP v Botha N.O.* 2020 (6) BCLR 693 (CC).
[213] *Ibid,* par 34.
[214] *Ibid,* par 41.
[215] Constitution of South Africa, 1996.

that the Constitution may still protect unlawfully acquired property against *arbitrary* deprivation.

The Court went on to note that neither *Prophet* nor *Mohunram* distinguished between forfeiture orders based on proceeds and forfeiture orders based on instrumentality.[216]

The Constitutional Court went on to find that it would be artificial and technical to have a separate approach to the forfeiture of property characterized as the proceeds and property characterized as the instrument of an offence. The Court went on to note that if a proportionality enquiry is not necessary for property characterized as proceeds, the NDPP need only establish the likelihood of property being proceeds and the Court would then be duty-bound to order for forfeiture. In light of the fact that forfeiture was as the Court confirmed 'a serious incursions into well-entrenched civil protections particularly those against arbitrary and excessive punishment and arbitrary confiscation of property',[217] such an approach, the Court it seemed thought was unconstitutional.

The Constitutional Court accordingly found that the words 'shall order forfeiture' in Section 50(1)*(b)* of POCA required a court to conduct a proportionality analysis regardless of whether forfeiture is sought of proceeds of an offence, or the instrumentality of an offence. In a bizarre twist, a dissenting judgment was provided which held a higher quorum than for the main judgment. The dissenting judgment was per Jafta J, with Mogoeng CJ, Madlanga, Mhlantla and Theron JJ concurring, while the main judgment was per Victor AJ with Froneman and Khampepe JJ concurring). The dissent, however, agreed with the order eventually made in the main judgment.

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[216] *NDPP v Botha N.O.* 2020 (6) BCLR 693 (CC) par 51.
[217] *Ibid,* 711 paras 70 – 71.

The dissent, per Jafta, disagreed that the property with which the Court was concerned with constituted property envisaged in Section 25 of the Constitution[218] and whether the proportionality analysis applies to the 'present' proceeds of unlawful activities.

Jafta J said *inter alia* that POCA prescribes various protections including the fact that a person can persuade a court that they have legally acquired an interest, the Court may exclude such interest, in terms of Section 52 of POCA. Jafta J argued, however, that the 'owner' in this matter had no legal right to the property in question.[219] Therefore, Section 25 of the Constitution should not apply and, in the absence of the protections of Section 25 of the Constitution, the proportionality analysis is not required.[220]

5.4. *Ex parte* procedure

Applications for preservation are generally sought *ex parte*. This standard practice has been commented on in various decisions.[221] This practice is, however, unconstitutional. The law on the point is clear, and has been commented on by various divisions, all the way up to the Supreme Court of Appeal and Constitutional Court. In essence, the law is that, like any litigant, the NDPP has the option to seek an order of preservation *ex parte*, but if it does so, it must comply with certain obligations imposed on any *ex parte* application. Nevertheless, the NDPP repeatedly claims an *ex parte* procedure as of right – that it does not need to justify why it seeks an *ex parte* order.

[218] Constitution of South Africa, 1996.
[219] *NDPP v Botha N.O.* 2020 (6) BCLR 693 (CC) par 110.
[220] *Ibid,* par 125.
[221] *NDPP (Ex Parte Application)* 2018 (2) SACR 176 (SCA); *NDPP v Gumede* [2020] 3 All SA 554 (MM).

What follows below is a discussion of the key cases concerning this realm of Chapter 6 of POCA. It is, however, less complicated than it appears. Section 38 of POCA provides that the NDPP *may* seek such an order *ex parte*. Notably, the word used is *may* and not *must*.

Section 38(1) of POCA provides as follows:

> 'The National Director may by way of an ex parte application apply to a High Court [for a preservation order]…'

Much contention has arisen from this provision, as to whether it entitles the NDPP to approach a High Court *ex parte* as of right (and without justification), or whether it merely confirms the option for the NDPP to approach a High Court *ex parte* (and if it does proceed *ex parte* it is burdened with the hurdles of any litigant seeking to approach a court *ex parte*).

The principle *audi alteram partem* guarantees parties the right to be heard before an order is granted against them. In the normal course of litigation, *audi alteram partem* can be overlooked where the giving of notice would defeat the purpose of the application or the relief sought is so urgent that too much harm would be caused if time is provided to allow notice to the other side. Naturally, if a litigant approaches a court *ex parte* they must justify the *ex parte* nature of the application. The *ex parte* litigant is furthermore required to act in good faith and investigate and disclose all material facts which might influence the decision of the court, even if those facts are adverse to the *ex parte* litigants case. Where a litigant fails to properly investigate or disclose material facts, this alone can be a basis to set aside the order granted *ex parte*.[222]

Presumably the NDPP does not want to have to justify the *ex parte* procedure because of the costs and complications that would arise. In many cases, the property the NDPP seeks to forfeit may already be in police custody at the time of seeking preservation. It would be difficult to

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[222] See for example *Schlesinger v Schlesinger* 1979 (4) SA 342 (W).

justify an *ex parte* procedure when the property was safely in the hands of the police.[223] Of course, if it does give such notice it could be subject to three separate applications it may need to fight – opposition to preservation, opposition to forfeiture and possibly an application to exclude interest.

Turning back to the current law on *ex parte* procedure in applications for preservation, the starting key cases are those of *Mohamed.*

5.4.1. Mohamed I

Shortly after the commencement of POCA, the NDPP sought a preservation order in the Witwatersrand Local Division of the High Court, on an *ex parte* basis, in terms of Section 38(1) of POCA for *inter alia* two immovable properties and 'the furniture, fittings, equipment and other movable items in the buildings'.[224] Once the order was published, an application for forfeiture was sought on an unopposed basis (this time, with notice to the persons affected). In response, *inter alia* the trustees of a trust which owned the impugned immovable properties brought a counter-application to declare Chapter 6 of POCA unconstitutional.

The Court, per Cloete J, found that the right to a fair public hearing, in terms of Section 34 of the Constitution[225], was impugned by Chapter 6, given the intrusions on *audi alteram partem*. The Court went so far as to say 'the procedure envisaged in chap 6 of the Act therefore constitutes a gross invasion of the rights of a person affected by a preservation order.'[226] The Court distinguished between the constitutionally justifiable object of 'ensuring that criminals do not profit from their misdeeds' in regard to the principle of asset forfeiture, against the

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[223] See for example *Khosana v NDPP* 2012 (1) SACR 176 (FB) 185A.
[224] *Mohamed NO and others v NDPP* 2002 (2) SACR 93 (W) 95E.
[225] Constitution of South Africa, 1996.
[226] *Mohamed NO and others v NDPP* 2002 (2) SACR 93 (W) 101D.

procedure prescribed in Chapter 6 – the latter of which the Court was convinced was unconstitutional.[227]

In coming to this conclusion of unconstitutionality, the Court noted that it could find no legitimate reason why the legislature could not have chosen less restrictive means to achieve its purpose, because not all preservation applications needed to be sought *ex parte* and chapter 6 made no provision calling for a rule *nisi*. Chapter 6 was accordingly declared unconstitutional to the extent that it required preservation applications to be brought *ex parte* and made no provision calling for a rule *nisi*.

5.4.2. Mohamed II

The same year the Constitutional Court published it's judgment in regard to *Mohamed I*, in which it set aside the Cloete J's order of constitutional invalidity. The NDPP and the Minister of Justice and Constitutional Development sought to appeal Cloete J's order, and had together an impressive set of five senior and respected counsel arguing their case. Their opponents were represented by one counsel.

The Constitutional Court gave a unanimous judgment per Ackermann J. Here the Court noted that as opposed to Chapter 5 proceedings, Chapter 6 proceedings were on the property used to commit and offence or which constitutes the proceeds of crime and the guilt or wrongdoing of the owners of possessors of property is, therefore, not primarily relevant to the proceedings.[228] The Constitutional Court's gripe with Cloete J's order was that it was a notional severance order against the legislation for an omission in the legislation. As the Constitutional Court noted, the appropriate response to an unconstitutional omission in legislation is that of reading

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[227] *Mohamed NO and others v NDPP* 2002 (2) SACR 93 (W) 101I.
[228] *NDPP v Mohamed* SACR 2002 (2) SACR 196 (CC) 204E.

in, rather than severance.[229] The Constitutional Court accordingly set aside Cloete J's order of constitutional invalidity and referred the matter back to the court *a quo* to reconsider the constitutional challenges in light of the Constitutional Court's guidance on the topic.

5.4.3. Mohamed III

Once the matter was back before Cloete J, the NDPP's opponents sought to declare the entirety of Chapter 6 unconstitutional. Unperturbed, Cloete J came to the same conclusion, and a similar order, as in Mohamed I in regard to the *ex parte* procedure for seeking preservation orders. The following further challenges were considered (amongst other, less notable challenges): [230]

A. Chapter 6 unconstitutionally infringed the right to remain silent and the right against self-incrimination. In this regard, the Court did not find Chapter 6 to be unconstitutional, because this could be left as an issue of evidence for the relevant trial court.
B. Chapter 6 was unconstitutional to the extent that it resulted in a finding of a crime being committed on a balance of probabilities, rather than proof beyond reasonable doubt. Here the Court rejected this challenge because chapter 6 'is not aimed at and nor does it constitute the criminal punishment of an offender'.[231]
C. Chapter 6 was unconstitutional to the extent that in an application to exclude one's interest in a property, there was a reverse onus. The Court rejected this challenge on the basis that there was no procedural unfairness and, in any event, the reverse onus was justifiable.[232]

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[229] *NDPP v Mohamed* SACR 2002 (2) SACR 196 (CC) 207.
[230] *Mohamed v NDPP* 2003 (1) SACR 286 (W) 309D.
[231] *Ibid,* 304E.
[232] *Ibid,* 306A & 307D.

D. Chapter 6 was generally unconstitutional because there was no proportionality enquiry and, for example, negligent driving could result in the forfeiture of a very valuable motor vehicle.[233] The Court rejected this argument on the basis that this challenge was not properly raised and did not did deal with the merits of this challenge.

5.4.4. Mohammed IV

With a fresh order of severance from Cloete J (along with a new read-in order concerning a rule *nisi* procedure), the matter was sent to the Constitutional Court for confirmation.

The Constitutional Court again gave a unanimous judgment per Ackermann J. The Court came to a rather straight forward conclusion – while Section 38 of POCA provided a discretion on the NDPP to seek a preservation order *ex parte*, it was not a peremptory provision – the NDPP could, if needs be, seek a preservation order with notice to the other side. Similarly, if a Court wished, a Court could issue a rule *nisi*. Accordingly, the Court decided that Cloete J's order was unnecessary and set aside the order of constitutional invalidity.

5.4.5. Post-Mohamed cases

Notwithstanding the intimations of the Constitutional Court regarding the *ex parte* nature of the preservation of property applications, the *ex parte* character of preservation application is still the topic of hot dispute.

In the case of *NDPP v Braun*[234], Traverso DJP was presented with an application in terms of the High Court rules (Rule 6(12)*(c)*) to reconsider an *ex parte* order – a remedy reserved for orders granted *ex parte*. The NDPP's argument, as expressed by Traverso DJP was that the

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[233] *Mohamed v NDPP* 2003 (1) SACR 286 (W) 308C.
[234] *NDPP v Braun* 2007 (1) SA 189 (C).

NDPP argued *in limine* that Rule 6(12)*(c)* cannot apply in an application made in terms of s 38(2) of POCA, that Rule 6(12)*(c)* was in direct conflict with the provisions of POCA and that the Rule may not be invoked to 'undo that which is authorised by the Act itself'.[235] The Court summarily dismissed this argument.

The Court referred to Mohammed IV and noted that an order in terms of Section 38(2) of POCA cannot be set aside solely because it was brought *ex parte*, however, the learned Judge went on to note, Section 38(2) of POCA does not relive the NDPP from the normal burden imposed on every applicant who approaches a court for an *ex parte* order. Further, the Court went on, the *ex parte* procedure should only be invoked where there is some good cause or reason for the procedure, such as genuine urgency or when the giving of notice would defeat the very object for which the order is sought.[236]

Notwithstanding this rather clear enunciation of what the *ex parte* procedure entails, the NDPP appears to maintain a stance throughout the country that it is permitted to seek an *ex parte* order as of right. For example, in one unpublished judgment reported in the media, the respondent sought the reconsideration of a preservation order freezing over 30 million rand, which was granted *ex parte*.[237] The Court referred to the authority of *NDPP v Braun* and set the order aside.

Some ten years later, in 2016, the NDPP brought an *ex parte* application for preservation in the Mpumalanga division of the High Court. The Court struck the matter from its roll and directed the NDPP to serve its application on the respondent in the event that it wished to re-enrol the

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[235] *NDPP v Braun* 2007 (1) SA 189 (C) 194C.
[236] *Ibid*.
[237] G Quintal, 'Victory for Guptas as court frees assets', *Business Live*, 28 May 2018, accessed June 2022, at https://www.businesslive.co.za/bd/national/2018-05-28-victory-for-guptas-as-court-releases-assets-related-to-estina-matter/.

application for preservation. The Court claimed that in order to proceed *ex parte* the NDPP would have to justify bringing its application *ex parte*. This decision was taken on appeal to the Supreme Court of Appeal. The Supreme Court of Appeal disagreed with this decision. On appeal, per Seriti JA, it was stated that Section 38[238] allows the NDPP to proceed *ex parte*.[239] It seems here that the conclusion was that the NDPP is entitled to approach a Court *ex parte*, although an aggrieved un-heard party may exercise certain remedies associated with *ex parte* proceedings.

In the case of *NDPP v Gumede* a particularly biting judgment against the NDPP's compliance with the *ex parte* procedures was released.[240] Here the Court, per Roelofse AJ engaged with whether a case reported as 'NDPP (*Ex Parte* Application) 2018'[241] entitled the NDPP to approach the court on an urgent basis and without notice as of right. The Court decided that if the NDPP seeks an *ex parte* order it must say why notice to the other party is unnecessary, not required or must be disposed of and justify this *ex parte* nature in evidence, by way of an affidavit.

The above cases are but a few of many cases (both reported and unreported) in which the NDPP sought an order *ex parte* order and claimed an entitlement to do so as of right. The law on the point is, however, clear. The NDPP *can* approach a court *ex parte*, but it is not relieved of the burdens on any litigant who chooses to approach a court *ex parte*. Those burdens include, as was pointed out in *Gumede*, justifying the *ex parte* nature of the application. Undoubtedly, there will be more on this topic because unrelentingly the NDPP presses on its claim that it can

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[238] of POCA.
[239] *NDPP (Ex Parte Application)* 2018 (2) SACR 176 (SCA).
[240] *NDPP v Gumede* [2020] 3 All SA 554 (MM).
[241] *NDPP (Ex Parte Application)* 2018 (2) SACR 176 (SCA).

approach a court *ex parte* as of right, notwithstanding what was said in *Mohamed*, *Braun* and *Gumede*.

The nuance is that the NDPP cannot have its application dismissed simply on the basis that it proceeds *ex parte* – in order to render the *ex parte* order liable to be reconsidered or set aside, the aggrieved party needs to demonstrate that the NDPP did not comply with its duties as an *ex parte* applicant like, for example, the duty to disclose material facts.

While Roelofse AJ was particularly astute to pick up the NDPP's transgressions in *Gumede*, given the obscurity of the law concerning preservation orders (which is not widely known), many judges will accept the submission from the NDPP *ex parte* that it is entitled, as of right to approach a court *ex parte*. In both the Western Cape High Court and the Gauteng Local Divisions, the NDPP will bring several unrelated applications for preservation, *ex parte*, and seek the orders on the unopposed motion roll. A single court presented with a series of unopposed applications on one court roll may accept the NDPP's claims on their word and grant the orders *ex parte*, notwithstanding non-compliance with the steps outlined in *Mohamed, Braun* and *Gumede*.

The *ex parte* nature of preservation order applications is accordingly one of those issues which is theoretically constitutional, but in practice often misused. At some point, the NDPP will have to review its conduct in how it seeks preservation orders *en masse*. Otherwise, notwithstanding the law being constitutional with regard to *ex parte* preservation orders, the practice of the NDPP in seeking *ex parte* preservation orders appears to be out of line with the law on *ex parte* preservation orders and, clearly, unconstitutional.

5.5. Onus of proof

5.5.1. *Resolution of disputes*

The onus of proof differs between preservation and forfeiture applications. In both cases, the generally duty to 'prove' rests on the NDPP, but the degree of the burden differs. This section will engage with how factual disputes are resolved in asset forfeiture proceedings.

In the case of preservation, Section 38(2) of POCA prescribes the onus of 'reasonable grounds to believe'. In the case of forfeiture, Section 50(1) of POCA prescribes the onus of 'balance of probabilities'.

These varying degrees of onus give rise to two issues. The first issue is simply what they require and the second is how they are applied when most of forfeiture proceedings are decided on paper. When a court is required to decide an issue on paper, it makes its decision without the benefit of a trial, oral testimony or cross-examination. Accordingly, there is no balancing of creditworthiness and reliability. Rather, a set of rules is applied to determine how an issue must be resolved. The finding is accordingly, as will be argued, more of a default finding and not, as is required, a determination of proof.

The rule applied for resolving disputes of fact is differs between interim relief and final relief. In the case of final relief,[242] the rule is that the facts accepted by the Court are those averred by the applicant, which the respondent admitted, along with the facts averred by the respondent. This rule is caveated by the principles that (a) the facts denied by the respondent must be denied in such a manner than the denial gives rise to a genuine dispute of fact and (b) the facts of the respondent which are to be accepted must not be far-fetched or clearly untenable. It is generally

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242 *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A).

accepted that in the case of motion proceedings for final relief, the respondent holds the advantage.

In the case of interim relief, the rule is that the facts accepted by the Court are those averred by the applicant together with the facts averred by the respondent which the applicant cannot dispute.[243] If the respondent is only able to case 'some doubt' then the applicant's facts are accepted – the applicant's case will only be rejected if the respondent manages to case 'serious doubt'. Accordingly, in the case of interim relief, the applicant holds the advantage.

While the rule seems somewhat arbitrary and unfair, theoretically either party has the option of referring a dispute to oral evidence, in which case witnesses can be called and the resolution of disputes of fact is more reliable. Of course, a referral to oral evidence comes with it various issues relating to the delays it can cause in resolving a case and, of course, an increase in the legal costs associated therewith.

In forfeiture proceedings a referral to oral evidence appears to be rare although not unheard of. In the reported decision of *NDPP v Patterson*,[244] a dispute of fact arose on the papers and the matter was referred to oral evidence in the Western Cape High Court. Billy Downer and Hermione Cronje represented the NDPP and claimed that this matter was the first Chapter 6 POCA proceedings to be referred to oral evidence.[245] *Patterson* concerned a drug-dealing operation. Police searches at the property in question had yielded findings of mandrax, dagga and cocaine. Once a search was complete at the property, one of the police officers was leaving the property he looked over at a neighbouring backyard and noticed a small hole freshly covered with dry sand and footprints leading from the properties wall to the hole.[246] Various

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[243] *Webster v Mitchell* 1948 (1) SA 1186 (W) 1189.
[244] *NDPP v Patterson* [2001] 4 All SA 525 (C).
[245] *Ibid,* 526H.
[246] *Ibid,* 529J.

police witnesses were called to establish that the property in question was instrumental to the offence of drug dealing. Nevertheless, the State's case was defective. One of the NDPP's witnesses claimed that unless the 'State is able to provide adequate protection persons willing to testify' it was very difficult to get witnesses. And so, in the NDPP's first ever oral evidence hearing, Pete Mihalik for the respondent succeeded in having the application dismissed. In some cases, respondents have attempted to place certain issues in dispute by denying the NDPP's allegations but the rules of motion procedure have prevailed and the bare denials have resulted in Court's accepting the NDPP's allegations.[247]

Courts have occasionally doubted the applicability of the normal rules of motion procedure to asset forfeiture matters, suggesting that, perhaps Court's should rather consider the 'balance of probabilities'.[248] In the case of *NDPP v Kyriacou*,[249] which concerned a Chapter 5 Forfeiture, the Supreme Court of Appeal engaged with the relationship between varying degrees of onus prescribed by POCA against the normal rules of motion procedure. In this matter, Mlambo AJA required the NDPP to actually prove (rather than merely assert), up to the degree of proof required at the time.

In the case of *NDPP v Stander,*[250] Plasket J, in discussing the onus of 'reasonable grounds to believe' said that the belief must be objectively justifiable. The Judge went on to say there must be 'grounds, or facts, which give rise to, or form the basis of the belief and they must be reasonable grounds'.[251]

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[247] See for example *NDPP v Seleoane* [2003] 3 All SA 102 (NC); *NDPP v Zhong* 2005 (2) SACR 544 (W).
[248] *NDPP v Zhong* 2005 (2) SACR 544 (W) 550.
[249] *NDPP v Kyriacou* [2003] 4 All SA 153 (SCA) 157B-C.
[250] *NDPP v Stander* 2008 (1) SACR 116 (E).
[251] *Ibid,* 120A.

In the case of *NDPP v Madatt*,[252] Samela AJ (as he then was), said that 'reason to believe' cannot be based on the subjective belief of a person. Rather, it must be based on facts adduced by the applicant which can be objectively ascertained and the Applicant's facts must have a rational and reasonable basis, and they must bear relation to the relief sought. In the case of *NDPP v Fillis*,[253] the Court engaged in an evidence based evaluation, despite the entire matter having been argued on paper and, despite the NDPP having the necessary allegations on paper, the Court was not persuaded that the NDPP's case had been proven.

There is a clash between the rules of motion procedure and the onus of proof imposed by POCA. In some cases, a failure to refer to oral evidence has resulted in a default factual finding and in other cases the Courts have engaged with evidence and determined whether in fact a case brought by the NDPP was 'proven' to the required degree. If the rules of motion procedure apply to POCA proceedings the onus of proof provisions in POCA are redundant – a reading of the Act contrary to the rules of statutory interpretation which require interpretation of status to avoid rendering words or provisions 'superfluous, meaningless, or otherwise otiose.'[254]

Accordingly, the rules of motion procedure in actual fact ought not to apply to POCA proceedings. Rather, a Court should evaluate the evidence before it and determine whether the requisite onus has been established.

5.5.2. What 'reasonable grounds to believe' means

Preservation orders are granted on the relatively low bar of 'reasonable grounds to believe'. Long before the enactment of POCA, Gerald Patrick Kearney, an anti-apartheid activist was

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[252] *NDPP v Madatt* [2008] WCHC 6488/2007.
[253] *NDPP v Fillis* [2009] JOL 24018 (SE).
[254] *S v Weinberg* 1979 (3) SA 89 (A) 98G.

arrested 29 (1) of the Internal Security Act 74 of 1982 on the basis, according to the Apartheid state, that there were 'reason to believe' that Kearney was *inter alia* intending to commit an offence. In a landmark decision, in the matter of *Hurley and another v Minister of law and order,*[255] the Durban High Court engaged with what 'reason to believe' meant. Leon ADJP concluded that 'reason to believe' means 'to believe rationally as a reasonable man would upon the information that he has.'[256] Later on, in the matter of *NDPP v Stander*[257] Plasket J imported the *Hurley* definition to POCA. The learned Judge said:[258]

> It is clear from the cases that reason to believe that a state of affairs exists involves an objectively justifiable belief 'a belief based on reason' in which a 'factual basis for the reason' exists. There must, in other words, be 'grounds, or facts, which give rise to, or form the basis of, the belief' and they must be reasonable grounds. That the belief must be objectively rational (even, I venture to suggest, when more subjective language is used in a statute) is now a constitutional imperative, flowing from the founding value of the rule of law.

The same interpretation was also ascribed in the unreported decision of the Western Cape High Court, per Samela AJ, as he then was, in the case of *NDPP v Madatt*[259] where the following was said, after similar references to *Hurley*:[260]

> Clearly the authorities point to the conclusion that 'reason to believe' cannot be based on the subjective belief of a person. It must be based on facts adduced by the applicant which can be objectively ascertained. However, the court need not be 'satisfied' on a balance of probabilities that these 'facts' are indeed established by the applicant. The applicant's facts must have a rational and reasonable basis, and they must bear relation to the relief sought.

'Reasonable grounds to believe' accordingly requires an evidential basis to believe the conclusion sought to be arrived at, but not necessarily proof thereof. In other words, as long as the conclusion is not clearly wrong or far-fetched, based on the evidence before the court, the conclusion will be a reasonable one, whilst not necessarily the more likely conclusion.

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[255] *Hurley and another v Minister of law and order and another* 1985 (4) SA 709 (D).
[256] *Ibid,* 719D.
[257] *NDPP v Stander and others* 2008 (1) SACR 116 (E).
[258] *Ibid,* 120A-B.
[259] *NDPP v Madatt and another* [2008] JOL 21555 (C).
[260] *Ibid,* par 9.

In the circumstances, in opposing a preservation order, one would have to demonstrate the conclusion to clearly be wrong, rather than simply open to doubt. Where the high water mark of one's opposition is improbable, or unlikely, (but the conclusion is nonetheless 'reasonable') then one is more likely to succeed in opposing forfeiture, where the test is 'balance of probabilities'.

5.5.3. What 'balance of probabilities' means

'Balance of probabilities' is not a novel standard of proof. It is, however, juxtaposed to the standard of 'beyond reasonable doubt' normally applicable in criminal proceedings. Simply, as Schwikkard puts it, balance of probabilities means 'that the probabilities in the case be such that, on a preponderance, it is probable that the particular state of affairs existed'.[261] Given the triteness of this standard, the scope of the standard has not received much judicial consideration in the context of POCA, aside from whether this standard, as opposed to proof beyond reasonable doubt, is required, given the penal nature of the proceedings. Given that which has already been discussed under Chapter 2.2, this issue will not be considered further.

5.6. The innocent owner defence

Once a preservation order has been granted and an application for forfeiture has been brought, Section 52 of POCA provides for a court to, when making a forfeiture order, exclude certain interests in the property from the forfeiture order. In other words, Section 52[262] provides for a forfeiture order to exclude certain portions of the property concerned.

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[261] P Schwikkard, S Van der Merwe, *Principles of Evidence*, JUTA, (2016), 4th ed., Pg. 627.
[262] of POCA.

This exclusion can occur when, in regard to forfeiture on the basis of 'proceeds' the Court finds on a balance of probabilities that the person applying for the exclusion:[263]

> (a) had acquired the interest concerned legally and for a consideration, the value of which is not significantly less than the value of that interest; and
>
> (b) where the applicant had acquired the interest concerned after the commencement of this Act, that he or she neither knew nor had reasonable grounds to suspect that the property in which the interest is held is the proceeds of unlawful activities.

Alternatively, this exclusion can occur when, in regard to forfeiture on the basis of 'instrumentality' the Court finds on a balance of probabilities that the person applying for the exclusion *inter alia*:[264]

> acquired the interest concerned legally, and
>
> neither knew nor had reasonable grounds to suspect that the property in which the interest is held is an instrumentality of an offence referred to in Schedule 1 or property associated with terrorist and related activities.

As is explained by Kruger in *Organised Crime and Proceeds of Crime Law in South Africa*[265] this provision provides some confusion as to who bears what onus. Kruger clarifies it as follows – the NDPP must make out its case for the forfeiture of all the property concerned on a balance of probabilities. If the respondent raises a defence that all of the property is not liable to be forfeited, the NDPP bears the onus to rebut this defence. This is in accordance with Section 50 of POCA which set outs the jurisdictional requirements necessary for the making of a forfeiture order (and which requirements the NDPP is required to prove). However, once these jurisdictional requirements are satisfied by the NDPP making out its case, and a respondent

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[263] Section 52(2) of POCA.
[264] Section 52(2A) of POCA.
[265] A Kruger, *Organised Crime and Proceeds of Crime Law in South Africa*, Lexis Nexis, 2nd ed. 2013, pg. 147.

seeks to exclude certain interests in the property in terms of Section 52[266], the onus lies on that respondent to establish the requirements set out in Section 52[267].

Section 52[268] accordingly provides for what is, effectively, a counter-application, rather than a defence to forfeiture in the normal course. In the matter of *Van der Merwe*, a full court of the Western Cape High Court confirmed that Section 52[269] required a separate application to be brought by the respondent for an exclusion to be considered.[270]

In the matter of *Gerber*[271] the court had a slightly more progressive approach to its interpretation of this section. Schwartzman J, for the Witwatersrand Local Division was presented with a unique set of facts where the second respondent knew that the property was being used for an unlawful purpose by the first respondent. The court held as follows:[272]

> The second respondent's version that the applicant was unable to refute, and which it did not seek to test by way of a reference to oral evidence, was that she found herself in a position where she was powerless to prevent the first respondent from pursuing his unlawful conduct by using her property as an instrumentality for his unlawful conduct. This assertion is supported by Kaplan's report.
>
> To avoid a forfeiture, the second respondent cannot, on the facts, rely on either the innocent or ignorant owner defence. On the facts, the second respondent has, in the words of Kennedy J in the Austin decision, 'committed no wrong of any sort, intentional or negligent'. In its *obiter dictum* on this issue, the Supreme Court of Appeal, in paragraph [26] of it judgment in *Cook* (supra) suggested that a defendant should also be required to prove that his or her conduct was not 'acquiescent'. I do not, with the greatest respect, agree with the need to add this requirement. On the facts of the application, I find that an unrestricted application of Chapter 6 of POCA and, in particular, section 52(2A)(a) would result in the second respondent, who committed no wrong of any sort, intentional or negligent, being arbitrarily deprived of her property.
>
> If I am wrong in coming to the above conclusion and that it could reasonably be expected of the second respondent that she report the first respondent's conduct to the police, I am satisfied, on the basis of paragraph [9] of the Constitutional Court's judgment in *First National Bank v SARS* (*supra*) paragraph [24]) that having regard to all the facts of the matter it would not be appropriate to make

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[266] of POCA.
[267] *Ibid.*
[268] *Ibid.*
[269] *Ibid.*
[270] *National Director of Public Prosecutions v Van Der Merwe and Another* 2011 (2) SACR 188 (WCC) 197B and footnote 19.
[271] *National Director of Public Prosecutions v Gerber and another* [2007] 2 All SA 639 (W).
[272] *Ibid,* 648B-F.

> a forfeiture order that would leave the second respondent, her foster child and her elderly mother homeless.

Notwithstanding the fact that there was no Section 52[273] 'counter-application' in *Gerber*, the application for forfeiture was dismissed on the reasoning set out above. The reasoning in *Gerber* was progressive but has received little recognition. In the case of *Bobroff*[274] the court indicated that it was referred to *Gerber* in the context of a proportionality analysis.[275] *Gerber* was, however, decided on consideration of the factors in Section 52[276] and not a proportionality analysis.

Despite the *Gerber* decision, case law has largely leaned more on the stricter 'reverse-onus' approach adopted in *Van der Merwe*.[277] In an earlier decision, the Northern Cape High Court held that:[278]

> I am of the opinion that the respondents were saddled with the burden to prove on a balance of probabilities that they did not know, nor had reasonable grounds to believe, that the vehicle and the property (respectively) were being used as instrumentalities of the offence of dealing in or possession of dagga (see *Mohamed NO v National Director of Public Prosecutions* 2003 (1) SACR 286 (W) at 307b–c). In view of the fact that a respondent's knowledge, or lack thereof, would normally be something on which such a respondent would be in the best position to comment it makes sense that the burden of proof in this regard should not be upon the applicant for forfeiture and the next question to consider is whether any of the respondents have discharged this onus.

It is this interpretation which has dominated the application of POCA and the reasoning in *Gerber* appears to have fallen by the wayside. In the matter of *Mazibuko*,[279] the SCA put the respondent to prove on a balance of probabilities that that they neither knew nor had reasonable grounds to suspect that the farm was used as an instrumentality of an offence in terms of section 52(2A) of POCA. In *Mazibuko*, Mr Mazibuko was found to 'must have been aware that the

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[273] of POCA.
[274] *National Director of Public Prosecutions v Bobroff and another* 2020 (1) SACR 288 (GP).
[275] *Ibid,* 314.
[276] of POCA.
[277] *National Director of Public Prosecutions v Van Der Merwe and Another* 2011 (2) SACR 188 (WCC).
[278] *National Director of Public Prosecutions v Seleoane and others* [2003] 3 All SA 102 (NC) 114E-F.
[279] *Mazibuko v NDPP* [2009] 3 All SA 548 (SCA) 551C.

farm was being used for the manufacture of drugs.'[280] However, in the case of Mrs Mazibuko, it was 'not in dispute that Mrs Mazibuko was neither aware, nor had grounds to suspect, that the property was an instrumentality of an offence and that she fell within the provisions of the section.'[281] On that basis, the court excluded Mrs Mazibuko's interest in the property and ordered the *curator* to pay her half of the proceeds of the sale of the property.

There is a potential middle road between the *Gerber* reasoning and the approach adopted in *Van der Merwe* and *Seleoane*. Whilst POCA clearly requires a separate application to be brought for an exclusion of interest, the Court nevertheless possesses the power to exclude a parties interest, having regard to their state of culpability in the proportionality enquiry, without a counter-application being brought. This may have been the argument presented in *Bobroff* as discussed above, and such an argument is probably with merit.

[280] *Mazibuko v NDPP* [2009] 3 All SA 548 (SCA) 561C.
[281] *Ibid,* 561E.

6. Conclusion and closing remarks

Having considered the six themes discussed above and the Constitutional rights affected, the following summary can be made.

With regard to the definition of proceeds of unlawful activity, the courts have tried to avoided infringing the right against arbitrary deprivation of property by either claiming that property obtained unlawfully is not 'property' for purposes of Section 25 of the Constitution[282], or that the forfeiture thereof is not 'arbitrary'. The former approach is problematic. Property law is concerned with the principle of *in rem* and 'transfer' is the determinative factor as regard when property is owned or not.[283] As is explained by du Bois, 'The reason for the transfer, is strictly separated from the juristic act of transfer'.[284]

The argument that property derived with unlawful proceeds is therefore not 'property' for the purposes of section 25 of the Constitution is problematic. The argument that the forfeiture thereof is not arbitrary is, however, more credible, given that it is for the purposes of *inter alia* depriving criminals of their ill-gotten gains. At some point, however, one may find an engagement with whether asset forfeiture does have any substantive effect on deterring or curing incidences of crime and, if it does not, the issue of arbitrariness may require revisiting.

In regard to the definition of 'instrumentality' one key concern is the degree of the link between the commission of the offence and the property concerned. The greater the degree of separation, the greater the chances of, potentially, the forfeiture thereof becoming arbitrary and

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[282] Constitution of South Africa, 1996.
[283] See, for example, H Mostert (Ed), A Pope (Ed), *The Law of Property in South Africa*, Oxford University Press (2010), pg. 160.
[284] F Du Bois, *Wille's Principles of South African Law*, JUTA, (2016) 9th ed., pg. 520.

constituting an infringement of section 25 of the Constitution. These concerns have largely been cured by the Court's introduction of the self-help tool of the proportionality enquiry.

The proportionality enquiry has become an important and well-regarded principle in South Africa's asset forfeiture law, having been imported from the United States of America. Despite not being accounted for expressly in POCA, the proportionality enquiry is an important guard against potential infringement of various rights including, that against arbitrary deprivation of property and the paramountcy of the child principle. The proportionality enquiry thus provides a tool for the court to exercise its discretion in granting forfeiture orders so as to avoid infringing Constitutional rights. In this regard, South African Courts have done well to keep POCA Constitutionally sound.

South African Courts have, however, with respect, been less astute to keeping POCA constitutionally sound in regard to the *ex parte* procedure, the onus' of proof and the innocent owner defence.

In regard to the *ex parte* procedure, because of the nature of POCA proceedings which are often voluminous, courts are put in the position where the NDPP, as a default, moves for an application *ex parte*, when doing so is not entirely necessary. The Court is placed in the position where it accepts the NDPP's case on its word and, often this can lead to unfair results. At the same time, Courts have become weary to entertain reconsideration applications brought on the basis of technical irregularities in regard to the *ex parte* procedure and this is started to result in a problematic scenario. Respectfully, the NDPP should only proceed *ex parte* when it is necessary to do so. Giving respondents the opportunity to respond to applications for preservation does not necessary mean the respondent will respond – and if they do unreasonably, appropriate costs orders should follow.

What is now occurring, however, is *en masse* applications for preservation *ex parte* and this practice is probably unfair and would constitutes an infringement of the right to a fair public hearing found at Section 34 of the Constitution.[285] Of course, whether that limitation is justified has to be determined on a case by case basis. Where the *ex parte* procedure is justified, the limitation is probably also justified. However, where the *ex parte* procedure is unnecessary, the limitation is probably not justified.

In regard to the onus of proof, given that asset forfeiture proceedings are generally done on paper, in motion proceedings, the duty of the NDPP to satisfy the necessary jurisdictional requirements to make out its case is at risk of being confused with the normal rules of motion procedure for the resolution of disputes. Whether or not a preservation order or a forfeiture order is sought, courts should be concerned with whether 'reasonable grounds' or 'balance of probability' is established.

In regard to the innocent owner defence, courts should be more liberal in their approach to Section 52.[286] The *Gerber* inspired middle-road proposed, which blurs the line between an application for exclusion and a proportionality enquiry would do well to ensure that property is not forfeited arbitrarily.

POCA's use has become broadly accepted and its provisions applied in a more rigid fashion to the detriment of the respondents. When POCA was first enacted, it was stressed that POCA's provisions were quite draconian and given the state of asset forfeiture in, for example, the United States of America, courts should be careful to ensure that the application of POCA was constitutionally sound. Whilst POCA was still new law, courts were astute to this caution and

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[285] Constitution of South Africa, 1996.
[286] of POCA.

were critical in applying its provisions and trying to apply those parts of POCA which potentially limited rights in a restrictive manner. As time has gone by, however, POCA's application has taken a more practical approach which has resulted in a broad and less restrictive approach.

If courts continue to apply POCA without ensuring its restrictive interpretation, the potential for POCA's application to become constitutionally inconsistent is likely. What has been argued above is that courts are not consistently applying POCA to ensure that its application is constitutional. Further attention and regard must be had to ensure that the application of POCA is constitutional, notwithstanding the broad acceptance that the text of POCA is constitutional.

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