

THE CONSTITUTIONALITY OF FORFEITURE OF PROPERTY

Submitted in fulfillment of the requirements for the degree *Magister
Legum* at the North-West University, Potchefstroom Campus

Submitted by

M Fourie

11005335

Study leader: Prof GJ Pienaar

November 2008

ACKNOWLEDGEMENTS

This research would not have been possible without the support and professional guidance of the following individuals and institutions, to whom I owe a sincere debt of gratitude:

Prof Gerrit Pienaar

My study leader and mentor, who guided me throughout this study with the utmost professionalism, patience and enthusiasm. This study would not have been completed without his knowledge of and insight into all aspects of South African law, which were indispensable to this research.

National Research Foundation

The financial support by the NRF is gratefully acknowledged. Any opinion, findings and conclusions or recommendations expressed in this dissertation are those of the author and therefore the NRF does not accept any liability in regard thereto.

Faculty of Law, North-West University

I am grateful to all the personnel and staff, who were always willing to assist me throughout this study.

Prof AJ Van der Walt

The University of Stellenbosch is thanked for their financial support and the opportunity offered to visit and participate in a research seminar held in September 2008.

Me Christine Bronkhorst

Information specialist at the Ferdinand Postma Library, North-West University, who assisted me promptly in all of my research enquiries.

My husband, children, family and friends

I will ever be grateful for their unparalleled belief in me, their support, understanding, love and care.

TABLE OF CONTENTS

Afrikaanse opsomming	i
List of abbreviations	ii
1 Introduction	1
1.1 Background	1
1.2 Purpose of the study	3
1.3 Structure of the study	3
2 The constitutional right to property	5
2.1 Introduction	5
2.1.1 <i>The meaning of “property”</i>	5
2.1.2 <i>Property rights and protection under private law distinguished from constitutional property rights</i>	6
2.1.3 <i>Loss of ownership</i>	8
2.2 The property clause: Section 25 of the Constitution	9
2.2.1 <i>The structure of a constitutional enquiry</i>	10
2.2.2 <i>The nature and scope of constitutional property</i>	12
2.3 Infringements on the right to property	14
2.3.1 <i>Section 25(1) and the deprivation of property</i>	14
2.3.1.1 <i>Formal requirements</i>	16
2.3.2 <i>Section 25(2) and the expropriation of property</i>	19
2.4 The FNB decision	20
2.4.1 <i>Factual background</i>	20
2.4.2 <i>Constitutional challenge against the test for arbitrariness</i>	21
2.4.2.1 <i>Sufficient reason</i>	22
2.4.2.2 <i>Application to the facts in FNB</i>	23
2.4.2.3 <i>Possible shortcomings and criticism</i>	24
2.4.3 <i>Significant differences between the Harksen and FNB decisions</i>	25
2.4.4 <i>Test for arbitrariness compared to the Mkontwana decision</i>	26

	2.4.4.1	Deprivation of property	27
	2.4.4.2	Arbitrary deprivation and sufficient reason	27
	2.4.4	<i>Criticism</i>	28
2.5		<i>Deprivation of immovable property</i>	29
	2.5.1	<i>The relationship between sections 25(1) and 26(3): the Port Elizabeth decision</i>	29
	2.5.2	<i>The relationship between sections 25(1) and 26(3): the Modderklip decision</i>	31
2.6		<i>Concluding remarks</i>	33
3		Forfeiture of property	36
	3.1	<i>Introduction</i>	36
	3.2	<i>The classification and aim of punishment in terms of Criminal law</i>	37
	3.2.1	<i>Aims of punishment</i>	39
	3.2.2	<i>Classification of theories of punishment</i>	39
	3.2.2.1	Absolute or retributive theory	39
	3.2.2.2	Relative theory	40
	3.2.3	<i>The principle of legality</i>	42
	3.3	<i>The development and aim of forfeiture legislation in South Africa</i>	44
	3.3.1	<i>Background</i>	44
	3.3.2	<i>The importance of forfeiture</i>	46
	3.4	<i>The Prevention of Organised Crime Act 21 of 1998</i>	48
	3.4.1	<i>History and background of POCA</i>	48
	3.4.2	<i>Organised crime defined</i>	50
	3.4.3	<i>Preamble and purpose of POCA</i>	52
	3.4.4	<i>Focus and scope of POCA</i>	53
	3.4.4.1	Racketeering activities: Chapter 2	54
	3.4.4.2	Proceeds of unlawful activities: Chapter 3	55
	3.4.4.3	Criminal gang activities: Chapter 4	57
	3.4.4.4	Offences listed in Schedule I	59
	3.4.4.5	The Asset Forfeiture Unit	61

3.5	Criminal confiscation (in personam): Chapter 5 of POCA	62
3.5.1	<i>Restraint orders</i>	63
3.5.2	<i>Confiscation orders</i>	66
3.6	Civil forfeiture (in rem): Chapter 6 of POCA	69
3.6.1	<i>Preservation of property orders</i>	70
3.6.2	<i>Instrumentalities of the offence</i>	72
3.7	Assessment of POCA and punishment	77
3.8	Concluding remarks	81
4	The constitutionality of forfeiture of property	83
4.1	Introduction	83
4.2	Arbitrary deprivation of property	85
4.3	Proportionality	87
4.3.1	<i>The standard of proportionality applied in the Prophet decision</i>	88
4.3.2	<i>The standard of proportionality applied in the Mohunram decision</i>	89
4.4	A critical analysis of the Courts' interpretation of "instrumentality and proportionality" in cases of individual wrongdoing	92
4.4.1	<i>Instrumentality of offences listed under the Liquor Act 27 of 1989</i>	94
4.4.2	<i>Instrumentality of forfeiture of motor vehicles in contravention of the National Road Traffic Act 93 of 1996</i>	96
4.4.2.1	<i>The Ex Parte NDPP in re Preservation Orders – decision</i>	97
4.4.2.2	<i>The Van Staden – decision</i>	98
4.4.2.3	<i>The Vermaak – decision</i>	101
4.4.2.4	<i>The Kleinbooi – decision</i>	103
4.4.3	<i>Illegal trade in abalone in contravention of the Marine Living Resources Act 18 of 1998</i>	105
4.5	The rule against double jeopardy	107
4.6	The right to a fair trial	110

4.7	<i>Protection of innocent owners and third parties against forfeiture of property</i>	114
4.7.1	<i>Protection and Chapter 5 of POCA</i>	114
4.7.2	<i>Protection and Chapter 6 of POCA</i>	115
4.7.2.1	The “innocent owner” defence	116
4.7.2.2	The “innocent owner” defence and spouses married in community of property	119
4.7.3	<i>Children as victims of crime and their constitutional rights</i>	120
4.8	<i>Concluding remarks</i>	125
5	Conclusions and recommendations	129
5.1	<i>The constitutional right to property</i>	129
5.2	<i>The application of POCA and forfeiture of property</i>	130
5.3	<i>The constitutionality of forfeiture of property</i>	132
5.4	<i>Final remarks and recommendations</i>	
6	Bibliography	137
6.1	<i>Books</i>	137
6.2	<i>Case law</i>	139
6.3	<i>Internet</i>	146
6.4	<i>Journal articles</i>	149
6.5	<i>Legislation</i>	156
6.6	<i>Newspaper reports</i>	157
6.7	<i>Thesis and dissertations</i>	158

Afrikaanse opsomming

Die hoeksteen van 'n oop en demokratiese samelewing is verskans in die Handves van Menseregte, gebaseer op menswaardigheid, gelyke beskerming en vryheid. 'n Verpligting word op die staat geplaas om dienooreenkomstig hierdie regte te respekteer, beskerm en te bevorder. Die eiendomsklousule word beskou as een van die belangrikste fundamentele regte wat beskerming geniet. Artikel 25(1) van die *Grondwet van die Republiek van Suid Afrika, 1996* (hierna verwys as die *Grondwet*) bepaal dat niemand mag, behalwe ingevolge 'n algemene regsvoorskrif, van eiendom ontnem word nie. Vervolgens bepaal dit ook dat geen regsvoorskrif arbitrêre ontneming van eiendom mag veroorloof nie. 'n Eienaar se reg op eiendom is egter nie absoluut nie en kan beperk word deur daargestelde wetgewing wat inmenging vanaf staatsowerhede noodsaak en regverdig. Daar rus dus 'n verpligting op wetsgehoorsame eienaars en besitters van eiendom in 'n konstitusionele staat om hulle eiendom op 'n verantwoordelike wyse te bestuur en te beheer, en word dienooreenkomstig ontmoedig om dit nie vir kriminele doeleindes aan te wend nie.

Die *Wet op die Voorkoming van Georganiseerde Misdad* 121 van 1998 vorm die basis van 'n program van die Suid Afrikaanse regering om die kommerwekkende toename in georganiseerde misdaad, geldwassery en die aktiwiteite van kriminele sindikate aan te spreek. Gemeenregtelike en ander strafregtelike maatstawwe blyk 'n onvoldoende afskrikmiddel te wees om hierdie probleem suksesvol te bekamp. Die hoë-profiel misdaadsindikate en oortreders slaag dikwels daarin om die onwettige opbrengste van misdaad te verskuil, selfs al word hulle voor die gereg gedaag en skuldig bevind. Hierdie besonder ernstige verskynsel word as 'n bedreiging beskou vir ons land se demokrasie en ekonomie. Die Wet maak voorsiening vir besondere hoë boetes, asook beslagleggings- en verbeurdverklaringsbevele van enige eiendom wat "'n middel tot 'n misdaad" daarstel, insluitende enige voordele en bates wat bekom is deur onwettige aktiwiteite. Hierdie studie noodsaak 'n kritiese analise en ondersoek na die grondwetlikheid van hierdie bevele wat moontlik aanleiding kan gee tot die aantasting van sekere gevestigde konstitusionele regte en veral die reg om nie arbitrêr van eiendom ontnem te word nie. As gevolg van die sivielregterlike aard van hierdie bevele kan ook geargumenteer word dat die betrokke oortreder se grondwetlike reg op 'n regverdige en billike verhoor geskend kan word. Van besondere belang is Hoofstuk 6 wat bepaal dat 'n skuldigbevinding nie 'n voorvereiste is vir die bekragtiging van so 'n bevel nie.

Die vraag ontstaan dan ook of die interpretasie en toepassing van die Wet deur die houe in gevalle waar individue betrokke was by misdaad wat nie direk verband hou met georganiseerde misdaad nie, nie ook neerkom op 'n skending van die eiendomsklousule nie. In hierdie gevalle was daar dan ook wel gepaste alternatiewe strafregterlike maatreëls beskikbaar wat as voldoende afskrikmiddel kon dien. Klem word ook gelê op die impak van sulke bevele op onskuldige eienaars, derdes en kinders, en die beskerming wat die Wet bied. Alhoewel deurgaans beklemtoon word dat die strawwe soos vervat in die Wet nie gemik is op die eienaar nie maar op die (skuldige) eiendom wat gebruik is in misdaad, bestaan die moontlikheid dat hierdie bevele neerkom op buitensporige en selfs dubbele strafmaatreëls wat uiteraard grondwetlik aanvegbaar kan wees.

Abbreviations

AFU	:	Asset Forfeiture Unit
CARA	:	Criminal Assets Recovery Account
CEA	:	<i>Customs and Excise Act 91 of 1964</i>
ESR	:	<i>Economic and Social Rights in South Africa</i>
FICA	:	<i>Financial Intelligence Centre Act 38 of 2001</i>
ISS	:	<i>Institute for Security Studies</i>
ISSM	:	<i>Institute for Security Studies Monographs</i>
MLRA	:	<i>Marine Living and Resources Act 18 of 1998</i>
NDPP	:	National Director of Public Prosecutions
PIE	:	<i>Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 18 of 1998</i>
POCA	:	<i>Prevention of Organised Crime Act 121 of 1998</i>
RICO	:	<i>American Racketeer Influenced and Corrupt Organisations Act of 1970</i>
SACJ	:	<i>South African Journal of Criminal Justice</i>
SAJHR	:	<i>The South African Journal on Human Rights</i>
SALJ	:	<i>The South African Law Journal</i>
SAPL/R	:	<i>SA Public Law / Publikereg</i>
SARS	:	South African Revenue Services
STEP	:	<i>California Street Terrorism Enforcement and Prevention Act of 1988</i>
THRHR	:	<i>Tydskrif vir die Hedendaagse Romeins-Hollandse Reg</i>
TSAR	:	<i>Tydskrif vir die Suid Afrikaanse Reg</i>

1 Introduction

1.1 Background

The cornerstone of an open and democratic society is entrenched in the Bill of Rights, based on human dignity, equal protection and freedom. It obliges the state to respect, protect, promote and fulfil these rights.¹ One of these fundamentally protected rights is contained in the property clause, which consists of two equally important principles. Section 25(1) stipulates that no one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.² Ackerman J strongly emphasised in *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service*³ (hereafter *FNB*) that ownership of movable property, as well as ownership of land, lies at the heart of our constitutional concept of property, both in relation to the nature and object of the right involved. A deprivation of property will be arbitrary when the law does not provide sufficient reason for the deprivation or is procedurally unfair.⁴

Although ownership is regarded as the most comprehensive real right that an individual can have, the power and freedom of an owner to do with his property as he pleases is limited by the restrictions imposed thereupon by law.⁵ A just and equitable balance needs to be established between the protection of private property and the promotion of public interest, based on the premise that the Bill of Rights is not intended to isolate private property

1 S 7(1) and (2) of the *Constitution of the Republic of South Africa*, 1996 (hereafter the *Constitution*). S 7(3) stipulates that these rights are subject to the limitation clause provided for under s 36, which stipulates that the courts must interpret legislation in the spirit, purport and objects of the Bill of Rights.

2 The formal requirements in this regard will be discussed at par 2.3.1.1 below.

3 2002 4 SA 768 (CC) par [51]. A detailed discussion of *FNB* will be provided in par 2.4 below.

4 Par [100].

5 *Gien v Gien* 1979 2 SA 1113 (T) at 1120C-D.

from state interference.⁶ The proportionality standard in order for a deprivation to be valid was depicted in *FNB*. The Constitutional Court held that an appropriate relationship must exist between means and ends, the sacrifice the individual is asked to make, and the public purpose it is intended to serve.⁷ As was pointed out by Van der Walt,⁸ one's right to property is not absolute, and the property of those who were actually involved in crime may be permanently lost to the state through legislative forfeiture procedures.

The *Prevention of Organised Crime Act*⁹ (hereafter *POCA*) was promulgated as a serious attempt by the government to combat the rapid growth of organised crime, money laundering and criminal gang activities which posed a serious threat to South Africa's democratic dispensation. Furthermore, it is common cause that conventional criminal penalties are inadequate to serve the purpose of deterrence when crime syndicates are able to retain and conceal their illicit gains derived from organised crime, even when brought to justice.¹⁰

Two mechanisms are implemented by *POCA* in order to ensure that the property used in the commission of an offence and the proceeds thereof will be forfeited to the state. Chapter 5 of *POCA* provides for the forfeiture of assets and benefits obtained from criminal activities after the conviction of the offender, and Chapter 6 for the civil forfeiture of the benefits of and property used in the commission of the offence, without prior conviction.¹¹

6 Van der Walt *Constitutional Property* 33, *Mohunram v National Director of Public Prosecutions* 2007 2 SACR 145 (CC) par [60]. Van Heerden J in this decision reiterated that a person's right to property imposes a duty to use and manage it in a responsible manner.

7 Par [98].

8 Van der Walt *Constitutional Property* 195.

9 121 of 1998.

10 *National Director of Public Prosecutions v Mohamed* 2002 4 SA 843 (CC) par [15].

11 The requirements and distinguishing principles, as well as the afforded protection provided for in *POCA*, will be analysed in par 3.5, 3.6, 4.7.1 and 4.7.2 respectively.

1.2 Purpose of the study

It is a major concern that an unrestrained application of *POCA* may result in excessive and unreasonable consequences for people whose rights were adversely affected by the forfeiture of instrumentalities and the proceeds of crime. This is specifically important in the application of Chapter 6, where immovable or residential property is forfeited to the state without a conviction, once it has been established that the property was an instrumentality of the offence. These deterrent measures embodied in *POCA*, which is aimed at combating *inter alia* organised crime, need to be critically analysed, as they may violate well-established constitutional rights such as the right not be arbitrary deprived of property, and not to be subjected to excessive punishment.¹² Children, who are often victims of their parent's or family's criminal conduct, are particularly vulnerable in forfeiture and confiscation orders. The constitutionality of forfeiture procedures necessitates a decisive analysis of the courts' interpretation of the term "organised crime" and the instrumentalities and proportionality standards applicable to cases of individual wrongdoing. The forfeiture of property, without taking into consideration the available alternative criminal remedies in addressing these particular offences, which could have served the necessary deterrent purpose, needs to be critically evaluated.¹³

1.3 Structure of the study

The constitutional right to property in terms of section 25(1), the structure of a constitutional property enquiry and the test for arbitrariness will be the

12 *Mohunram v NDPP supra* n 6 par [120] and [122]; *Prophet v National Director of Public Prosecutions* 2007 BCLR 140 (CC) par [61], *National Director of Public Prosecutions v Gerber* 2006 JOL 18856 (W) par 24. The court held in *NDPP v Mohamed supra* n 10 at par [20] and [21] that the *audi alteram partem* principle lies at the heart of the rule of law.

13 An in-depth discussion and analysis will address this controversy at par 4.3 and 4.4. Par 4.4 will focus specifically on cases of individual wrongdoing.

focus of Chapter Two. The proportionality standard according to the *dictum* of the Constitutional Court in *FNB* will be compared with other leading judgments, as well as the interrelatedness of section 25(1) and the right to housing provided for in section 26 of the *Constitution*.

The introductory paragraphs of Chapter Three will briefly outline the purpose and aim of punishment in terms of criminal law, which is closely related to the objectives and scope of forfeiture procedures under *POCA*. The history and importance of forfeiture legislation will also be addressed with emphasis on the Preamble of *POCA* and the listed offences, as well as the meaning of “proceeds of unlawful activities.” A clear distinction between Chapters 5 and 6 of *POCA* needs attention, as the measures described in them may violate the right not to be arbitrary deprived of property and the right to a fair trial, protected under sections 34 and 35(3)(h) of the *Constitution*, which will also be addressed in Chapter Four.

In Chapter Four the constitutionality of the forfeiture of property will be critically evaluated. The interpretation and application of the provisions of *POCA* in applicable case law are of paramount importance in establishing whether or not these powerful measures infringe certain protected constitutional rights, for example excessive punishment in violation of section 12(1)(e) of the *Constitution* and the rule against double jeopardy. Special attention will be given to cases of individual wrongdoing, innocent owners and third parties whose rights were detrimentally affected by forfeiture procedures. Emphasis will predominantly be placed on the right not to be arbitrary deprived of property, which deprivation could result in leaving children, whose rights are fiercely protected under section 28 of the *Constitution*, as well as other dependants, without a home and proper care.

2 The constitutional right to property

2.1 Introduction

The introductory remarks of this chapter will briefly outline the importance of the applicable provisions provided for in the Bill of Rights. Particular emphasis will be placed on the fundamentally protected property rights afforded by section 25 of the *Constitution of the Republic of South Africa, 1996* (hereafter the *Constitution*). The cornerstone of an open and democratic society is entrenched in the Bill of Rights in terms of section 7(1) based on human dignity, equal protection and freedom. The *Grundnorm*¹ is furthermore derived from the provisions of sections 8,² 9,³ 36⁴ and 39.⁵

2.1.1 The meaning of “property”

Defining the meaning of the word “property”, in particular the attempt to supply a comprehensive, all-inclusive definition of the word in legal commerce, is difficult and almost impossible. The exact meaning of the term will vary depending on the context in which it is used. Three concepts are distinguished in this regard: firstly, the right of ownership in a legal object, secondly the rights relating to the legal object, which is classified as “things” when the legal object is tangible, and thirdly the

1 Robinson JA “The Evolution of the Concept of Marriage in South Africa: The Influence of the Bill of Rights in 1994” 2005 *Obiter* 492. The implacable protection and application of these rights was eminent in *S v Makwanyane* 1995 3 SA 391 (CC) par [423B].

2 The application clause, which stipulates that “the Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state.”

3 The equality clause, which stipulates in s 9(1) that “everyone is equal before the law and has the right to equal protection and benefit of the law.” S 9(2) provides that “equality includes the full and equal enjoyment of all rights and freedoms.” The promotion of equality may be achieved by legislative and other measures designed to protect or advance persons or categories of persons disadvantaged by unfair discrimination.

4 The rights in the Bill of Rights may be limited by law of general application, provided that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.

5 The interpretation clause, which obliges the courts to interpret legislation in the spirit, purport and objects of the Bill of Rights.

legal relationships which qualify for constitutional protection even if they do not necessarily fall under the first two categories.⁶ In *First National Bank of SA t/a Wesbank v Commissioner, South African Revenue Services*⁷ (hereafter *FNB*) Ackermann J⁸ stated that:

ownership of a corporeal moveable must – as ownership of land – lie at the heart of our constitutional concept of property both as regards the nature of the right involved as well as the objects of the right.

The Constitutional Court held that ownership in terms of an instalment sale agreement qualifies as a constitutionally protected property right but omitted to formulate a definition of property. The court stated that it would be judicially unwise at this early stage of constitutional development to prescribe a *numerous clauses* of objects of property that should be constitutionally protected.⁹

Property law, in a narrow context, is defined and constitutes¹⁰

that area of law dealing with the acquisition, nature, content, transfer and loss of patrimonial rights and relationships to things. The object of these patrimonial rights is either things or personal rights and real rights serving as the object of a real right.

According to Van der Walt¹¹ “property” has a broader meaning and constitutes “rights in property” which are vested in the claimant and have patrimonial value. A vested right is a right that has accrued to the holder, either in terms of common law principles, or by a statutory right.¹²

2.1.2 Property rights and protection under private law distinguished from constitutional property rights

6 Badenhorst, Pienaar and Mostert *Silberberg's Property* 1.

7 2002 4 SA 768 (CC). See also Roux and Davis “Property” 20-18 in this regard. A detailed discussion of *FNB* follows below at par 2.4.

8 Par [51], Badenhorst, Pienaar and Mostert *Silberberg's Property* 12.

9 Par [54], Badenhorst, Pienaar and Mostert *Silberberg's Property* 533.

10 Badenhorst, Pienaar and Mostert *Silberberg's Property* 22.

11 Currie and de Waal *Bill of Rights* 538 n 18.

12 Badenhorst, Pienaar and Mostert *Silberberg's Property* 11.

Traditionally property, and in particular ownership, was envisaged as an absolute or unlimited right in private law, and may only be restricted by legislative measures and regulatory action.¹³ Ownership is defined as follows by Spoelstra JA in *Gien v Gien*:¹⁴

The right of ownership is the most comprehensive real right that a person can have in respect of a thing...a person can, in respect of immoveable property, do with and on his property as he pleases. This apparently unfettered freedom is, however, a half-truth. This absolute power of an owner is limited by the restrictions imposed thereupon by law. [My translation].

Property as a constitutional right constitutes three significant differences from the property concept in private law:¹⁵

- (a) The objects of property rights in the private law context are restricted to corporeals, and incorporeal objects are recognised only as exceptions.¹⁶ Constitutional property, on the other hand, not only includes both corporeal and incorporeal objects, but also interests which have never been recognised as property before.¹⁷ In terms of section 25(4)(b) of the *Constitution* “property is not limited land.”
- (b) In private law, property as a right means ownership whilst all other rights are derivative limited real rights or personal rights.

13 Van der Walt *Constitutional Property* 109-110 n 187 where the exclusivity principle of ownership and the absolute right of an owner in private law are only temporarily limited in exceptional circumstances. The legitimacy of these limitations is subject to the owner’s consent “through contract or the ballot.”

14 1979 2 SA 1113 (T) at 1120C-D. This was also reiterated by the Constitutional Court in *Van der Merwe v Taylor* 2008 1 SA 1 (CC) par [26].

15 Van der Walt AJ “Roman law, fundamental rights, and land reform in Southern Africa” 1998 *THRHR* 414.

16 See van der Walt *Constitutional Property* 77 n 61, Van der Walt *Property Clause* 53 n 84 where the relevance of “eiendom” in the Afrikaans text of s 25 for “property” may lead to confusion. “Eiendom” is Germanic in origin and can either mean the object of property rights or ownership. Constitutional property in terms of s 25 is a much broader and easier concept to understand than the narrower private law “ownership” or “things.”

17 Currie and de Waal *Bill of Rights* 539. Constitutional property protection should therefore not be restricted to real rights because the wealth of a person no longer depends on the ownership of land, or of other physical assets. Personal rights, such as shares, pension funds, life insurance policies and intellectual property rights are not real rights, and if no constitutional protection is rendered, the state will consequently have unlimited power to confiscate these assets. See also in this regard Currie and de Waal *Constitutional and Administrative Law* 391.

- (c) Traditionally property rights, and in particular ownership, are referred to as unrestricted rights, contrary to the constitutional context where property is a fundamentally restricted right, provided that just and equitable compensation be awarded in cases of expropriation, which not necessarily relates to the market value of the property.

Van der Walt¹⁸ emphasised the importance of deviating from “a static...private law conceptualistic view” to a “dynamic, typically public-law” conception of property.

Property, as a constitutional right, which is neither recognised nor protected by private law may be protected under the property clause of the *Constitution*, provided that the protection so afforded falls within the ambit of the Bill of Rights. An equitable balance must exist between the protection of existing property rights and the public interest that needs to be protected, taking due cognisance of the values of an open and democratic society based on human dignity, equality and freedom. The limitation of constitutional property rights must therefore be justifiable and reasonable in accordance with the values enshrined in the *Constitution*.¹⁹

2.1.3 Loss of ownership

In general, owners cannot be deprived of their property against their will, and the maxim *nemo plus iuris transferre potest quam ipse habet* applies. This means that “no-one can transfer more rights to another than he himself or herself has.”²⁰

Apart from the situation where ownership is lost when the owner intentionally abandons his property, statutory provisions may also result

18 Van der Walt *Property Clause* 11, Roux “Property” 46-15.

19 Van der Walt *Constitutional Property* 76-77.

20 Badenhorst, Pienaar and Mostert *Silberberg's Property* 241 n 7.

in the loss of ownership, for example in the case of expropriation, where ownership of property passes to the state.²¹ The same applies when tainted property is forfeited to the state, where the owner was involved in the commission of a criminal offence. The purpose of forfeiture is to strip the offender of the proceeds of crime rather than to enrich the state.²²

2.2 The property clause: Section 25 of the Constitution

The inclusion of a constitutional right to property or a property clause in both the interim and final *Constitutions* of South Africa caused a great deal of controversy and debate amongst academics and politicians. The main concern was based on the assumption that the constitutionalisation of property could isolate and keep in place the existing protection of white South Africans' property rights as during the apartheid regime, and thereby jeopardise and frustrate proposed land reform measures designed to redress these disparities.²³

According to Van der Walt²⁴ one of the characteristics of land reform in the constitutional dispensation of 1996 is to dispose of the "paradigmatic primacy and inviolability of existing (mostly 'white') land rights" and to establish a "new, constitutional balance between the protection of existing rights and the promotion of land reform."

Section 25 of the *Constitution* reads as follows:

21 Badenhorst, Pienaar and Mostert *Silberberg's Property* 271. A distinction can therefore be drawn between transfer of ownership, where ownership of a thing is lost if it is transferred to another person in terms of a real agreement by delivery, and loss of ownership through operation of law. In this case the owner loses control over the thing without necessarily having the intention to abandon ownership. See in this regard Van der Walt and Pienaar *Law of Property* 184-185.

22 Badenhorst, Pienaar and Mostert *Silberberg's Property* 271-272. See also in this regard *National Director of Public Prosecutions v Rebutzi* 2002 2 SA 38 (SCA) par 11.

23 Van der Walt AJ "An overview of the developments in constitutional property law since the introduction of the property clause in 1993" 2004 *SAPL/P* 47, Currie and de Waal *Bill of Rights* 352.

24 Van der Walt 1998 *THRHR* 409.

- (1) No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.
- (2) Property may be expropriated only in terms of law of general application-
 - (a) for a public purpose or in the public interest; and
 - (b) subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court.

The dual purpose of the property clause is to protect existing property rights on the one hand and on the other hand to correct the historical imbalances of the past through legislative measures.²⁵

Van Heerden AJ stated in *Mohunram v National Director of Public Prosecutions*²⁶ that one's right to property imposes a duty on the owner to use and manage it in a responsible manner. In support the court quoted Van der Walt:²⁷

...the aim of section 25 is to establish a just and equitable balance between the protection of private property and the promotion of public interest...And can be seen as a property guarantee without necessarily falling foul of the typically libertarian view that the main function of the Bill of Rights is to insulate private property from state interference...and also without making the error of opening the door on unjustified and purely obstructive judicial activism.

The "proportionate balance" between the protection of private property rights and the promotion of public interest, which encompasses the aim and purpose of the constitutional property clause, was confirmed in 2002 by the Constitutional Court in *FNB*.²⁸

2.2.1 *The structure of a constitutional property enquiry*

In fundamental rights adjudication, when enquiring into the constitutional validity of a statute that limits a fundamental right, the Constitutional

25 Currie and de Waal *Bill of Rights* 533.

26 2007 2 SACR 145 (CC) par [60].

27 Van der Walt *Constitutional Property* 33.

28 *Supra* n 7 par [50], Roux "Property" 46-2.

Court, in its first few decisions,²⁹ followed the Canadian “two stage” approach.³⁰ The first stage of a fundamental right enquiry, in which the applicants bear the onus of proof, should be to ascertain whether there has been an infringement of a constitutionally protected right in the Bill of Rights. The case proceeds to the second stage of the enquiry only when a positive finding is concluded in the first stage. In the second stage the party relying on the validity of the contested legislation bears the onus of proof in justifying the infringement³¹ in terms of the general limitations clause of the *Constitution*.³²

The “two-stage” approach, which was originally based on the *Canadian Charter of Rights and Freedoms*, does not particularly provide for the protection of property rights.³³ When it is assumed that this approach will also be followed in a section 25 dispute relating to constitutional property, the onus is on the applicants to prove during the first stage that a property right, of which protection is rendered by section 25, has been violated. In establishing a probable infringement, two questions suffice, namely if the property or interest qualifies for protection under section 25, and if an infringement of that property or interest took place. If this is successfully proven by the applicants the matter proceeds to the second stage. The onus then shifts to the state or the party relying on the validity of the impugned legislation to prove that the infringement is justified either in terms of section 25 or in terms of section 36 or both.³⁴ The application of the “two stage” approach to constitutional property

29 *S v Makwanyane* 1995 3 SA 391 (CC) par [100-102] at 435C-436A, *Ferreira v Levin*; *Vryhoek v Powell* 1996 1 SA 984 (CC) par [44] at 1012B.

30 *Supra* n 29; Roux and Davis “Property” 20-7; Badenhorst, Pienaar and Mostert *Silberberg’s Property* 528; Van der Walt *Property Clause* 28; Van der Walt *Constitutional Property* 53, Van der Walt AJ “The limits of constitutional property” 1997 *SAPL/R* 277.

31 *Supra* n 30.

32 S 36 stipulates that the rights in the Bill of Rights may be limited only in terms of law of general application provided that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.

33 Mostert and Badenhorst 2007 LexisNexis Butterworths, available at <http://www.bohss.co.za> [6 Nov 2008].

34 Van der Walt *Property Clause* 28; Van der Walt *Constitutional Property* 53, Van der Walt 1997 *SAPL/R* 277.

disputes was, however, amended by the Constitutional Court in the *FNB* decision and accordingly recapitulated into one single inquiry.³⁵

2.2.2 *The nature and scope of constitutional property*

Although constitutional property clauses vary in content, the following characteristics are in general recognised by different jurisdictions:³⁶

- (a) A constitutional property clause may be phrased as a positive guarantee of property, for example section 28(1) of the interim *Constitution*, which stipulates explicitly “that every person shall have the right to acquire and hold rights in property.”³⁷
- (b) A constitutional property clause may contain a negative guarantee. For instance, section 25(1) of the *Constitution* stipulates that nobody may be deprived of property except in terms of law of general application.
- (c) Constitutional property clauses in most cases provide for the limitation of property rights in the interest of the public; for example section 25(2) of the *Constitution*, which provides that property may be expropriated for a public purpose and against compensation.

The question arose as to whether the scope of section 25, which is negatively formulated, could be interpreted as a constitutional property guarantee.³⁸ Two objections against the draft of section 25 were rejected by the Constitutional Court in *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996*.³⁹ The first objection which raised concern was that a

35 Van der Walt *Constitutional Property* 54; Mostert and Badenhorst *supra* n 33, Badenhorst, Pienaar and Mostert *Silberberg's Property* 529. See the discussion on this aspect at par 2.4 below.

36 Van der Walt 1998 *THRHR* 411-412; Badenhorst, Pienaar and Mostert *Silberberg's Property* 532 n 99 and 127, Van der Walt *Property Clause* 30.

37 See also in this regard Mostert and Badenhorst *supra* n 33.

38 Van der Walt *Constitutional Property* 26.

39 1996 4 SA 744 (CC) par [70]-[75], Van der Walt 2004 *SAPL/R* 53-54.

positive formulation of property and an explicit guarantee of protection of the right to acquire, hold and dispose of property had not been provided for. The phraseology of section 25 therefore fundamentally differs from a positive property clause⁴⁰ which confers protection to the right to acquire, hold and dispose of property. The Constitutional Court acknowledged that neither a positive nor a negative formulation of the constitutional property clause can be described as a “universally recognised formulation.”⁴¹ The negative protection of property constitutes an “appropriate” description for sufficient constitutional protection of property. It is therefore not necessary for a property clause to be phrased in positive terms to be regarded as a property guarantee.⁴²

The second objection, which was also rejected by the court on the same grounds, pertained to the failure of the draft in expressly protecting intellectual property or mineral rights.⁴³ The court held that the fact that section 25 does not explicitly provide for constitutional protection of incorporeal property was not *per se* in contradiction of the Constitutional Principles in Schedule 4 of the interim *Constitution*.⁴⁴ Accordingly, “property can be institutionalised even in the absence of a clause expressly guaranteeing the existence of the right to property.”⁴⁵ The notion of “dephysicalization”⁴⁶ of property refers to incorporeal or intangible interests in property (which normally do not qualify as property in a private law context) with economic value. These interests in property should qualify for protection under the constitutional property clause as a result of the increasingly important growth in personal wealth and the

40 S 28(1) of the interim *Constitution*.

41 Par [72]. See also in this regard Van der Walt *Constitutional Property* 26-27; Badenhorst, Pienaar and Mostert *Silberberg's Property* 532 read with n 99, Van der Walt 1997 *SAPL/R* 299.

42 Van der Walt *Constitutional Property* 27.

43 Van der Walt *Constitutional Property* 86.

44 Roux “Property” 46-15. According to Roux, *ibid* n 4 the aim of the certification exercise was to test the 1996 *Constitution* against the Constitutional Principles which includes the principle that “all universally accepted fundamental rights” should be subject to constitutional protection.

45 Badenhorst, Pienaar and Mostert *Silberberg's Property* 535.

46 Van der Walt *Constitutional Property* 66.

need for security, both in private and commercial intercourse.⁴⁷

2.3 Infringements on the right to property

The fundamentally protected rights and freedoms in the Bill of Rights are not absolute or unrestricted, but are subject to certain limitations.⁴⁸ Once it is established that a particular property interest is eligible for protection under section 25, or has passed the “threshold test” in a constitutional enquiry, the applicable infringement needs to be identified prior to an investigation into the justifiable constitutional validity and requirements of that particular infringement.⁴⁹

Limitations with regards to property can take the form of either of the following two categories:⁵⁰

- (a) Deprivation of property in terms of section 25(1), which provides for a specific category of limitation of property, namely that deprivation may be justified only by law of general application, and no law may permit arbitrary deprivation.
- (b) Expropriation of property in terms of section 25(2), which provides for a specific form of deprivation, namely that property may be expropriated only in terms of law of general application, for a public purpose or in the interest of the public and subject to compensation.

2.3.1 Section 25(1) and the deprivation of property

47 Badenhorst, Pienaar and Mostert *Silberberg's Property* 532, Van der Walt *Constitutional Property* 66. Examples cited by Van der Walt include not only intellectual property rights such as copyright, patents and trade marks, but also commercial interests such as shares, the good will of companies, and debts.

48 Van der Walt *Property Clause* 72. S 7(3) of the *Constitution* stipulates that the rights in the Bill of Rights are subject to the limitations provided for in s 36, or elsewhere in the Bill.

49 Badenhorst, Pienaar and Mostert *Silberberg's Property* 540. The “threshold test” emanates from an enquiry as to whether a property interest qualifies as property and “hence crosses the threshold into realm of constitutional property protection,” at 531.

50 Van der Walt *Property Clause* 100.

The term “deprivation” of property may lead to confusion and could be interpreted as “the taking away of property.”⁵¹ The argument that a deprivation always constitutes complete removal of property rights was rejected by Ackermann J in *FNB* where he stated:⁵²

In a certain sense any interference with the use, enjoyment or exploitation of private property involves some deprivation in respect of the person having title or right to or in the property concerned.

Although a comprehensive definition of the term deprivation has not been formulated in case law, it is defined as⁵³

properly authorised and fairly imposed limitation on the use, enjoyment, exploitation or disposal of property for the sake of protecting and promoting public health and safety, normally without compensation.

Any enquiry relating to the constitutional validity of an infringement of property should always start with the general, all-embracing requirements of section 25(1).⁵⁴ The guidelines for use in such an investigation were construed by the Constitutional Court in *FNB*.⁵⁵

Examples of justifiable deprivations of property relate to public health matters and safety laws, land-use planning and the control of developments, building regulations and environmental conservation

51 Van der Walt *Constitutional Property* 121.

52 Par [57]. See also in this regard Du Plessis M and Penfold G “Bill of Rights Jurisprudence” 2005 *Annual Survey of SA Law* 68. Deprivation of property may, however, in certain circumstances be regarded as a complete removal of property rights; for example, where property is expropriated or forfeited to the state.

53 Van der Walt *Constitutional Property* 131, Badenhorst, Pienaar and Mostert *Silberberg’s Property* 544.

54 Van der Walt AJ “Striving for the better interpretation - a critical reflection on the Constitutional Court’s *Harksen* and *FNB* decisions on the property clause” 2004 *SALJ* 868.

55 Par [58]-[60] at 796I-797D, Van der Walt 2004 *SALJ* 868. S 25(1) involves all property and all deprivations and expropriations. If the deprivation amounts to an infringement of s 25 and is not justified in terms of s 36, the provision is unconstitutional and “that is the end of the matter.” If the deprivation passes scrutiny under s 25(1) the next step is to determine whether the deprivation amounts to expropriation and if so, it must pass scrutiny under s 25(2)(a) and provide for compensation under s 25(2)(b). Of importance is the court’s finding that “the starting point for constitutional analysis, when considering any challenge under s 25 for the infringement of property rights, must be s 25(1).” See also the discussion in this regard at par 2.4.2 below.

laws. The owner's free use, enjoyment and disposal of property are normally only temporarily restricted by these regulations, with the inevitable consequence of a diminution of the value or profitability of the property.⁵⁶

2.3.1.1 Formal requirements

Section 25(1) consists of two requirements, namely: deprivation must take place in terms of law of general application, and no law may permit arbitrary deprivation. According to Van der Walt⁵⁷ these two explicit requirements are "threshold requirements" and non-compliance will inevitably result in the invalidity of the limitation, irrespective of the intended purpose that it needs to serve or of the right that has been affected.

(a) Law of general application

This requirement not only appears twice in the property clause in terms of section 25(1) and (2), but also in section 36(1) of the *Constitution*.⁵⁸ Law of general application means more than just a valid law, and any law permitting deprivation of property must be "generally applicable, non-arbitrary, specific and accessible."⁵⁹ Law of general application includes statutes and legislative measures, as well as common and customary law, duly promulgated by the democratically elected legislature as provided for in the *Constitution*.⁶⁰ The intended purpose of this requirement is to protect from deprivation of their property individuals

56 Van der Walt *Constitutional Property* 124. An owner's free use and enjoyment of his property may however be permanently lost through forfeiture procedures where the property was used in the commission of an offence. See in this regard *Mohunram v NDPP supra* n 26 par [58].

57 Van der Walt *Constitutional Property* 137.

58 Badenhorst, Pienaar and Mostert *Silberberg's Property* 545. S 36(1) stipulates that the rights in the Bill of Rights may be limited only in terms of law of general application.

59 Van der Walt *Property Clause* 106, Van der Walt *Constitutional Property* 144.

60 Badenhorst, Pienaar and Mostert *Silberberg's Property* 545.

who are singled out by law as a particular group “for discriminatory treatment.”⁶¹

This requirement will most probably not apply to state action in instances where deprivation of a person’s property took place by administrative action without being authorised by law of general application. Unjustified state action is reviewable under the *Promotion of Administrative Justice Act*⁶² as well as the right to just administrative action as provided for in section 33 of the *Constitution*.

(b) Arbitrary deprivation of property

The second requirement in terms of section 25(1) which provides that “no law may permit arbitrary deprivation of property” is contemplated to afford more protection to private property holders against the power of the state to regulate property than section 28(2) of the interim *Constitution*.⁶³ This is attributable to the tenet that a deprivation will be unconstitutional even when authorised by law of general application.⁶⁴

Two observations emanate from the interpretation of the term “arbitrary,” which can cause problems.⁶⁵ Firstly, according to one view, the provision presents a “thin,” low level of scrutiny for state deprivations of property. This requires that regulatory deprivations must be rationally connected to a legitimate governmental purpose, without a substantive enquiry into the proportionality between means and ends.⁶⁶ This view reflects the opinion that a law authorising deprivation is the only substantive ground for constitutional scrutiny. Prior to the *FNB* decision the “means-end” and

61 Roux “Property” 46-21, Badenhorst, Pienaar and Mostert *Silberberg’s Property* 545.

62 3 of 2000. See also in this regard Roux “Property” 46-21, *Armbruster v Minister of Finance* 2007 12 BCLR 1283 par [61].

63 Currie and de Waal *Bill of Rights* 542-543. S 28(2) required only that deprivations must be “in accordance with a law.”

64 Currie and de Waal *Bill of Rights* 542, Currie and de Waal *Constitutional and Administrative Law* 394.

65 Van der Walt *Constitutional Property* 145, Van der Walt 2004 *SAPL/R* 62.

66 Van der Walt *Constitutional Property* 145.

“rational connection” test for non-arbitrariness was applied by the Constitutional Court in *S v Lawrence*; *S v Negal*; *S v Solberg*⁶⁷ as equivalent to the rationality requirement in terms of section 9(1) of the *Constitution*. This was consequently rejected in *FNB* where it was held that the validity of a deprivation depends on “an appropriate relationship between means and ends, between the sacrifice the individual is asked to make and the public purpose this is intended to serve.”⁶⁸

The second view of the non-arbitrary requirement purports a “thicker” interpretation of section 25(1) in that the deprivation should not result in “an unacceptably heavy burden upon or demand an exceptional sacrifice from one individual or a small group of individuals for the public at large.”⁶⁹ Sufficient reason for the deprivation needs to be established by the law authorising the deprivation by establishing a rational link between a legitimate governmental purpose and a balance between ends and means. According to Van der Walt,⁷⁰ “arbitrary” in a restricted sense refers to actions that are “irrational, capricious or in bad faith” and not to actions that are “rational but disproportionately unfair.”

A justified governmental regulatory deprivation of property, excluding expropriation, would be arbitrary if a balance between public interest and the harm or sacrifice it would cause either to an individual or a group of private individuals had not been established.

67 1997 4 SA 1176 (CC). See also in this regard Roux “Property” 46-20, Badenhorst, Pienaar and Mostert *Silberberg’s Property* 546.

68 Par [98], Roux “Property” 46-22 and 46-22.

69 Van der Walt *Constitutional Property* 145, Badenhorst, Pienaar and Mostert *Silberberg’s Property* 550.

70 Van der Walt 2004 *SAPL/R* 63. The restrictive meaning can also be compared with review procedures of unreasonable administrative actions provided for in section 33 of the *Constitution* and section 6 of the *Promotion of Administrative Justice Act* 3 of 2000. Arbitrary action in relation to Administrative Law has been described as “capricious or proceeding merely from the will and not based on reason or principle.” See Currie and de Waal *Constitutional and Administrative Law* 394 in this regard. This factor is also salient in Van der Walt *Constitutional Property* 153, where he observed that the non-arbitrary requirement of s 25(1) could be interpreted in accordance to the reasonableness requirement in Administrative Law, with cognisance of the “countermajoritarian-inspired view.” The courts should accordingly refrain from interfering with the policy decisions of administrative bodies, duly authorised by democratically elected legislation.

2.3.2 Section 25(2) and the expropriation of property

Certain guidelines were expounded by the Constitutional Court in *FNB*, based on an enquiry into the constitutionality of infringements in terms of section 25(1), namely that there must be sufficient reason for the deprivation of property and it must be procedurally fair. These requirements have to be met in addition to the requirements provided for in section 25(2), namely that property firstly may be expropriated only in terms of law of general application, secondly for a public purpose or in the public interest, and thirdly subject to compensation.⁷¹

The Constitutional Court held in *Harksen v Lane*⁷² that section 21 of the *Insolvency Act 24 of 1936* was not unconstitutional in terms of section 28(3) of the interim *Constitution* and did not constitute expropriation. Section 21 provides for the temporary divestment of the property in the *curator bonis*, subject to proof of ownership. The ruling of the court on the distinction between expropriation and deprivation is in pursuance of the following three notions:

- (a) The distinction is categorical and constitutes two distinct and separate entities with different characteristics. These abstract characteristics assigned to particular categories of impositions on property exclude possible “grey areas” which could be identified as “regulatory expropriations or inverse condemnations.”⁷³

71 Par [100] and [58]-[60] respectively. See also a more detailed discussion on this issue at par 2.4.2 below. These additional requirements were also formulated by Roux “Property” 46-28 and 46-29, Mostert H “The Distinction between Deprivations and the Future of the ‘Doctrine’ of Constructive Expropriation in South Africa” 2003 *SAJHR* 574. These additional requirements for a valid expropriation were referred to by the author as “conjunctive reading,” which suggests that expropriation is a specialised form of deprivation. To understand the doctrine of constructive expropriation in SA it needs to be established whether expropriations are *ipso facto* deprivations.

72 1998 1 SA 300 (CC) par [37]. See also in this regard Van der Walt 2004 *SALJ* 862-863 in relation to the distinction between deprivation and expropriation.

73 Mostert 2003 *SAJHR* 576. According to the author the abstract approach followed by the Constitutional Court may give rise to uncompensated claims based on “excessive regulation.”

- (b) Expropriation could be justified only when the property is permanently acquired by the state. Consequently, if property is not acquired by the state and not permanent, there is no expropriation and an infringement of section 28(3) of the interim *Constitution* will not suffice.
- (c) A person who wants to challenge the constitutionality of state interference with property in terms of section 28(3) must do so either on the basis of unconstitutional expropriation or unconstitutional deprivation of property.

2.4 The FNB decision

2.4.1 Factual background

The dispute in this decision relates to the constitutional validity of section 114 of the *Customs and Excise Act* 91 of 1964 (hereafter the *CEA*), which provides for a statutory lien over the property of a taxpayer in default in favour of the South African Revenue Services (hereafter SARS). The security right over the property so owned by third parties save for the taxpayer is vested in SARS, who may remove, detain and sell the property in execution without an order of court.⁷⁴

In casu FNB retained ownership of property as a security right in terms of a credit sales agreement. SARS detained and sold the property in execution in terms of the statutory lien provided for in section 114 of the *CEA*, after the taxpayer erred in paying certain customs debts.⁷⁵ The interference with an owner's property in circumstances where he had no

74 Hopkins and Hofmeyer 2003 *SALJ* 53; Currie and de Waal *Bill of Rights* 546, Van der Walt AJ "Notes and Comments Negating Grotius-The Constitutional Validity of Statutory Security in Favour of the State: *First National Bank of SA t/a Wesbank v Commissioner of the South African Service* 2001 (7) BCLR 715 (C)" 2001 *SAJHR* 87.

75 Currie and de Waal *Bill of Rights* 546, Van der Walt AJ "Retreating from the FNB Arbitrary Test Already? *Mkontwana v Nelson Mandela Metropolitan Municipality; Bissett v Buffalo City Municipality; Transfer Rights Action Campaign v MEC for Local Government and Housing, Gauteng*" 2005 *SALJ* 76.

prior knowledge of the attached property and no relation to the principle debt was the constitutional issue in *FNB*.⁷⁶

2.4.2 Constitutional challenge against the test for arbitrariness

The constitutional validity of section 114 of the *CEA* was investigated by the Constitutional Court in pursuance of the deprivation requirements of section 25(1) of the property clause. Certain guidelines featured in *FNB* when the constitutionality of any limitations of property rights needs to be analysed. The court held that expropriation encompasses a subspecies of deprivations and the requirements for a valid deprivation in terms of section 25(1) apply to a non-expropriatory deprivation, as well as to expropriation “in addition to the specific s 25(2) requirements that apply to expropriation only.”⁷⁷ The steps as proposed by the court on the basis of an investigation in terms of the constitutionality of infringements of section 25(1)⁷⁸ are the following:

Viewed from this perspective s 25(1) deals with all “property” and all deprivations (including expropriations). If the deprivation infringes (limits) s 25 and cannot be justified under s 36, that is the end of the matter. The provision is unconstitutional.⁷⁹

If, however, the deprivation passes scrutiny under s 25(1) (i.e. it does not infringe s 25(1) or, if it does, is a justified limitation) then the question arises as to whether it is an expropriation. If the deprivation amounts to an expropriation it must pass scrutiny under s 25(2)(a) and make provision for compensation under s 25(2)(b).⁸⁰

The starting point for constitutional analyses, when considering any challenge under s 25 for the infringement of property rights, must be s 25(1).⁸¹

76 Van der Walt *Constitutional Property* 148. The court had to establish if the statutory created preferent security interest in favour of SARS resulted in an unconstitutional deprivation of the “innocent bank’s” property. Van der Walt 2005 *SALJ* 77 used the term “innocent third-party owner’s property.”

77 Van der Walt 2005 *SALJ* 77, Van der Walt *Constitutional Property* 148.

78 *Supra* n 77. The Constitutional Court reduced the two-stage approach, as discussed under 2.2.1 above, into a “single, multi-factor balancing test.” See also Roux 2007 http://www.saifac.org.za/docs/res_papers/RPS%20NO.%2042pdf [13 Feb 2008] in this regard.

79 Par [58], *ibid* n 77.

80 Par [59], *ibid* n 77.

81 Par [60], *ibid* n 77.

A “new methodology”⁸² has therefore been established by the Constitutional Court, in which the emphasis is placed on the section 25(1) requirement that no law may authorise arbitrary deprivation of property. This is eminent in the court’s renunciation of the differentiation between a “thin” and a “thick” approach during the first stage analysis, by introducing a substantive or “thick” element into the interpretation of arbitrariness.⁸³

A violation of property rights in terms of section 25(1) depends on “how close the arbitrariness enquiry approached the proportionality end of the continuum”. In *FNB Ackermann J*⁸⁴ stated as follows:

In its context “arbitrary”, as used in s 25, is not limited to non-rational deprivations, in the sense of there being no rational connection between means and ends. It refers to a wider concept and a broader controlling principle that is more demanding than an enquiry into mere rationality. At the same time it is a narrower and less intrusive concept than that of the proportionality evaluation by the limitation provisions of s 36.

The court recapitulated and concluded that a deprivation of property is arbitrary under section 25(1) when the impugned law, with reference to section 25(1), does not provide sufficient reason for the deprivation in question, or is procedurally unfair.⁸⁵

2.4.2.1 *Sufficient reason*

After an analysis of foreign law, the Constitutional Court’s exposition of the test in determining “sufficient reason” can briefly be composed as follows:⁸⁶

82 Van der Walt *Constitutional Property* 148- 151, Van der Walt 2005 *SALJ* 77.

83 *Supra* n 77. See in this regard the discussion of the “thin” and “thick” interpretation respectively at par 2.3.1.1 (b) above.

84 Par [65]. See also in this regard Hopkins and Hofmeyer 2003 *SALJ* 56, Roux and Davis “Property” 20-19.

85 Par [100]; Van der Walt 2004 *SAPL/R* 66, Mostert and Badenhorst *supra* n 33.

86 Par [100]. See also in this regard Van der Walt 2004 *SAPL/R* 66; Van der Walt *Constitutional Property* 154; Roux “Property” 46-22; Roux and Davis “Property” 20-19 and 20-21, Currie and De Waal *Bill of Rights* 545-546.

- (a) The evaluation of the relationship between the deprivation or the means employed, and the purpose of the law or the means end has to be determined.
- (b) A complexity of relationships has to be considered.
- (c) The person affected by the deprivation of the property and the purpose of the deprivation must be taken into account.
- (d) Cognisance has to be taken of the relationship between the purpose of the deprivation, the nature of the property, and the extent of the deprivation.
- (e) A more compelling purpose or reason must be established for the deprivation of ownership of land or corporeal movable property.
- (f) Deprivation of all of the incidents of ownership should require more compelling reasons than a deprivation of just some incidents of ownership or partial deprivation of incidents of ownership.
- (g) Depending on the “interplay between variable means and ends, the nature of the property in question and the extent of its deprivation,”⁸⁷ sufficient reason is envisaged as a mere rational relationship between means and ends, as opposed to a proportionality evaluation closer to that provided for in section 36(1) of the *Constitution*.
- (h) Sufficient reason that justifies deprivation always has to be determined on all of the relevant facts applicable to each particular case, taking cognisance of the fact that the underlying enquiry is “concerned with ‘arbitrary’ in relation to the deprivation of property under s 25.”⁸⁸

2.4.2.2 *Application to the facts in FNB*

The Constitutional Court’s analysis of the test⁸⁹ when applied to section 114 of the *CEA* comprises a thicker test than mere rationality because a “strong reason” was required for the deprivation. The infringed right in

87 *Supra* n 86.

88 Van der Walt *Constitutional Property* 154.

89 Par [100] *supra* n 99.

this decision was ownership, which included all the incidents of ownership. No *nexus* or relationship existed between either the affected owner or the affected property, and the purpose of the deprivation.⁹⁰ Although section 114 pursued a legitimate purpose, the net was cast too wide. According to Ackermann J,⁹¹ section 114 of the *CEA*

...sanctions the total deprivation of a person's property under the circumstances where (a) such *person* has no connection with the *transaction* giving rise to the custom debt; (b) where such *property* also has no connection with the *customs debt*; and (c) where such person has not transacted with or placed the customs debtor in possession of the property under circumstances that have induced the Commissioner to act to her detriment in relation to the incurring of the customs debt.

The court enumerated and held that in the absence of any such relevant *nexus*, no sufficient reason exists in justifying a deprivation in terms of section 114, other than the customs debtor, of their property.⁹² The deprivation is accordingly arbitrary in terms of section 25(1), a limitation or infringement of such a person's right, and therefore unconstitutional. However, the court refrained from considering whether or not infringements of section 25(1) are justified in terms of section 36 "and simply assumed they are".⁹³

2.4.2.3 Possible shortcoming and criticism

Although the flexible approach of the Constitutional Court in this judgment is welcomed by safeguarding legitimate and justified regulatory state action, it did not bring with it the sort of clarity which ultimately empowers the court with a wide discretion to decide cases on an

90 Par [108]; Roux "Property" 46-23; Roux and Davis "Property" 20-21; Van der Walt 2005 *SALJ* 78; Van der Walt *Constitutional Property* 154; Hopkins and Hofmeyer 2003 *SALJ* 57, Currie and de Waal *Bill of Rights* 547.

91 *Supra* n 90.

92 Par [109]; Roux "Property" 46-23, Van der Walt *Constitutional Property* 154.

93 Van der Walt *Constitutional Property* 154, Van der Walt 2005 *SALJ* 78. The author opines that s 36 finds no application to infringements of s 25. See also Van der Walt 1997 *SAPL/R* 275 where it is submitted that the property clause contains limitation provisions applicable to section 25 only, while section 36 provides for general limitation provisions applicable to all of the rights in Chapter 2 of the *Constitution*.

individual basis.⁹⁴ According to Roux,⁹⁵ this decision has a “telescoping” effect, and all of the issues are “sucked into” the “vortex” of the test for arbitrariness. The consequence of this telescoping results in the investigation of just one enquiry, namely if there was sufficient reason for the deprivation of property in pursuance of paragraph [100] of the judgment.⁹⁶

The wide judicial discretionary power awarded to the courts means⁹⁷

that the level of scrutiny will vacillate between two fixed poles: rationality review at the lower end of the scale, and something just short of a review for proportionality at the other.

2.4.3 Significant differences between the *Harksen* and *FNB* decisions

The Constitutional Court in *Harksen* clearly distinguished deprivation and expropriation as two distinct categories, and prompts a plaintiff to select either category under which the constitutionality of any limitation of the concerned property is challenged. The approach by the court in *FNB* deviated from a categorical distinction and replaced it with a less categorical distinction: all infringements are *ipso facto* treated as deprivations.⁹⁸ Secondly, in *FNB* the test for arbitrariness in terms of section 25(1) in the first stage of the constitutional challenge is based on a substantive proportionality analysis which is regarded as an improvement on *Harksen* because of the wide judicial discretion afforded to the court. Lastly, the telescoping effect of the test for arbitrariness has ousted the relationship between sections 25 and 26 of the *Constitution* in the application of section 25.⁹⁹

94 Van der Walt 2004 *SAPLR* 68; Van der Walt 2005 *SALJ* 79, Van der Walt *Constitutional Property* 155.

95 *Ibid* n 94.

96 See n 86 in this regard.

97 Van der Walt *Constitutional Property* 155, Van der Walt 2005 *SALJ* 79.

98 Van der Walt *Constitutional Property* 150 n 98, Van der Walt 2004 *SALJ* 875.

99 Van der Walt 2004 *SALJ* 875-876. Of importance in this regard, according to Van der Walt, is that a possible recognition of constructive expropriation has been excluded.

In correspondence, Mostert¹⁰⁰ underscored the court's interpretation in *Harksen* as follows:

...the treatment of deprivation and expropriation renders it impossible to claim compensation on the basis of excessive regulation. Instead of recognising the interrelatedness of expropriation and deprivation, the *Harksen* court relied on an interpretation of the requirements of expropriation alone.

2.4.4 Test for arbitrariness compared to the *Mkontwana* decision

The judgement in *Mkontwana v Nelson Mandela Metropolitan Municipality; Transfer Rights Action Campaign v Member of the Executive Council for Local Government and Housing, Gauteng*¹⁰¹ is note-worthy as it confirms the two key features in the *FNB* decision, namely the requirement that a deprivation may not be arbitrary, and that the court has a wide discretion to decide each case on an individual basis in any enquiry relating to arbitrary deprivation of property.¹⁰²

What was at issue was the constitutionality of section 118(1) of the *Local Government Municipal Systems Act 32 of 2000*, which effectively provides that immovable property cannot be transferred to a purchaser unless the municipality has issued a clearance certificate to the effect that consumption charges for services and electricity during the two previous years have been paid in full.¹⁰³ It was argued by the applicants that section 118(1) amounted to arbitrary deprivation of their property and an infringement of their property rights protected under section 25(1) of the *Constitution*. In his majority judgment Yacoob J held that section 118(1) gave rise to deprivation of property, but when the *FNB* test was

100 Mostert 2003 *SAJHR* 576-578.

101 2005 1 SA 530 (CC). See also in this regard Freedman W "The constitutional right not to be deprived of property: the constitutional court keeps its options open" 2006 *TSAR* 83.

102 *Supra* n 100, where these two features were also explained by Roux.

103 Du Plessis and Penfold 2005 *Annual Survey of SA Law* 69, Van der Walt *Constitutional Property* 155.

applied for arbitrary deprivation, the learned judge concluded that it was not.¹⁰⁴

2.4.4.1 *Deprivation of property*

In its explanation the court pointed out that a deprivation is dependent on the extent of the interference with or limitation of the use, enjoyment and exploitation of the property. If the interference is “substantial” and “goes beyond the normal restrictions” on these rights found in an open and democratic society, it might constitute a deprivation of property.¹⁰⁵ Section 118(1) did impose a significant interference with a landowner’s right to alienate property.

The extent of the impugned section 118(1) deprivation was tested against considerations such as: the deprivation related to only a single incident of ownership; the deprivation lasted for two years and was temporary in nature; the deprivation depended on the amount of the consumption charge owing, which would necessarily influence the market value of the property, and the owner had the responsibility to prevent unreasonable accumulation of outstanding accounts.¹⁰⁶

2.4.4.2 *Arbitrary deprivation and sufficient reason*

In relying on the test applied in *FNB* the court had to establish whether there was sufficient reason for the deprivation, with cognisance of the relationship between the purpose of the limitation and the effect of the deprivation.¹⁰⁷ Yacoob J held¹⁰⁸ that section 118(1) was not arbitrary, and there would be sufficient reason for the deprivation¹⁰⁹

104 Van der Walt *Constitutional Property* 156, Freedman 2006 *TSAR* 84.

105 Par [32]. See also Du Plessis and Penfold 2005 *Annual Survey of SA Law* 70, Freedman 2006 *TSAR* 85 and 93 in this regard.

106 Par [45] and [47]. See also in this regard Du Plessis and Penfold 2005 *Annual Survey of SA Law* 74, Van der Walt *Constitutional Property* 157.

107 Van der Walt *Constitutional Property* 156, Van der Walt 2005 *SALJ* 83.

108 Par [51]; Du Plessis and Penfold *Annual Survey of SA Law* 74; Van der Walt 2005 *SALJ* 83; Van der Walt *Constitutional Property* 156, Freedman 2006 *TSAR* 86.

109 Par [51] *supra* n 108, Badenhorst, Pienaar and Mostert *Silberberg’s Property* 548.

[If] the government purpose was both legitimate and compelling and if it would, in the circumstances, not be unreasonable to expect the owner to take the risk of non-payment. The closer the relationship between the consumption charge and the property, the more tenuous the link between the consumption charge and the owner can be,

The legitimate and important purpose of this provision is to provide a form of security to municipalities for the payment of consumption charges, and to encourage property owners to do regular payments and thus fulfil their civic responsibilities.¹¹⁰

When applied to the facts, the court held in the first place that there was a close enough relationship between the consumption charge and the property, because the services rendered by the municipality were accessed and consumed on the property. These services were attributable to the enhancement of the use, enjoyment and value of the property.¹¹¹ Secondly, Yacoob J ruled that there was a close connection between the consumption charge and the owner, even if the land was unlawfully occupied and the services enjoyed by unlawful occupiers.¹¹² The court argued that ownership consists of rights and duties and the owner still had the responsibility to take reasonable steps in preventing unlawful occupation of his property and to ensure regular payments of municipal services.¹¹³

2.4.5 Criticism

According to Van der Walt¹¹⁴ the possible shortcomings in *Mkontwana* are *inter alia* the absence of any conflict between the constitutional duty

110 Par [52]. See also Van der Walt *Constitutional Property* 157; Van der Walt 2005 SALJ 83; Du Plessis and Penfold *Annual Survey of SA Law* 74; Freedman 2006 TSAR 86, Kelly-Louw M "Selling or Leasing Property? Beware of Municipal Debts! A Note in Two Parts (Part II)" 2005 SALJ 782.

111 Par [40]; Kelly Louw 2005 SALJ 782; Freedman 2006 TSAR 86-87, Van der Walt 2005 SALJ 83.

112 At par [42] the court stated, for example, a squatter cannot break the "strong owner, property and consumption charge chain." See also in this regard Freedman 2006 TSAR 87.

113 Par [41], *supra* n 111. See a more detailed discussion on this aspect in Van der Walt *Constitutional Property* 156-160.

114 Van der Walt *Constitutional Property* 159-160, Van der Walt 2005 SALJ 86-87.

of the municipality to deliver services and its contractual right to terminate services due to arrear payments; the court's hesitancy to properly investigate the reasons for non-payment, which could have been the result of improper administration and debt enforcement strategies on the part of the municipality; and the fact that the only remedy available to an owner is the eviction of unlawful occupiers. This aspect complicates matters for any owner, as eviction procedures are subject to limitations as provided for in the *Constitution*, legislation and case law. Moreover, landowners are not in a favourable position to provide alternative housing during an eviction process, whilst a local government has the necessary power and responsibility to do so.

2.5 Deprivation of immovable property

After *FNB* and *Mkontwana*, two significant and important Constitutional Court decisions are noteworthy, as they were not specifically decided in terms of section 25(1) of the Constitution but dealt with the eviction of unlawful occupiers provided for in section 26(3)¹¹⁵ of the *Constitution* and the *Prevention of Illegal Eviction from and Unlawful Occupation of Land Act* 18 of 1998 (hereafter *PIE*). These statutory and constitutional anti-eviction provisions are a legitimate and regulatory limitation and deprivation of a landowner's property rights, and not arbitrary when justified by the requirements under section 25(1).¹¹⁶

2.5.1 The relationship between sections 25(1) and 26(3): the Port Elizabeth decision

A fine balance needs to be established by the courts between the

115 S 26(3) provides that no one may be evicted from their home, or have their homes demolished without an order of court and after consideration of all the relevant circumstances, and no law may permit arbitrary evictions.

116 Van der Walt *Constitutional Property* 161-162. See also a comprehensive discussion and interpretation on the impact of s 26(3) on evictions of a person from his or her home and applicable case law which gave rise to the *PE* and *Modderklip* decisions, in Roux T "Continuity and Change in a Transforming legal Order: The Impact of Section 26(3) of the Constitution on South African Law" 2004 *SALJ* 466-492.

protection of an owner's property rights in terms of section 25(1) and the right to housing as provided for in section 26 of the *Constitution*. In *Port Elizabeth Municipality v Various Occupiers*¹¹⁷ the Constitutional Court elaborated on the constitutional framework in which the development of common law needs to be established as far as evictions are concerned. Of importance in common law is the right of an owner to enforce his right of ownership to the exclusion of others.

Section 6 of *PIE* was in dispute in this decision, which dealt with evictions undertaken by organs of state and should be applied "within a defined and carefully calibrated constitutional matrix."¹¹⁸ This requires a constitutional relationship between the property rights in section 25 and housing rights provided for in section 26, which inevitably are closely intertwined.¹¹⁹ The court then identified three "salient features" of the way in which the *Constitution* approaches the interrelationship between land hunger, homelessness, and respect for property rights. Firstly, the land rights of the dispossessed are not in general self-enforcing but are subject to the adoption of legislative and other measures by the state. The section 26(3) rights are defensive rather than affirmative. It was stated by the court that "the landowner cannot simply say: This is my land, I can do with it what I want, and then send all the bulldozers or sledgehammers."¹²⁰

Secondly, the eviction of people living in informal settlements may take

117 2005 1 SA 217 (CC). See also in this regard Van der Walt AJ "Transformative constitutionalism and the development of South African property law (part 1)" 2005 *TSAR* 684.

118 Van der Walt 2005 *TSAR* 684, Badenhorst, Pienaar and Mostert *Silberberg's Property* 580-581.

119 Par [19], and underscored by the court as follows: "The stronger the right to land, the greater the prospect of a secure home."

120 Par [20]. See also in this regard Van der Walt 2005 *TSAR* 685; Van der Walt "The State's Duty To Protect Property Owners v The State's Duty to Provide Housing: Thoughts On The *Modderklip* Case" 2005 *SAJHR* 151 n 28; Van der Walt 2005 *SALJ* 86; Van der Walt *Constitutional Property* 159 n 137; Van der Merwe CG and Pienaar JM "Law of Property (Including Real Security)" 2005 *Annual Survey of SA Law* 380; Alexander G "The potential of the right to property in achieving social transformation in South Africa" 2007 *ESR Review* 8, Badenhorst, Pienaar and Mostert *Silberberg's Property* 581.

place even if it results in the loss of a home,¹²¹ and thirdly section 26(3) emphasises the need to establish a “concrete and case-specific solution” to the problems at hand.¹²²

In the constitutional dispensation new obligations are imposed on the courts regarding rights not previously recognised by common law. These conventional entitlements of property rights, namely possession, use and occupation, need to be juxtaposed by the courts against “a new” and equally relevant right not to be arbitrarily deprived of property.¹²³ In recognising the fine balance between sections 25 and 26, the state and the courts must respect and protect existing property interests in accordance with the values enshrined in the Bill of Rights, such as human dignity, equality and freedom. Evictions in terms of section 6 of *PIE* must be approached in accordance with this balance, provided that they are deemed just and equitable after considering all the relevant circumstances.¹²⁴

2.5.2 *The relationship between sections 25(1) and 26(3): the Modderklip decision*

In *President of the Republic of South Africa v Modderklip Boerdery (Pty)*

121 Par [21].

122 Par [22], *supra* n 120.

123 Par [23]. See also in this regard Badenhorst, Pienaar and Mostert *Silberberg's Property* 581; Pienaar JM and Mostert H “Uitsettings onder die Suid-Afrikaanse grondwet: die verhouding tussen artikel 25(1), artikel 26(3) en die uitsettingswet (slot)” 2006 *TSAR* 525, Van der Merwe and Pienaar 2006 *Annual Survey of SA Law* 380.

124 Freedman 2006 *TSAR* 98 where the balance between the interests of the landowner and unlawful occupier are underscored. The author observed that the consequence of this balance is that the private law requirement is not sufficient any more for granting an eviction order; Van der Walt *Casebook for Students* 216-217, Van der Walt *Constitutional Property* 159 n 137. Of importance in this regard (with reference to *Mkontwana*), as was pointed out by van der Walt, is that it becomes more difficult to evict unlawful occupiers, and if consumption charges are not paid by these occupiers, the effect on the landowner can have dire consequences. The owner will be forced to pay arrear service charges while precluded at the same time from using eviction, which is the only effective measure at his or her disposal.

*Ltd (Agri SA, Amici Curiae)*¹²⁵ two constitutional duties of the state surfaced, namely the duty to protect the landowner's property rights provided for in section 25(1) and the duty to provide access to adequate housing under section 26(1) and (2).¹²⁶

In the subsequent Supreme Court of Appeal decision it was held that the state's failure to provide alternative housing to the unlawful occupiers under section 26(1) boiled down to a deprivation of the landowner's property rights in terms of section 25(1). In addition, the rights of the landowner were breached by the state in terms of sections 7(2) and 9(1) and (2) of the *Constitution*, which requires the state to protect, respect and promote the rights in the Bill of Rights as well as the right to equality and non-discrimination respectively.¹²⁷ The landowner was unable to enforce an eviction order against the squatters on his property because they had no alternative accommodation. The state was ordered to pay compensation to the landowner for the loss of his land during the period of unlawful occupation. The property right of the landowner under section 25(1) was accordingly not ignored, but recognised and protected.¹²⁸

Although the decision of the Supreme Court of Appeal was upheld by the Constitutional Court, the emphasis was placed on section 34 of the *Constitution*, which guarantees access to courts and the rule of law in terms of section 1(c), without considering the constitutional rights under sections 7(2), 9(1) and (2) of the *Constitution*.¹²⁹ The court patently stated that the state is the only party to hold the key to the solution of

125 2005 5 SA 3 (CC).

126 Alexander 2007 *ESR Review* 8. See also in this regard Pienaar and Mostert 2006 *TSAR* 526 where the following was stated "...dat die uitsettingswet – as gevolg van sy vereiste balanseringproses – 'n "spatium" skep, waartydens prosedures vir uitsetting nagekom moet word, maar die grondeienaar ook ernstig benadeel word".

127 Van der Walt 2005 *SAJHR* 151, Roux and Davis "Property" 20-15.

128 Van der Walt *Constitutional Property* 162.

129 Par [39]. See also in this regard Van der Merwe and Pienaar 2005 *Annual Survey of SA Law* 377; Van der Walt 2005 *TSAR* 688; Van der Walt 2005 *SAJHR* 153, Roux and Davis "Property" 20-16. In par [43] the court emphasised that the state "was obliged to take reasonable steps, where possible, to ensure that large-scale disruptions in the social fabric do not occur in the wake of the execution of court orders, thus undermining the rule of law."

Modderklip's problem,¹³⁰ and it was unreasonable of the state to stand by and refrain from doing anything in circumstances where it was impossible for Modderklip to evict the occupiers.¹³¹ With regards to the rule of law and section 34, the Constitutional Court held that the state is obliged to provide the necessary mechanisms for citizens to resolve their disputes. This encompasses an efficacious legislative framework, institutions such as the courts, and provisions made in *PIE*, which regulates the rights of both the landowner and the unlawful occupier.¹³²

The effect of *Modderklip* when juxtaposed against *Mkontwana* raises the question whether or not it would still be reasonable to hold a landowner responsible for outstanding consumption charges, because, according to Van der Walt,¹³³ the decision in *Modderklip*

makes it clear that the state has a duty to step in and assist the landowner in protecting her property against unlawful occupation, especially in situations where the sheer magnitude of the invasion or the circumstances of the occupiers would render the possibility of a successful eviction nugatory.

The protection of immovable property interests is therefore protected and recognised, provided that the approach to evictions and the provisions of *PIE* should be applied in conformity with the Constitutional Court's ruling in *Port Elizabeth Municipality v Various Occupiers*. To underscore the importance of the correct historical context for adjudication in eviction cases, Sachs J stated in *Modderklip*.¹³⁴

[The Act] expressly requires the court to infuse elements of grace and compassion into the formal structures of the law. It is called upon to balance competing interests in a principled way and promote the constitutional vision of a caring society based on good neighbourliness and shared concern.

130 Par [42]; Van der Walt 2005 *SAJHR* 153, Van der Merwe and Pienaar 2005 *Annual Survey of SA Law* 377.

131 Par [48], Van der Walt 2005 *SAJHR* 153.

132 Par [41], Van der Merwe and Pienaar 2005 *Annual Survey of SA Law* 377.

133 Van der Walt 2005 *SAJHR* 158 with reference to par [45] and [48].

134 Par [55], Van der Walt 2005 *SAJHR* 149 n 18.

2.6 Concluding remarks

An efficient legal system is characterised by its ability to amend and to adapt to changing needs and priorities.¹³⁵ The purpose of the above exposition is to illustrate the manner in which constitutional principles were applied by the judiciary to correct the imbalances created by the tension between existing individual or private property rights, and the protection of the public interest, provided for in section 25(1) of the *Constitution*.¹³⁶ The rights protected under the property clause gave rise to many controversies attributable to the interpretation of what is meant by property, what is deprivation, and what is arbitrary deprivation.

The predominant principle underscored by the Constitutional Court in *FNB* was an assessment of what constitutes arbitrary deprivation. A deprivation will be arbitrary when the law, in terms of section 25(1), does not provide sufficient reason for the limitation or is procedurally unfair. Sufficient reason will be established by evaluating the relationship between a “means ends” analysis, the balance and relationship between the purpose of the deprivation and the person whose property is affected, and the nature of the property.¹³⁷

Unlike *FNB*, which constituted a complete loss of ownership in a corporeal, the Constitutional Court in *Mkontwana* used its wide judicial discretion as awarded in *FNB*, and held that the deprivation of property is not arbitrary and related only to one single incident of ownership which was temporary of nature. The reason for the deprivation is “both legitimate and compelling”¹³⁸ as it ensures the regular payments of consumption charges by landowners.

In the *Port Elizabeth Municipality* and *Modderklip* decisions, where

135 Badenhorst, Pienaar and Mostert *Silberberg's Property* 585.

136 Van der Walt *Property Clause* 15-16.

137 Currie and de Waal *Bill of Rights* 545-546.

138 Par [51]. See also Van der Walt *Constitutional Property* 157 in this regard.

conflicting interests between property rights, on the one hand, and the right to adequate housing, on the other, were at stake, the interrelatedness between sections 25(1) and 26(3) was analysed by the Constitutional Court. In resolving the matter, a fine balance was established by the court between the property and ownership rights of the landowner and the housing rights of the unlawful occupants.

3 Forfeiture of property

3.1 Introduction

Limitations on an owner's right to do with his property or things belonging to him as he wishes are not a new phenomenon in legal jurisprudence. In earlier Roman law¹ the principles of morality, ethics, religion and public law required the *censores* to prevent the misuse of property in violation of the general interest by the promulgation of applicable legislation. Goods that were confiscated as punishment for capital crimes were dedicated to the gods and then destroyed. Such forfeiture actions were established practice during the Imperial period,² when these goods were first delegated to the temple and then forfeited to the state.

As far back as in the times of the Old Testament,³ Jewish customs recognised civil or *in rem* forfeiture, and in European medieval doctrine animals and objects were sacrificed or forfeited to the crown when the involvement in wrongdoing was proven. In the 17th century, Admiralty courts used civil forfeiture to punish foreign owners of pirate ships who escaped criminal punishment because their piratical acts had been committed outside the jurisdiction of England.⁴

In *First National Bank of South Africa Ltd t/a Wesbank v Commissioner*,

1 753 BC-AD 565. See in this regard Van Zyl *History of Roman Law* 4, 133.

2 AD 527-565. See in this regard Van Zyl *History of Roman Law* 8 n 1, Van Jaarsveld IL "The History of *In Rem* Forfeiture-A Penal Legacy of the Past" 2006 *Fundamina* 141 n 21.

3 For example Exodus 21:38, which stipulates that "if an ox gores a man or a woman, and they shall die, he shall be stoned and his flesh shall not be eaten." See also in this regard Burchell *Criminal Law* 1001 n 1. Civil forfeiture procedures, where forfeiture of the tainted property of an accused is justified without a conviction is discussed below at par 3.6.

4 Redpath 2001 http://www.crimeinstitute.ac.za/2ndconf/papers/redpath_2.pdf [12 Feb 2008]; Van Jaarsveld 2006 *Fundamina* 145, Redpath 2000 <http://www.iss.co.za/ASR/9No5And6/Redpath.html> [11 Feb 2008]. Consequently the wrongfully used properties, for example the pirate ships and smuggled goods, were forfeited. This served as punishment where its foreign owners escaped criminal prosecution.

*South African Revenue Service*⁵ (hereafter *FNB*) Ackermann J held that legislation may permit the confiscation of property without compensation, provided that an appropriate relationship exists between means and ends, the sacrifice that the affected person has to endure, and the public purpose this needs to serve. Although *FNB* did not deal with the forfeiture of property which had been wrongfully obtained through criminal activities, it is arguable that the proportionality analysis by Ackermann J in establishing the extent of the deprivation of property in terms of section 25(1) of the property clause, may also apply to criminal confiscation and civil forfeiture.⁶

This chapter will focus chiefly on legislation authorising state powers to interfere with private property in order to combat organised crime, which poses a serious threat to our democratic society's economy, as well as to the safety and interests of the public. In particular, an analysis of civil forfeiture actions needs to be performed, juxtaposing them against the right not be arbitrary deprived of property.⁷

3.2 The classification and aim of punishment in terms of Criminal law

The interrelatedness between the aim of legislation regulating forfeiture procedures and the objectives of punishment in terms of criminal law necessitates an analysis of what constitutes crime, and accordingly the appropriateness and purpose of an applicable sanction or punishment, both in terms of criminal law and forfeiture procedures.

5 2002 4 SA 768 (CC) Par [98]. See also in this regard Van Jaarsveld 2006 *Fundamina* 137 n 4, Burchell *Criminal Law* 1017. The *FNB* decision is analysed and discussed at par 2.4 above.

6 Burchell *Criminal Law* 1018. Deprivation of property in terms of s 25(1) will be arbitrary when the law does not provide sufficient reason or is procedurally unfair. See *FNB* par [100] in this regard.

7 Forfeiture of the assets of an accused are justified without a conviction when it is proved that they are the proceeds of crime or have been used in the commission of a crime. See par 3.6 below in this regard.

There are five possible theoretical interpretations and explanations by criminologists for crime.⁸ *Individual criminality* initially linked crime to the “innate evil” of an individual and later to biological disorder. Criminal behaviour according to this theory is also the result of acquired anti-social conduct and adjustments in a criminal environment. Secondly, criminal behaviour occurs in *groups* or *sub-cultural* relations such as gangs, which exhibit behaviours deviant from the *mores* of their particular environment. Crime may also be linked to a specific *ecological area* or neighbourhood where elements of social disorganisation and deprivation are prevalent. Fourthly, *societal explanations* for criminal behaviour are eminent in the mechanisms and structures of society. Conflict in these societies develops as a result of economic materialism and systemic aberrations such as apartheid. Lastly, *intentional professional* crime is a deliberate and premeditated choice of criminal behaviour, mostly as an alternative career option.

It is trite that criminal law prohibits certain forms of human conduct. When basic constitutionally protected human rights such as the right to life, bodily integrity, dignity, personal security, liberty and property are violated by any human conduct, punishment will then be the sanction regulated by criminal law.⁹ Punishment represents the deprivation of property or liberty,¹⁰ as is evident in Issue Paper 11 entitled (Project 82) Sentencing: Mandatory minimum sentences, issued in 1997.¹¹ The justifications for punishment are simultaneously the intentional infliction of suffering upon an offender who committed the prohibited crime, and the expression of the community’s condemnation and abhorrence of the offender and his criminal conduct.¹²

8 Breetzke GD and AC Horn “Key Requirements in the Development of a Spatial-Ecological Theory of Crime in South Africa” 2008 *Acta Criminologica* 125. The aim of forfeiture legislation is discussed in more detail below at par 3.4.3.

9 Burchell *Criminal Law* 5, 49.

10 Burchell *Criminal Law* 5.

11 See in this regard Sloth-Nielsen J and Ehlers L “A Pyrrhic victory? Mandatory and minimum sentences in South Africa” 2005 *JSS* 2. Issue Paper 11 (Project 82) is available at <http://www.saflii.org/za/other/zalc/ip/11/11-CHAPTER-2.html> [14 June 2008].

12 *Supra* n 11.

These characteristics are envisaged as criminal in nature which inevitably is of paramount importance in evaluating the procedures applicable to asset forfeiture.¹³

3.2.1 Aims of punishment

The contemplated aims or theories of punishment recognised by South African courts are focussed on the result to be achieved by punishment. These aims are stated in Issue Paper 11 with reference to the court's decision in *S v Khumalo*,¹⁴ namely that when assessing an appropriate sentence, the courts should be guided by the main purposes of punishment underscored by Davis AJA in *R v Swanepoel*.¹⁵ These objectives of punishment are said to serve a deterrent, preventative, reformative and retributive purpose.

The predominant function and object of criminal law is to deter harmful human conduct which is against the *boni mores* and interests of society through the imposition of sanctions. The welfare and fundamental human rights of the community are thus protected, and peace and order are restored.¹⁶

3.2.2 Classification of theories of punishment

Punishment has an indubitable effect on an offender's fundamental rights, such as the right to freedom of movement, privacy and dignity. In justifying these infringements the theories of punishment necessitate answers as to the scope and type of punishment that should be imposed in each individual case.¹⁷

3.2.2.1 Absolute or retributive theory

13 *Supra* n 10. A discussion on this aspect follows below at par 3.4 read with par 3.7.

14 1984 3 SA 327 (A) at par 330 D-E, *supra* n 11.

15 1945 AD 444 and 445, *supra* n 11.

16 Burchell *Criminal Law* 9.

17 Snyman *Criminal Law* 12-13.

According to this theory punishment is justified because it is the offender's earned just desert. The theory is retrospective in nature and looks at the past, namely the fact that a crime has been committed. Retribution subsequently restores the legal balance or order which has been disturbed by the commission of a crime.¹⁸ Although it is argued that the punishment should fit the crime,¹⁹ retribution does not mean vengeance, as it did in the Old Testament's *lex talionis* principle of an eye for an eye and a tooth for a tooth.²⁰ An appropriate proportionality is required between the degree or extent of the harm done and the punishment.²¹

The retributive theory pre-eminently represents the community's condemnation of the crime, and also respects the freedom, will and human dignity of each member of a society.²²

3.2.2.2 Relative theory

The relative theory, which is known as the utilitarian or purpose theory,²³ is distinguished from the retributive or absolute theory of punishment. In the former, punishment is justified by societal subscription to the belief that offenders should be coerced into law abiding conduct, or conversely that citizens should be encouraged to abstain from committing crime.²⁴

According to the relative theory punishment is a means to a secondary purpose, which is categorised under the preventative, deterrent and reformative theories.²⁵

18 Snyman *Criminal Law* 13-14.

19 Sloth-Nielsen and Ehlers 2005 *ISS* 3.

20 Snyman *Criminal Law* 15.

21 Snyman *Criminal Law* 16. See also Burchell *Criminal Law* 69-70, where it is stated that the conduct of the wrongdoer must bear some relationship to the harm done to society. Retribution in this regard is reminiscent of a public demand for revenge, and if this basic human need is not satisfied, disrespect for the law and private revenge may prevail.

22 Snyman *Criminal Law* 16-18.

23 Snyman *Criminal Law* 13.

24 Issue Paper 11 (Project 82) 3, *supra* n 11.

25 *Supra* n 23.

- (a) Punishment, also called incapacitation in terms of the *preventative theory*, is aimed at the prevention of crime. The offender is prevented from committing further crimes by the nature of the punishment, for example imprisonment, or the forfeiture of a driver's licence. Criticism of this theory arises from the perception of the temporary nature of the punishment. The convicted offender is removed from society only for the term of the sentence.²⁶ Prevention as punishment is a legitimate and justifiable measure to protect the community, subject to an investigation by the courts into the likelihood of the commission of further crimes by the offender. This entails the establishing of a proportionate, consistent and fair balance between the protection of society and the offender's welfare.²⁷
- (b) The *theory of deterrence* is based on either individual or general deterrence. Individual deterrence is aimed at conditioning a previously convicted offender, who has already been subjected to the pain and consequences of punishment, to refrain from further criminal conduct. The validity of the theory is cast into doubt by the high rate of recidivism (second or third convictions) amongst offenders.²⁸ General deterrence, on the other hand, emphasises the effect of punishment on society as a whole. The premise is that the assumed fear or threat created by the possibility of the imposition of punishment will stop people from engaging in criminal conduct.²⁹ Criticism of the notion that punishment is a general deterrent focuses on the possibility that a court may impose a sentence on one person to serve as a deterrent to others. That would in those circumstances be sacrificed and used as an instrument for the sake of the community.³⁰ Nevertheless,

26 Snyman *Criminal Law* 18-19, Burchell *Criminal Law* 73.

27 Burchell *Criminal Law* 74.

28 Burchell *Criminal Law* 75, Snyman *Criminal Law* 19.

29 *Supra* n 28.

30 Snyman *Criminal Law* 21; Viljoen 2000 LexisNexis Butterworths available at <http://www.bohss.co.za> [6 Nov 2008], *S v Williams* 1995 7 BCLR 861 (CC). In the latter decision the Constitutional Court recognised the importance of deterrence even when an exemplary sentence is imposed to serve as a deterrent to others.

South African courts favour the theory of general deterrence and often justify punishment with arguments to be found in this model.³¹

- (c) The *reformatory or rehabilitative theory* aims at reforming the offender, as a person, into a law-abiding citizen through having the person participate in rehabilitative programmes. These programmes are administered while the convicted offender is still incarcerated in prison, and the emphasis is therefore not on the crime, the prejudice done, or the deterrent effect of the imposed punishment. The purpose of rehabilitation is to enable the offender to readjust to the demands of society by imposing a sentence suitable to his or her personality. The punishment must fit the personality and not the crime.³² In modern legal commerce the term restorative justice is commonly used as describing a more effective system of punishment than the conventional forms of punishment. The high rate of crime, the inability of the criminal justice's penal systems to address crime effectively, and the overpopulation of prisons in South Africa compels the courts to consider rehabilitation as a form of punishment.³³

3.2.3 *The principle of legality*

The doctrine known as the *nullum crimen, nulla poena sine lege* principle (no crime, no punishment without law)³⁴ encompasses the protection of the freedom of an individual. This principle prevents the state from imposing arbitrary punishment which does not correspond with existing rules of law.³⁵ The principle of legality is underscored by the provisions of

31 Burchell *Criminal Law* 76.

32 Burchell *Criminal Law* 78-79, Snyman *Criminal Law* 21.

33 Hargovan H "Restorative Justice: Yesterday, Today and Tomorrow-Making Sense of Shifting Perspectives in Crime Control and Criminal Justice in South Africa" 2007 *Acta Criminologica* 81, 86. See also in this regard Vemaak L "Crime and Punishment in South Africa *Correctional supervision as an alternative to imprisonment*" 2008 *De Rebus*.

34 Burchell *Criminal Law* 95, Snyman *Criminal Law* 39.

35 Snyman *Criminal Law* 39.

section 35(3)(l) and (n) of the *Constitution*, which provide that every accused person has a right to a fair trial.³⁶

The *rationale* of the principle of legality is captured in the policy consideration that the law must be clear and precise, so that people will know in advance and with reasonable certainty how to behave and how to avoid criminal conduct.³⁷ Punishment may therefore be inflicted only for contravening a designated crime created by a law prior to the contravention.³⁸

The following five principles or rules are embodied in the *nullem crimen sine lege* principle (no crime without a law):³⁹

- (a) the *ius acceptum* principle: a court may convict an accused person only if the act performed by him is recognised as a crime by law; a court itself may not create a crime;
- (b) the *ius praeivium* principle: an accused may be convicted only if the act performed by him was already recognised as a crime at the time of its commission;
- (c) the *ius certum* principle: crimes may not be formulated vaguely;
- (d) the *ius strictum* principle: the definition of a crime must be interpreted narrowly by the courts; and
- (e) the above four principles must be applied *mutatis mutandis* by the courts when sentence is imposed. The applicable sentence must already have been established in reasonably clear terms by the law.

36 Burchell *Criminal Law* 105, Snyman *Criminal Law* 41-42. The right to a fair trial includes *inter alia* the right not to be convicted for an act or commission that was not an offence recognised by national or international law at the time when the crime was committed, and to impose the least severe of the prescribed punishments for the offence if the prescribed punishment has been changed between the time that the offence was committed and the time of sentencing. The constitutional right to a fair trial is discussed at par 4.6 below.

37 Snyman *Criminal Law* 41.

38 Burchell *Criminal Law* 94.

39 Snyman *Criminal Law* 39-40. See also in this regard Marè 1997 LexisNexis Butterworths available at <http://www.bohss.co.za> [6 Nov 2008].

In accordance with the *nulla poena* principle, the five principles are tantamount to the requirement that the sources of the law must be accessible to the people, enabling them to determine what conduct is lawful or unlawful. Secondly, the language in which a crime or the rules applicable to criminal liability is formulated must be understandable to ordinary people.⁴⁰

When imposing an appropriate sentence, the courts should be cautious not to infringe the rights protected under section 12 (1)(e) of the *Constitution*, which stipulates that everyone has the right to freedom and security of the person, which includes the right not to be punished in a cruel, inhumane or degrading way. This was confirmed by the Constitutional Court in *S v Dodo*,⁴¹ where the emphasis was placed on the concept of proportionality.⁴² The court held that when justifying any period of penal incarceration, a failure to enquire into the proportionality between the offence and the period of imprisonment “is to ignore, if not to deny, that which lies at the very heart of human dignity.”⁴³

The offence should be evaluated by taking into consideration the nature and seriousness of the particular criminal act, as well as all relevant personal and other circumstances of the offender, which could have an influence on the seriousness of the offence and the culpability of the offender.⁴⁴

3.3 The development and aim of forfeiture legislation in South Africa

3.3.1 Background

40 Snyman *Criminal Law* 40 n 81.

41 2001 1 SACR 594 (CC).

42 Par [37] where it was held that proportionality “goes to the heart of the enquiry as to whether punishment is cruel, inhuman or degrading.”

43 Par [38].

44 Par [37].

Nationally and internationally, criminal justice systems are under severe pressure to address the constantly growing incidence of organised crime, terrorism, drugs, illegal firearms and human trafficking, corruption, fraud, gangsterism and money laundering.⁴⁵ According to a survey of The *United Nations Office on Drugs and Crime* on the topic of crime in Africa, the growth in international commerce and transport and the manifest inefficiency of law enforcement have resulted in the rise of organised criminal networks, some of which have even infiltrated state structures.⁴⁶

It is trite that crime encumbers not only the economic development of a country, but also has a predominantly negative effect on social and human capital, political stability and business investments. The proceeds of crime promote corruption and criminal activities, which in turn incite the commission of more crimes. It is self-evident that the persistent growth of organised crime has a damaging and undermining effect on good governance and democracy.⁴⁷

From another perspective, Potgieter, Ras and Nesor⁴⁸ express the opinion that social factors such as HIV/Aids, unemployment and the urge for better living conditions among previously disadvantaged people have resulted in the depopulation of rural areas and migration to cities. Fast-growing neighbourhoods inevitably develop into slum areas or informal settlements which pose a breeding ground for *inter alia* economic crimes, drug abuse, prostitution and criminal gang activities.

The negative impact of organised crime on the economy can be ascribed to the difficulty in bringing these criminals to justice, with the result that

45 Hargovan 2007 *Acta Criminologica* 79.

46 Moshi PB "Fighting money laundering The Challenges in Africa" 2007 *ISS* 1.

47 *Supra* n 46.

48 Potgieter PJ, Ras JM and Nesor JJ "Can Private Security Stand Up to the Challenges of Crime and Crime Prevention in South Africa? A Contemporary Perspective" 2008 *Acta Criminologica* 34. Of interest in this article is the prediction of the World Watch Institution that by the end of August 2008, urbanization will have resulted in an urban population surpassing the rural total for the first time in history, and by 2030 more than half of all Africans will have migrated to the cities.

the origins of funds or proceeds obtained by their illicit activities are concealed.⁴⁹ The accessibility of modern technology, such as telecommunications, internet services and online banking, contributes to the rapid rise in crimes committed for profit.⁵⁰

A survey of 100 companies conducted by PriceWaterhouseCoopers⁵¹ in 2005 showed that 83% of these companies were financially affected by the proceeds of economic crime. Reports revealed that by the end of 2004 South African companies had lost an estimated R40 billion per year as a result of white-collar crime, and this figure doubled in 2005.

In July 2008 the Minister of Safety and Security, Charles Nqakula, addressed the media in Pretoria, where he emphasised that organised crime continues to be of great concern to the government because of the damaging impact thereof on society.⁵² He stated that not only do organised criminal gangs involved in illicit drug trafficking have a severe affect on the youth, but also that their illegal financial resources are used to corrupt people.

3.3.2 *The importance of forfeiture*

The suppression of crime is seen as the most important function in a criminal justice system. Hence, when law enforcement is unsuccessful in bringing crime under control, crime flourishes, the law is violated, the security of law-abiding citizens and their property is put at risk, and public order breaks down.⁵³ In combating crime, the police should effectively be

49 Moshi 2007 *ISS* 2.

50 Redpath 2001 http://www.crimeinstitute.ac.za/2ndconf/papers/redpath_2.pdf [12 Feb 2008].

51 Goredema C "Confronting Money Laundering in South Africa: An Overview of Challenges and Milestones" 2007 *ISSM* 78.

52 Du Plessis 2008 <http://www.southafrica.info/about/democracy/crime010708b.htm> [4 Jul 2008].

53 Burchell *Criminal Law* 107. See also in this regard *S v Thebus* 2003 6 SA 505 (CC) par [34] where Moseneke J stated that the doctrine of common purpose evolves around the criminilisation of collective criminal conduct, and the purpose is to "satisfy the social need to control crime committed in the course of joint enterprises."

empowered to search the property of any individuals suspected of criminal activities or conduct, and to seize incriminating evidence related to any crime under investigation.⁵⁴

The recovery of the proceeds of crime is *ipso facto* regulated by the guilt or innocence of the alleged criminal. The recovery measures are accordingly dependent on the efficiency and effectiveness of the rest of the criminal justice system, which means that the fewer the number of convictions in for example corruption and economic crimes, the less successful the attempts at recovery. But in a system that is primarily based on economic justice, when organised crime, corruption and other sources of illegal income are recognised they cannot be recuperated by the criminal justice system alone. Criminal income is a phenomenon separate from the rest of the criminal justice process, and the aim of the criminal is to incorporate illegal income into legal commerce. When criminal income has already infiltrated the legitimate mainstream, the purpose of asset forfeiture is to remove these illegal proceeds from the control and possession of the alleged criminal, irrespective of whether or not he or she has been convicted of a crime.⁵⁵

Forfeiture, in general, renders the property guilty of wrongdoing, and is described as a punishment *ex lege* for “some illegal act, or negligence, in the owner of lands, tenements, or hereditaments: whereby he loses all his interests therein.”⁵⁶ The forfeiture of assets encompasses the following objectives:⁵⁷

- (a) to seize, remove and forfeit the instruments that were used in the commission of organised crimes, for example firearms, vehicles

54 *Supra* 53 n 107.

55 Goredema 2007 *ISSM* 87. See also in this regard Goredema C “Money Laundering Experiences, A Survey” 2006 *ISS* 4.

56 Van Jaarsveld 2006 *Fundamina* 139 n 13. At 140 n 16, it is observed that the word “forfeiture” derived from two Latin terms: *foris*, which means “outside,” and *facere* which means “to do.”

57 Cassella SD “Overview of asset forfeiture law in the United States” 2004 *SACJ* 347-349.

used for drug-trafficking, electronic devices used to commit economic fraud, as well as immovable property used to facilitate illegal brothel or gambling activities, or in the manufacturing and distribution of drugs;

- (b) the properties so forfeited or recovered are reserved as a possibility to compensate innocent victims once the case is finalised;
- (c) not only does asset forfeiture constitute an element of deterrence, but it removes the profit out of the crime and deprives the wrongdoers from their ill-gotten riches;
- (d) the message that is conveyed to a law-abiding community is that crime does not pay, and that these benefits, acquired as a result of a criminal lifestyle, are only temporary and illusive. Wrongdoers, such as criminal gangs and “fraud artists,”⁵⁸ are stripped of the illegal gains which contributed to their expensive and enviable lifestyles; and
- (e) asset forfeiture may represent a form of punishment by depriving a wrongdoer of his property used as an instrument in the commission of the crime, as well as of all of the proceeds obtained from these illegal activities. Forfeiture, therefore, “gives criminals their just desert.”⁵⁹

3.4 The Prevention of Organised Crime Act 21 of 1998

Against the background delineated above, the *Prevention of Organised Crime Act* 121 of 1998 (hereafter *POCA*) came into force on 21 January 1999. This powerful Act was drafted in order to combat the problematic and increasing tendency towards organised crime, which posed a threat to the new democracy of South Africa.

3.4.1 History and background of POCA

⁵⁸ *Supra* n 57 at 348.

⁵⁹ *Supra* n 57 at 349. See also the discussion of the absolute or retributive theory of punishment above at par 3.2.2.1.

International forfeiture legislation was adopted as a measure reflecting the desperate desire of law enforcement for a weapon with which to combat sophisticated criminals. Two basic strategies characterised this legislation. Firstly, these laws are aimed at groups involved in repetitive criminal activities. The objective is to bring those who assist criminal gang activities, with no direct involvement in the crime themselves, to justice. Not only are members of a criminal group, who committed certain crimes, subject to harsher penalties under forfeiture laws, but also those who directed and instigated criminal activities. Secondly, forfeiture endeavours to confiscate and remove the profit out of crime, thus reducing the incentive to commit crime.⁶⁰

In the climate of upcoming general elections and the critical predicament which law enforcement had to encounter in controlling organised crime, the drafters of *POCA* consulted legislation of the United States. The *American Racketeer Influenced and Corruption Organisations Act* of 1970 (hereafter *RICO*) and the *California Street Terrorism Enforcement and Prevention Act* of 1988 (hereafter *STEP*) were the prestigious guidelines on which *POCA* was based.⁶¹ *RICO* empowers the United States federal government to forfeit any property related to interests that a defendant has in a racketeering enterprise itself or related racketeering activities.⁶² Although forfeiture laws under *RICO* do make use of *in rem* or civil procedures,⁶³ it is intended to be directed at specific persons, notwithstanding the fact that the property itself was not tainted by criminal conduct.⁶⁴ *RICO* accordingly makes provision for the forfeiture of

60 *Supra* n 50. According to Redpath, the idea is “We know you did something really bad, but we can’t prove it.”

61 Standing S “The threat of gangs and anti-gangs policy” 2005 *ISS* 5; Goredema 2006 *ISS* 4, Van Jaarsveld 2006 *Fundamina* 138.

62 Cassella 2004 *SACJ* 352-353. For example, a court may order the forfeiture of a defendant’s interest in his entire business, irrespective of whether only a specific asset of the business was directly involved in illegal racketeering activities.

63 *Supra* n 3.

64 Van der Walt AJ “Civil Forfeiture of Instrumentalities and Proceeds of Crime and the Constitutional Property Clause” 2000 *SAJHR* 36-37. It is argued that *RICO* legislation, which provides for forfeiture of property not connected to criminal activity, should be subject to constitutional review. This is the case in SA when the formal requirements of *POCA* are applied. See the discussion below at par 3.6 and 4.3 in relation to instrumentality and proportionality.

criminally obtained property upon conviction of the accused. Only when it is proved that the property was used as a means to obtain illegal income will it be forfeited. In South Africa, criminal forfeiture is regulated by Chapter 5 of *POCA* which provides for criminal forfeiture similar to *RICO* law.⁶⁵

POCA is derived from “transnational criminal law,”⁶⁶ a phrase which refers to a body of law developed out of the need for international measures prohibiting organised crime, such as racketeering, corruption and money laundering. South Africa was one of the signatories to the *Palermo Convention*, or the *United Nations Convention against Transnational Organised Crime*, on 14 December 2000 and 20 February 2004.⁶⁷ South Africa’s international and domestic obligations to fight organised crime and to ensure that criminals do not benefit from their crimes were emphasised by the Constitutional Court in *National Director of Public Prosecutions v Mohamed* (hereafter *Mohamed 2*).⁶⁸

3.4.2 Organised crime defined

POCA does not define organised crime. The structural complexity and evasiveness of organised crime syndicates, which encompasses many

65 Redpath 2000 *supra* n 4. A controversial aspect of *RICO* is embodied in the punitive provisions applicable to racketeering, which provides that a person who has been financially injured by racketeering activities may sue and claim threefold the damages suffered. *POCA* however does not contain similar punitive remedies.

66 Burchell *Criminal Law* 4.

67 Burchell *Criminal Law* 4 n 24, Goredema C “Organising against organised crime: Does South Africa have what it takes?” 2001 *Nedbank ISS Crime Index* 1. The two primary objectives of the *Convention* are firstly to implement legislative and operational measures for domestic laws to effectively regulate and confront organised crime. Four categories of criminal activities are identified, namely participation in organised criminal groups, money laundering, corruption and obstruction of justice. The second objective is to eliminate existing differences and inconsistencies among national legal systems. Measures employed by the *Convention* to prevent and prosecute organised crime include controlled delivery of intercepted contraband, a witness protection programme and the confiscation of assets used to commit crime, irrespective of where the assets are located.

68 2003 4 SA 1 (CC) par [16]. The court stated that the provisions of *POCA*, as provided for in Chapters 5 and 6, constitute a process of law reform to give effect to these obligations. This has also been observed by Van Heerden J in *Mohunram v National Director of Public Prosecutions (Law Review Project as Amicus Curiae)* 2007 2 SACR 145 (CC) par [28].

forms of violent and non-violent crimes in South Africa, are envisaged as an impediment to formulating a comprehensive definition.⁶⁹

Attempted definitions merely focused on the functioning of criminal syndicates rather than the structure. For example, the South African Police Force defined organised crime as any group of criminals with a corporate structure, with its main objective being “to obtain money and power through illegal activities, often surviving on fear and corruption”.⁷⁰

Goredema⁷¹ defines organised crime as:

Systematic criminal activity of a serious nature committed by a structured group of individuals or corporate body in order to obtain, secure or retain, directly or indirectly, a financial or other material benefit.

It is inevitable that an inference can be drawn from the very title of *POCA* that some element of organised crime relating to racketeering, money laundering or the like must exist before the applicable provisions can be implemented. A narrow interpretation of organised crime was employed in *National Director of Public Prosecutions v Seevnarayan*,⁷² where Griesel J held that the evasion of personal income tax by a single individual cannot be categorised as organised crime, even where the evasion took place over a few successive tax years.

This restrictive interpretation given to *POCA* was however rejected in *National Director of Public Prosecutions v Cook Properties; NDPP v 37*

69 Berg *Reflections on Organised Crime* 7-8. Attributable to this phenomenon, according to Berg, is that syndicates operate on different levels of sophistication. See also in this regard *S v Shaik* 2008 1 SACR 1 (CC) par [71]. See also p 8 par (c) and (d) above with reference to the rules in accordance with the *nulla poena sine lege* principle.

70 *Supra* n 69 at 8. This definition is derived from Interpol's Organised Crime Unit. See also Burchell *Criminal Law* 975 n 23 with reference to s 16(2) of the *South African Police Service Act* 68 of 1995 where the emphasis is on “an enterprise or group of persons who have a common goal.”

71 Burchell *Criminal Law* 974.

72 2003 2 SA 178 (C); 2003 1 SACR 260 par 59, Burchell *Criminal Law* 976.

Gillespie Street Durban; NDPP v Seevnarayan,⁷³ (hereafter *Cook Properties*). The court ruled that a narrow interpretation “truncates the scope of the Act,” which is designed to reach beyond organised crime, money laundering and criminal gang activities, and consequently also applies to individual wrongdoing.⁷⁴

3.4.3 Preamble and purpose of POCA

In *National Director of Public Prosecutions v Mohamed*⁷⁵ it was stated that it is trite that conventional criminal penalties are inadequate as measures of deterrence, as the leaders of groups engaged in organised crime benefit from and retain their criminal income, even when brought to justice and convicted. Van Heerden J, in *Mohunram*,⁷⁶ underscored the importance of forfeiture procedures under *POCA*, namely the desire to combat organised criminal activity by depriving of their property those who obtained or used it in the commission of crimes. The primary objective of forfeiture procedures is not to punish the offender, but to remove the incentive to commit further crimes.⁷⁷ This was confirmed by Nkabinde J in *Prophet v National Director of Public Prosecutions*,⁷⁸ where he held that the property is rendered guilty of contravening the law and not the owner.

The overall legislative objectives and primary purpose of *POCA* are set out in its Preamble. Measures are introduced to combat the rapid growth

73 2004 2 SA 208 (SCA) par 65; *Mohunram v National Director of Public Prosecutions* 2007 2 SACR 145 (CC) par [25], *Prophet v National Director of Public Prosecutions* 2006 1 SA 38 (SCA) par 33.

74 The controversy surrounding the application of *POCA* to cases of individual wrongdoing is discussed and analysed at par 4.4 below.

75 2002 4 SA 842 (CC) par [15], (hereafter *Mohamed 1*). See also in this regard Van Jaarsveld *Fundamina* 139 n 13.

76 *Supra* n 68 par [70].

77 Van Jaarsveld 2006 *Fundamina* 139 n 13, see also *Mohamed supra* n 75 par [28]. In *National Director of Public Prosecutions v Cole* 2005 2 SACR 553 (W) par 12 and 13. At par 15 the court further argued that although forfeiture orders “could easily become a weapon of terror rather than a weapon of justice,” they remain a necessary and important measure in the prevention and punishment of drug offences.

78 2007 BCLR 140 (CC) par [58]. See also the discussion above with reference to the aim and theories of punishment at par 3.2.1 and 3.2.2.

of organised crime, money laundering, criminal gang activities and racketeering, which present a danger to public order and safety and economic stability, with the potential to inflict social damage. Secondly, the statement is made that the South African common law and statutory law have failed to adequately deal with organised crime, and to keep pace with international measures aimed at dealing effectively with such activities. *POCA* further provides that no person is entitled to benefit from the fruits of their unlawful activities or to use property for the commission of an offence. In order to achieve this objective, provision is made for a civil remedy, the restraint, seizure, and confiscation of property or the benefits derived from unlawful activities. Legislation is therefore necessary to legalise the seizure and forfeiture of property which is derived from these activities, or property which is concerned in the commission or suspected commission of an offence.⁷⁹

Section 1 of *POCA* defines “property” as money or any other movable, immovable, corporeal or incorporeal thing, including any rights, privileges, claims and securities and interests therein as well as all proceeds thereof.⁸⁰

3.4.4 Focus and scope of *POCA*

POCA criminalises the following offences, which include offences or unlawful activities committed at any time before or after the commencement of *POCA*, as amended.⁸¹ The meaning of “proceeds of unlawful activities” and “instrumentality of an offence” now applies

79 *Mohunram v NDPP supra* n 68 par [146]; *Prophet supra* n 78 par [59]; *National Director of Public Prosecutions v Mohamed* 2003 4 SA 1 (CC) par [14] (hereafter *Mohamed 2*); *National Director of Public Prosecutions v Naido* 2006 2 SACR 403 (T), Van Jaarsveld 2006 *Fundamina* 138 n 6.

80 See also par 2.1.2 n 17 above where it is submitted that “property” in terms of s 25(1) of the *Constitution* also has a broader meaning and is not restricted to real rights.

81 *Prevention of Organised Crime Second Amended Act* 38 of 1999, as explained by Van Heerden J in *Mohunram v NDPP supra* n 68 par [21].

retrospectively.⁸²

3.4.4.1 Racketeering activities: Chapter 2

The legal concept of racketeering was unknown in South Africa prior to *POCA*, and the definition derives from the requirements provided for in *RICO*.⁸³ A “pattern of criminal activity” in terms of *POCA* comprises the planned, ongoing or repeated involvement in any offence listed in Schedule 1. It is furthermore required that one of the offences must have occurred after the commencement of this Act, and the last offence must have occurred within 10 years (excluding any period of imprisonment) after the commission of the prior offence referred to in Schedule 1.⁸⁴

POCA provides for the criminalisation of conduct by any person who receives or retains property, directly or indirectly, from a pattern of racketeering activity (*actus reus*); and knows or ought to have known that such property is so derived (*mens rea*), and uses or invests, directly or indirectly, any part of such property with the objective of acquiring, establishing or operating an interest in any enterprise (*actus reus*).⁸⁵ The criminalisation of racketeering offences is indispensable in the fight

82 Burchell *Criminal Law* 981, where it is observed that these definitions were amended after *National Director of Public Prosecutions v Carolus* 2000 1 SA 1127 (SCA). *In casu* it was subsequently held that it is not desirable for a statute to operate retrospectively.

83 Burchell *Criminal Law* 976. See also the discussion above at par 3.4.1.

84 S 1 of *POCA*.

85 S 2(a), see also Burchell *Criminal Law* 976-977. It is also an offence in terms of s 2(b)-(d) if a person receives or retains, uses or invests, or acquires or maintains an interest in any property, directly or indirectly, on behalf of any enterprise, through racketeering activities. “Enterprise” includes any individual, partnership, corporation, association, a juristic person or legal entity, as well as any group of individuals associated in fact, who do not necessarily constitute a juristic person or legal entity. In *S v Dos Santos* 2006 JOL 18028 (C) at p 19-20 the defence contended that the meaning of “offence” in the definition of a “pattern of racketeering” must of necessity imply a conviction, since there can be no offence without a conviction. The court held that although it was unable to locate a definition on this aspect in case law, the spirit and purport of *POCA* should be observed. The court noted that “offence” is defined in the Dictionary of Legal Words and Phrases as “such a transgression of the law as will make the transgressor liable to trial and punishment.” With reference to the Preamble of *POCA* and the difficulty in proving organised crime related to enterprises involved in a pattern of racketeering, the court ruled that if it was intended by the legislature that the definition should embrace a conviction, it would have stated so explicitly.

against organised crime, since for forfeiture to become a possibility it is required only that certain conduct or property is related to or linked with a pattern of illegal conduct, without having to prove that an accused has committed a particular offence. This addresses the evasiveness and invisibility of the main actors behind organised crime, who conduct and control their criminal syndicates without being directly involved in the actual offences.⁸⁶

Any person convicted of racketeering offences under section 2(1) will be liable to a fine of up to R1 billion, or life imprisonment.⁸⁷

3.4.4.2 Proceeds of unlawful activities: Chapter 3

The “proceeds of unlawful activities” are defined as follows:

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 the 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.

Offences related to the proceeds of unlawful activities are money laundering (section 4), assisting another to benefit from the proceeds of unlawful activities (section 5), and the acquisition, possession or use of unlawful proceeds (section 6). Section 7 was amended and replaced by section 29 of the *Financial Intelligence Centre Act 38 of 2001* (hereafter *FICA*). *FICA* imposes a duty on members of the general public, or any person who carries on a business, or who is employed in such a business, to report suspicious or unusual transactions related to unlawful activities.⁸⁸

86 Burchell *Criminal Law* 978.

87 See also Redpath 2001 *supra* n 4. The interpretation of “enterprise” and “racketeering activities” in terms of s 2(1)(e) and (f) related to the Fancy Boys gang which was elucidated by the court in *S v Eyssen* (Reportable: Case 746/2007: Decided 17 Sept 2008 (SCA)) par 4-10.

88 Burchell *Criminal Law* 996. A duty is also imposed on any person to report suspicions regarding the facilitation or transfer of proceeds of unlawful activities of a business, for example tax evasion, a failure to pay a legitimate duty or levy, and money laundering. “Suspicious” not only means actual knowledge of a fact, but also foresight of the reasonable possibility that a fact exists.

A Financial Intelligence Centre and Money Laundering Advisory Council has also been established to assist in the identification of the proceeds of unlawful activities and money laundering, as well as procedures for the reporting of these activities.⁸⁹ Penalties provided for in section 29 for failing to report suspicious or unusual transactions are imprisonment for a period of up to a maximum of 15 years or a fine of up to R10 million.⁹⁰ The reporting responsibilities under *FICA* not only include traditional financial service institutions but are extended to comprise professional services rendered by attorneys, accountants, trust companies, estate agents, insurance companies and gambling institutions.⁹¹

Money laundering is described as a cleansing process whereby the source of “dirty money” is concealed through repetitive transfers, to reappear eventually in economic commerce as legitimate income.⁹² Three stages are distinguished in this process, the first of which is “placement,” where the launderer places the money in a financial institution. The illegal origin of the money is then hidden by concluding consecutive complex transactions called “layering.” The unlawful proceeds or funds are at this stage legally accessible, and are often used to buy and sell property or to invest in insurance or unit trusts. In the third stage, called “integration,” the criminal regains control over the proceeds without being detected by the authorities.⁹³

Successful money laundering activities are said to be closely linked with serious economic crimes such as fraud, corruption, bribery, violations of

89 Burchell *Criminal Law* 992. Money laundering legislation available at <http://www.libcorpben.co.za/legal/briefs/brief053.html> [9 Jul 2008].

90 Burchell *Criminal Law* 997, Money laundering legislation *supra* n 89.

91 Goredema 2001 *Nedbank ISS Crime Index* 2. These are some of the examples cited by the author.

92 Burchell *Criminal Law* 986.

93 *Supra* n 91. See also in this regard Goredema C “Money laundering in Southern Africa; Incidence, magnitude and prospects for its control” 2004 *ISS* 2, where it is stated that money laundering comprises “all activities to disguise or conceal the nature or source of, or entitlement to money or property that has been acquired from serious economic crime.”

tax and exchange control regulations, and international terrorism.⁹⁴

3.4.4.3 Criminal gang activities: Chapter 4

A “criminal gang” is defined in section 1 of *POCA* as any formal or informal ongoing organisation, association or group of three or more persons, one of whose activities consists of the commission of one or more criminal offences. The name, sign or symbol of the gang should be identifiable and the members, either individually or collectively, should be engaged in a pattern of criminal gang activity. A “pattern of criminal gang activity” includes the commission of two or more criminal offences listed in Schedule 1, provided that at least one of the offences occurred after the commencement of Chapter 4, and the last of these offences occurred within three years of a prior offence. These offences should have been committed either on separate occasions or on the same occasion by two or more members belonging to the same criminal gang.⁹⁵

Gang related offences are provided for in sections 9(1) and (2) of *POCA*.⁹⁶ Section 11 stipulates the factors to be considered by a court in

94 Goredema 2004 *ISS* 2-4. Syndicated drug trafficking is, however, regarded as the main predicate activity for money laundering in all parts of Southern Africa. Huge amounts of cash are hidden and converted to avoid the detection of drug trafficking. Profits are laundered by the purchasing *inter alia* of motor vehicles, legitimate businesses and companies and residential properties.

95 See Burchell *Criminal Law* 983 read with n 58, where the *United Nations Convention on Transnational Organised Crime* defines an “organised criminal group” as a “structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences.”

96 S 9(1)(a)-(c) criminalises the conduct of any person who actively participates in or is a member of a criminal gang, who wilfully aids criminal activity for the benefit of, at the direction of, or in association with any criminal gang; threatens to commit or perform any act of violence by, or with the assistance of a criminal gang, or threatens any person with retaliation in any manner, in response to an act of violence. A person shall be guilty of an offence in terms of s 9(2)(a)-(c) whose conduct is aimed at causing, bringing about, promoting or contributing towards a pattern of criminal activity; inciting, advising or instigating such behaviour, or intentionally encourages or recruits another person to join a criminal gang. S 9(1) or (2)(a) punishes a person after conviction with a fine or imprisonment for a period not exceeding six years, and s 9(2)(b) or (c) with a fine or imprisonment for a period not exceeding three years. Aggravating circumstances include offences committed on the premises or within 500 metres of a public or private school, or any educational institution during hours where the facility is open for classes.

establishing if a person is a member of a criminal gang, namely acknowledgement of membership; identification by a parent or guardian; residing in the area of a criminal gang and adopting their style of dress, hand signs, language, and tattoos, or associating with known members; having been arrested more than once in the company of identified members for offences consistent with usual criminal gang activities; and identification as a member by physical evidence such as photographs or other documentation.⁹⁷

However, a comprehensive legal definition of criminal gangs remains elusive. As was pointed out by Gastrow,⁹⁸ a single definition will be inadequate to encompass the many different manifestations of criminal gangs, and the focus should rather be on the conduct of gang activity than on trying to capture the nature of criminal gangs in a legal definition. Some critics⁹⁹ advise that the definition of “criminal gang” in *POCA* is confusing and “virtually useless.” The argument put forward contains three issues: firstly, the characterisation of gangs is in essence the same as the formulation of the definition for organised crime,¹⁰⁰ save for the underlying difference that criminal gangs are *inter alia* identified by their signs or symbols. Secondly, when criminal gangs are juxtaposed against non-criminal gangs, criminality is not a defining element of gangs. It is submitted that a definition of gangs should be established first before criminal gangs can be distinguished. Lastly, criminal gangs are characterised in terms of criminal gang activities, which move also requires an explanation of gangs, which is not provided.

The existing definitions fail “to describe the essence of gangs and they do not explain whether gangs are different from, synonymous with or a

97 See also Burchell *Criminal Law* 985 in this regard.

98 *Ibid* n 97.

99 Standing 2006 http://www.iss.co.za/index.php?link_id=28&slink_id=4121&link_type=12&tmpl_id=3 [6 Aug 2008]. See Chapter Six 251-253 in this regard.

100 See par 3.4.2 above where the definition of organised crime is analysed.

sub-category of organised crime.”¹⁰¹ To emphasise the fact that gangs and their criminal activities are an ever-increasing problem, it was estimated that during 1990 there were approximately 130 gangs on the Cape Flats alone with a membership of 100 000. These gangs included powerful, well-known groups such as the Americans, the Hard Livings, the Junky Funky Kids and the Mongrels.¹⁰²

In his budget speech on 15 May 2008 for the 2008/09 financial year, the Western Cape MEC for Community Safety Mr Leonard Ramatlakane confirmed that *POCA* has brought relief in the Western Cape where drug abuse and gangsterism “are a historic, parasitical fact.”¹⁰³

3.4.4.4 Offences listed in Schedule I

Schedule I provides for an itemised list of common law offences,

-
- 101 Standing 2006 *supra* n 99. The key difficulty in existing definitions for gangs and organised crime, according to the author, lies in their “trait-based” approach. With reference to Jay Albanese, who surveyed international literature on organised crime, the following traits were listed: the existence of an organised hierarchy; engagement in profit-driven crime; the use of force or threat; reliance on corruption to maintain immunity; the existence of a public demand for their services; their monopolising a particular market; their restricted membership; the fact that they are not ideological; their internal specialisation; their code of secrecy; and the fact that they plan their activities extensively.
- 102 Standing 2005 *ISS* 2. The Americans gang, which is believed to be the largest, is a complex internal organisation and consists of approximately 5 000 members. Personal fortunes are acquired by the control over economic and social activities, for example the distribution and sale of drugs and illegal firearms, prostitution, the exporting and selling of highjacked cars and the poaching of abalone. It is trite that investments in nightclubs, shops and garages as well as other illegal gains are used in money-laundering schemes. At the heart of a criminal gang, as it was put by Gayton Mckenzie, the leader of one of the biggest prison gangs in the world, is a sense of solidarity: “There’s no profession in the world that creates the sense of brotherhood that crime does.” See in this regard Cilliers *C The Choice; The Gayton Mckenzie Story* 56-57. At the age of 18, prior to his conviction and 15 years prison sentence at Grootvlei Prison, he and his gang members spent more than R40 000 a day on luxurious items earned out of the proceeds of their illegal gang activities. He is currently well-known for his motivational speeches throughout SA.
- 103 See in this regard Government information 2008 available at <http://www.search.gov.za/info/previewDocument.jsp?dk=%2Fstatic%2Finfo> [8 Aug 2008]. According to statistics provided, 1 658 high flyers were arrested in the last four years, 465 drug outlets were closed and 4 797 drug-related arrests were affected. The total weight of seized drugs and related substances “equals the total weight of 22 one-ton bakkies.” In monetary terms the confiscated drugs equal the salary of 1 028 million individuals with a monthly income of R3 000, for a period of three years.

amongst others murder, rape, kidnapping, arson, robbery, indecent assault, fraud, extortion and child stealing. Statutory offences include, among others, acts of sexual penetration or sexual violation with children, committing an immoral or indecent act with children under a specified age, and enticing such children to the commission of an indecent or immoral act. Item 10 relates to offences under legislation dealing with gambling, gaming or lotteries, and Item 11 relates to the contravention of section 20(1) of the *Sexual Offences Act 23 of 1957*.¹⁰⁴ Item 33 provides for any offence of which the punishment may be a period of imprisonment exceeding one year without the option of a fine.

It is noteworthy that human trafficking for the purposes of sexual exploitation is envisaged as the third most problematic phenomenon of syndicated or organised crime in Southern Africa, after drug trafficking and motor vehicle theft.¹⁰⁵ Researchers of the *United Nations* and the *International Labour Organisation* estimated that 12,3 million people per annum worldwide are enticed, transported and transferred for purposes of exploitation.¹⁰⁶

A legal definition of human trafficking does not currently exist in South

104 Certain provisions of the *Sexual Offences Act 23 of 1957* have been amended by the *Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007*, which commenced on 16 December 2007. For the purposes of the commitment of an act of sexual penetration or sexual violation with a child, a child is regarded as being a person of 12 years or older but under the age of 16 years. S 57 stipulates that children under the age of 12 years are not able to give consent to sexual acts. See Stassen S and Stassen K "New Legislation" 2008 *De Rebus* 39-41 in this regard. Furthermore, s 20(1)(a) provides that it is an offence for persons to knowingly live wholly or in part on earnings of prostitution; or (1)(aA) has unlawful carnal intercourse for reward; or (1)(b) commits an act of indecency in public; or (1)(c) assisting in the commission of indecent acts. S 2 makes it an offence to keep a brothel and the prescribed penalty is three years' imprisonment, with or without a fine of R6 000. Keeping a brothel is not a listed Schedule I offence, but may be challenged under Item 33. See *Cook Properties supra* n 73 par 37 and 42, *National Director of Public Prosecutions v Geysers* 2008 2 ALL SA 616 (SCA) par 17.

105 Goredema 2004 *ISS* 5.

106 SA Government Information 2007 <http://www.info.gov.za/issues/humantrafficking/what/background.htm> [13 Feb 2008]. The research showed that 80% of the trafficked persons are women and children, and 50% of the latter are minors. It is submitted that this alarming and fast growing industry constitutes nothing other than organised crime, with a total market value estimated at \$32 billion.

Africa, nor has legislation been promulgated in addressing this problem.¹⁰⁷ But offences relating to sexual exploitation may be challenged under common law such as abduction and kidnapping, the *Sexual Offences Act 23* of 1957, the *Child Care Act 74* of 1983, the *Children's Act 38* of 2005, which criminalises child trafficking, or *POCA*.¹⁰⁸ In *Phillips v National Director of Public Prosecutions*¹⁰⁹ the court upheld the decision of the court *a quo* and granted a confiscation order in terms of *POCA* against the property of Phillips called "The Ranch."¹¹⁰

3.4.4.5 The Asset Forfeiture Unit

Based on the model developed in the United States, the Asset Forfeiture Unit (hereafter the AFU) was established in 1999 in terms of *POCA*.¹¹¹ The key objective of the AFU is to take the profit out of crime.¹¹² It is seen a "potent new weapon in the arsenal of the State in fighting crime."¹¹³ The success rate of the AFU is evident from a statement made by the

107 The problems facing SA relating to human trafficking, according to a spokesperson of the *International Organisation of Migration* in Pretoria, are the country's porous borders and organised crime gangs, and "the problem is compounded because there are not laws in South Africa outlawing human trafficking." See in this regard Hilton 2007 <http://www.africanstudies.uct.ac.za/postamble/vol3-1/slavery.pdf> [27 Jan 2008].

108 SA Government Information 2007 *supra* n 106. The *Children's Act* provides for a fine or imprisonment of up to 20 years or both after conviction. See also the discussion of *POCA* relating to racketeering, proceeds of unlawful activities and criminal gangs above. Also applicable in this regard are Ch 5 and 6 which provide for the forfeiture of the proceeds of unlawful activities. See the discussion below at par 3.5 and 3.6 in this regard.

109 2003 6 SA 447 (SCA) par 458H.

110 The court found that there were reasonable grounds to believe that Phillips had profited considerably from unlawfully owning a brothel and living off the earnings of prostitution, and would accordingly be convicted. *POCA* in this case was used as a powerful tool against human trafficking: 40 women of foreign nationalities were arrested and Phillips was charged with offences under the *Sexual Offences Act* as well as the *Aliens Control Act 91* of 1996. See also in this regard Hilton 2007 *supra* n 107.

111 Goredema 2006 *ISS* 5.

112 Kempen (undated) www.npa.gov.za/UploadedFiles/FAQs%20on%20AFU.pdf [15 Feb 2008]. The focus is on implementing criminal and civil asset forfeiture procedures in terms of Ch 5 and 6 of *POCA* to seize tainted property used in the commission of organised crime.

113 Goredema 2007 *ISSM* 85. The powers allocated to the AFU are to remove the instruments as well as the proceeds of crime.

head of the AFU, Willie Hofmeyer.¹¹⁴

POCA provides for the forfeited and realised assets and monies to be deposited into the Criminal Assets Recovery Account (hereafter CARA) for distribution as approved by Cabinet.¹¹⁵

3.5 Criminal confiscation (in personam): Chapter 5 of POCA

Criminal or *in personam* forfeiture actions derive from the medieval “forfeiture for felony.”¹¹⁶ This is also called the personification theory or *deodand* forfeiture, emanating from the idea that a thing should be destroyed due to its capability of causing harm. The object was therefore held accountable for its crimes.¹¹⁷

Section 13 of *POCA* stipulates that applications for restraint or confiscation orders under this Chapter are civil and not criminal procedures, and that the civil rules of evidence and the onus of proof (the balance of probabilities) apply.¹¹⁸ The prominent purpose of civil forfeiture is not regulatory, for example to secure temporary control over property, but acquisitive: ownership of the property is vested in the state

114 According to Mr Hofmeyer, more than 85% of organised crime-related cases were successfully prosecuted. Over the past eight years R2,5 billion worth of assets were frozen and an estimated R125 million worth of assets were confiscated. See in this regard Organised crime prosecutions top 85% 2007, available at http://www.sagoodnews.co.za/crime/organised_crime_prosecutions_top_85_.html [13 June 2008].

115 SA Government Information 2006, media statement available at <http://www.info.gov.za/speeches/2006/06101912151001.htm> [16 June 2008]. CARA renders financial assistance to law enforcement agencies in combating organised crime, money laundering and criminal gang activities, as well as the allocation of funds to victims of crime. In instances where direct victims of crime were prejudiced, the proceeds of forfeited assets are usually not paid into CARA, but directly to the affected victim through a court order. Over R200 million of disbursements have been paid out in this way since the establishment of CARA.

116 Van Jaarsveld 2006 *Fundamina* 142-143. The concept “felon” was initially created by the courts to serve as punishment for tenants who failed to meet their obligations. This method of punishment was further developed by the courts in cases of murder, rape, arson or robbery, where the offender’s property was forfeited to the crown. The belief was that the privilege of ownership is lost once the rules of society are broken.

117 Van Jaarsveld 2006 *Fundamina* 144.

118 See also in this regard Van der Walt 2000 *SAJHR* 34.

for public benefit.¹¹⁹ Criminal forfeiture, as part of the sentence, operates *in personam* and is directed at the property of the defendant personally, and not against that of third parties.¹²⁰ This action also applies only to the “proceeds of crime” and not to “instrumentalities of the offence.”¹²¹

3.5.1 Restraint orders

Restraint orders are *interim* measures to secure and preserve property pending confiscation and forfeiture.¹²² Section 26(1) stipulates that the NDPP may by way of an *ex parte* application apply to a High Court for a restraint order prohibiting any person from dealing with the property.

A provisional restraint order, in terms of section 26(3), made with immediate effect, may be coupled with a rule *nisi* calling upon the defendant to show cause on a stipulated date why the order should not be made final.¹²³ The restraint order may be made in respect of any realisable property specified in the order, or held by such person, or all property transferred to such person after the restraint order was made.¹²⁴

The High Court may make a restraint order when a prosecution for an

119 Nel JY “The constitutional rights of children and the Prevention of Organised Crime Act 121 of 1998” 2003 *Journal for Juridical Science* 99-100, Van der Walt 2000 *SAJHR* 3. The efficaciousness of the scope of forfeiture has been exacerbated in recent years to include not only contraband, but also property regarded as instrumentalities and the proceeds of crime. The constitutionality of forfeiture procedures will be critically analysed in chapter 4 below.

120 Cassella 2004 *SACJ* 355; Van der Walt 2000 *SAJHR* 4, Burchell *Criminal Law* 999. Criminal forfeiture is subject to a conviction obtained against a specific person, and is restricted only to property which forms part of that person’s assets.

121 Burchell *Criminal Law* 999.

122 Van der Walt 2002 *SAJHR* 33; Nel 2003 *Journal for Juridical Science* 105; *National Director of Public Prosecutions v Kyriacou* 2003 2 *SACR* 524 (SCA) par 5, *National Director of Public Prosecutions v Rautenbach* 2005 1 *All SA* 412 (SCA) par 24. Restraint orders are regulated in terms of s 25-29 of *POCA*.

123 See also in this regard *National Director of Public Prosecutions v Rebutzi* 2002 2 *SA* 1 (SCA) par 4.

124 S 26(2)(a)-(c). Realisable property in terms of s 14 includes any property held by a person to whom the defendant has directly or indirectly made an affected gift. See also in this regard *Procopos v National Director of Public Prosecutions* (Reportable: Case 401/07: Decided 29 Sept 2008 (SCA)) par 35. The court held that realisable property in terms of s 26(1) and (2) relates to property held by the person prohibited from dealing with such property, which is “clearly a *factum probandum*” in an application for a restraint order.

offence has been instituted against a defendant but not concluded, and either a confiscation order has been made against that defendant or there are reasonable grounds to believe that a confiscation will be made; or when the court is satisfied that a person is to be charged with an offence, and there are reasonable grounds for believing that a confiscation will be made against such person.¹²⁵

In *National Director of Public Prosecutions v Kyriacou*¹²⁶ the respondent contended that a restraint order could not be granted "if the truth cannot be established from the papers" and that the discretion to grant a restraint order should be used sparingly, and accordingly only in "the clearest of cases."¹²⁷ Mlambo AJA disagreed and held that the discretion conferred upon a court in terms of section 25(1)(a) to make a restraint order is based on the existence of "reasonable grounds for believing that a confiscation order may be made."¹²⁸ The appellant is not required to prove that a confiscation will be made but only to submit evidence that satisfies the court that there are reasonable grounds that an order may

125 S 25(1)(a) and (b) respectively. See also in this regard Dendy M "Watching your back A guide to Fica and Poca" 2006 *De Rebus*, Van der Walt 2000 *SAJHR* 33 n 149. A comprehensive exposition of the nature and application of a restraint order is conveyed by High Court in *National Director of Public Prosecutions v Hlongwa*; *In Re National Director of Public Prosecutions v Nkosi* 2006 2 All SA 486 (T) par 7-17. However, in *National Director of Public Prosecutions v Mtungwa* 2006 1 SACR 122 (N) the court dismissed an application for a restraint order. The respondent fraudulently secured employment and promotions to the amount of R1,8 million by using a falsified matriculation certificate. The court held at par 129 G-H and 130D that firstly, no reasonable grounds existed for believing that a confiscation order might be made, as the type of offence that the respondent had been charged with was not an offence for which the Act was designed. Secondly, the benefits which accrued to the respondent over the 11 year period did not constitute benefits derived as a result of unlawful activities, nor had the quantum been proved.

126 2003 2 SACR 524 (SCA) par 9 and 10. See also in this regard *National Director of Public Prosecutions v Naidoo* 2006 2 SACR 403 (T).

127 This approach, as argued, is analogous to the principles set out in *Plascon-Evens Paints v Van Riebeeck Paints* 1984 3 SA 623 (A) and *Stellenbosch Farmers Winery Ltd v Stellenvale Winery (Pty) Ltd* 1957 4 SA 234 (C). The respondent also relied in this regard on the ruling of the court in *National Director of Public Prosecutions v Mcasa* 2000 1 SACR 263 (TK) at 275 E-F.

128 According to Nugent AJA in *National Director of Public Prosecutions v Basson* 2002 1 SA 419 (SCA) par 19 "reasonable grounds" for such belief requires at least "that the nature and tenure of the available evidence needs to be disclosed." See also *NDPP v Rautenbach supra* n 122 par 25 and 51, *National Director of Public Prosecutions v Van Zyl* (Not Reportable: Case 39358/2007: Decided 3 June 2008: (W)) par 17.

be made.¹²⁹

Where a restraint order has been made by a High Court, that court may appoint a *curator bonis* in terms of section 28 to take care of and administer the said property, or order the person against whom the restraint order has been made to surrender any property into the custody of the appointed *curator bonis*.¹³⁰ Any person affected by an order to surrender property into the custody of a *curator bonis* may apply for the variation or rescission of the order or for the variation of the terms of the appointment.¹³¹

Persons affected by a restraint order are not without remedies. Application may be brought to the High Court to vary or rescind a restraint order if it is unnecessarily onerous and deprives the applicant of reasonable living and legal expenses related to any proceedings instituted against him or her. The court must be satisfied that the applicant has disclosed under oath that the concerned expenses cannot be met out of unrestrained property.¹³²

In *Fraser v ABSA Bank (National Director of Public Prosecutions as Amicus Curiae)*¹³³ the applicant lodged an application in the High Court in

129 See also in this regard *NDPP v Phillips supra* n 109 at 81 D-H where the court stated that a restraint order is analogous with but not identical to an *interim* interdict and attachment *pendente lite*. The intention of the Legislature is not that it should be defeated by a conflict of facts, but the *prima facie* case “is proof of a reasonable prospect” that a conviction and confiscation will be obtained.

130 The meaning of surrender of immovable property was clarified by the court in *Mngomezulu v Van Den Heever* 2007 SACR 266 (SCA) par 12. S 28(1)(b) requires the person in occupation of immovable property to hand over possession to the *curator bonis*, and that there would be no reason why the defendant could not continue to reside on the property. However, in *Mngomezulu v National Director of Public Prosecutions* 2008 1 SACR 105 (SCA) par 14 the court held that property may be alienated by the *curator bonis* in order to preserve the value thereof. The duties conferred upon the *curator bonis* are to make available the current value of realisable property in satisfying a confiscation order, or to sell any restrained property for the purpose of administering the assets in his control. See par 11 in this regard.

131 S 28(2)(a) and (b).

132 S 26(6)(a) and (b), see also in this regard *NDPP v Hlongwa; NDPP v Nkosi supra* n 125 at par 13.

133 2007 3 SA 484 (CC).

terms of section 26(6) for the *curator bonis* to sell certain property in order to meet his legal expenses relating to his criminal trial. A concurrent creditor had obtained default judgement against the applicant and opposed the application. The Constitutional Court held that when a High Court exercised its discretion, it should ensure that a defendant was not prejudiced in terms of reasonable legal and living expenses or had not unduly benefited from the terms of a restraint order.¹³⁴ The appropriateness and extent of legal representation at the state's expense would depend on the seriousness and complexity of the criminal charges.¹³⁵

The consequences of a restraint order and the underlying affected interests of parties who were married in community of property were pivotal in *National Director of Public Prosecutions v Moronyane*.¹³⁶ The wives of the respondents claimed that certain assets could not be subject to a restraint order as those assets belonged to them personally and in their own names. The court held that it is trite in our law that a joint estate is formed where parties are married in community of property and that the respondents can lay no claim to a separate estate, since the spouses were joined as parties to the proceedings.¹³⁷

3.5.2 Confiscation orders

In terms of section 18(1) the public prosecutor may apply for a

134 Par [72]. The court further held at par [78] that it was incorrect of the SCA to assume that the applicant bore the onus in justifying his claim for reasonable legal expenses. Instead, the request to use property for this purpose should be weighed against the state's interest in securing the property for a possible confiscation order and the claims of creditors.

135 Par [68].

136 (Not Reported: Case 1351/04: Decided: 27 May 2005 (NC)).

137 Par 13.2. This argument is underscored by the court with reference to the definition of realisable property in terms of s 14 (*supra* n 124). Reliance is also given to the *Mcasa* decision (*supra* n 127) at 268 G-H where Madlanga AJP held that it is irrelevant whether a restraint order applies to a respondent's own property which is not proceeds of crime. The purpose is to "reverse whatever benefit was derived from criminal activities to which no legal entitlements can appropriately be claimed." See par 13.1 in this regard. The consequences of forfeiture where spouses are married in community of property are discussed in more detail at par 4.7.2.2 below.

confiscation order upon conviction of the defendant.¹³⁸ The court may enquire into any benefit derived from an offence of which the defendant is convicted, as well as from any criminal activity that is sufficiently related to those offences.¹³⁹ In addition to any punishment imposed in respect of the offence, the court may make an order against the defendant for the payment to the state of any amount it finds appropriate.¹⁴⁰ Section 18(2) stipulates that this amount may not exceed the value of the defendant's proceeds from criminal activity, or the value of all realisable property, whichever is the lesser.¹⁴¹ Realisable property includes the value of the realisable property held by the defendant as well as the value of all affected gifts made by the defendant.¹⁴² The amounts to be realised will be finalised only once all persons holding an interest in the property concerned have been afforded an opportunity to make representations.¹⁴³ Where the property of a defendant has not yet been realised the High Court may suspend the realisation until a victim's or judgement has been met. Where the property has been realised the High Court has a discretion in directing the manner in which the proceeds

138 S 23 stipulates that a confiscation order has the effect of a civil judgment. See in this regard Burchell *Criminal Law* 101, Van der Walt 2000 *SAJHR* 34, where it is submitted that the possible intention of this provision could be to isolate these measures against restricted criminal proceedings in terms of s 35 of the *Constitution*.

139 *NDPP v Kyriacou supra* n 126 par 12. An application for a confiscation order based on the conviction of the defendants was dismissed by the court in *National Director of Public Prosecutions v Ncongwane* 2005 2 *SACR* 377. (N). The court held that the applicant failed to prove that the defendants took delivery or possession of the money which had disappeared during the robbery. It could therefore not be said that the defendants had derived a benefit from the crime of which they were convicted.

140 Nugent JA held in the *Rautenbach* decision *supra* n 122 at par 52 and 53, that a confiscation order under s 18(1) is directed at confiscating the benefit that accrued to the offender whether or not he is still in possession thereof. Although the assets were acquired before the offences were committed and did not form part of the proceeds of his unlawful activities, he may be ordered to pay the monetary value of the benefit so derived. With reference to s 12(3) the court stated that a person has benefited from unlawful activities when the proceeds of these activities have been received or retained before or after the commencement of *POCA*. See also in this regard *NDPP v Moronyane supra* n 136 par 13.1.

141 Redpath 2000 *supra* n 4; Burchell *Criminal Law* 1000; Nel 2003 *Journal for Juridical Science* 100, Dendy 2006 *De Rebus*.

142 S 20(a) and (b). The sum of all obligations that a defendant has and which is recognised by the court may be deducted from this amount.

143 S 20(5). See also Burchell *Criminal Law* 1000 in this regard.

are to be distributed.¹⁴⁴

In determining whether a defendant has derived a benefit in terms of section 18(1) and failed to disclose legitimate sources of income sufficient to justify the interests in any property at the time of the fixed date (conviction) or seven years previously, the court must accept this as *prima facie* evidence that such interests form part of such a benefit.¹⁴⁵ The primary object of a confiscation order is not to enrich the state but to prevent the convicted person from profiting and to deprive that person of the proceeds of his unlawful activities.¹⁴⁶

In the most recent and leading *S v Shaik*¹⁴⁷ decision the Constitutional Court heard an appeal where the validity of a confiscation order was contested regarding two benefits which the High Court had ruled to constitute the proceeds of crime.¹⁴⁸ The court noted that one of the reasons for the wide ambit of the definition of the “proceeds of crime” applicable to this case is:¹⁴⁹

[T]hat sophisticated criminals will seek to avoid proceeds being confiscated by creating complex systems of “camouflage.”

It is a notorious fact that professional and habitual criminals frequently take steps to conceal their profits from crime. Effective but fair powers of confiscating the proceeds of crime are therefore essential.

144 S 30(5) and 31(1). See also in this regard Burchell *Criminal Law* 1000, *NDPP v Rebuzzi supra* n 123 par 17 and 19 where the court held that the state does not have a preferential claim in terms of s 31(1), and “might end up receiving nothing.”

145 S 22 read with s 26(7) which also requires a disclosure of any facts relating to property in the control of the defendant as well as the location of such property. See also *NDPP v Kyriacou supra* n 126 par 13 in this regard.

146 *NDPP v Rebuzzi supra* n 123 par 19; *S v Shaik supra* n 69 par [51] and [52]; *NDPP v Kyriacou supra* n 126 par 3, *NDPP v Van Zyl supra* n 128 par 15.

147 *Supra* n 69.

148 The appellants in this appeal, Mr Shaik, Nkobi Holdings (Pty) Ltd and Nkobi Investments (Pty) Ltd were convicted in June 2005 of corruption. In January 2006 the appellants were ordered to pay to the state the value of these benefits which amounted to over R34 million. The corruption convictions were founded on a series of corrupt payments made to Zuma, the now current President of the ANC, to use his political influence to obtain certain shares. The two benefits relate to Nkobi’s shareholding in Thint (Pty) Ltd, and through that shareholding its interest in African Defence Systems (Pty) Ltd, referred to as “the arms deal.” See also in this regard par [6] and [14].

149 Par [25] read with n 19 *ibid*.

The value of a defendant's proceeds of unlawful activities is calculated as provided for in section 19(1) of *POCA*.¹⁵⁰ In this case the state accordingly needed to establish on a balance of probabilities that the benefits, namely the shareholding and dividends to be confiscated, flowed from the bribes paid to Zuma.¹⁵¹ Although the appellants contended that the confiscation order was disproportionate, O'Regan ADCJ held analogous to the decision of the High Court and the provisions of section 18(1) and (2) that it, according to its conferred discretion, might make a confiscation order "in any amount it considers appropriate."¹⁵² In conclusion, the court held that corruption is a serious crime closely linked to organised crime and is harmful to our most important constitutional values. The shareholding and dividends flowed directly from the crime of which the appellants were convicted as a result from Zuma's interventions on behalf of the appellants. *POCA* explicitly permits that all benefits that have been derived from the commission of a crime, whether directly or indirectly, may be confiscated.¹⁵³

3.6 Civil forfeiture (in rem): Chapter 6 of POCA

Civil forfeiture is regulated by sections 37-62 and constitutes a more powerful and controversial tool in which tainted property may be permanently forfeited to the state without a prior conviction.¹⁵⁴ Chapter 6

150 Par [28]. See in this regard par 3.4.4.2 above.

151 Par [44], which was established by the SCA and confirmed by this court at par [47]. See also in this regard *Zuma v National Director of Public Prosecutions* (Reportable: Case 8652/08: Decided 12 Sept 2008 (N)) par 9 and 10. The court underscored at par 151 that the after-effects of corruption "can quite readily extend to the corrosion of any confidence in the integrity of anyone who has a duty...to discharge to the public."

152 Par [76]. A primary consideration that must "robustly remain" is that the object of the Act is to reduce crime and to fully deprive them of their original proceeds.

153 Par [80] and [81]. Thus O'Regan ADCJ held that the appellants failed to prove that the High Court's discretion was improperly exercised in determining the amount to be confiscated, nor that the shareholdings and dividends were disturbingly inappropriate.

154 Van der Walt 2000 *SAJHR* 4-5. Two further characteristics that distinguish *in rem* forfeiture from criminal forfeiture are that the state bears a lower burden of proof in the former. Civil forfeiture relates back to the date when the property was used for unlawful purposes, irrespective of whether it is still owned or possessed by the offender, as against criminal forfeiture, where the property concerned applies only at the time of conviction.

is focused on the legal “guilty property” fiction which is directed against the property that was used in the commission of the offence itself and not on the wrongdoers. It is accordingly also not directed against any person with an interest in the property,¹⁵⁵ and the guilt of the owners of such property is irrelevant to these proceedings.¹⁵⁶ The vital purpose of *in rem* forfeiture legislation was emphasised by the court in *National Director of Public Prosecutions v Braun*.¹⁵⁷ It allows Government to remove criminally tainted property out of circulation, to abate nuisance and to serve as an encouragement to property owners to manage their property with the necessary care.

3.6.1 Preservation of property orders

Section 38(1) stipulates that the national director may by way of an *ex parte* application apply to a High Court for an order prohibiting a person from dealing in any manner with certain property. Such an order shall be made, in terms of section 38(2), if there are reasonable grounds to believe that the property concerned is (a) an instrumentality of an offence

155 Van der Walt 2000 SAJHR 7 and n 32. This fiction is founded on the ancient concept related to the Biblical injunction of *deodand* forfeiture, where an ox that fatally gored a man or woman would be killed. *Deodands* were abolished in England in 1846 and never became part of the law in the United States. See also in this regard Burchell *Criminal Law* 1001, Van Jaarsveld 2006 *Fundamina* 144. See also in this regard par 3.5 read with n 116 and 117 above.

156 *National Director of Public Prosecutions v Parker* 2006 3 SA 198 (SCA) par 13, *Mohamed 1 supra* n 75. The court ruled in *Mohamed 2 supra* n 68 at par [16] that the object of these provisions is not to punish criminals, but to remove the incentive for crime.

157 2007 4 SA 72 (CPD) par 16. See also in this regard *National Director of Public Prosecutions v Mazibuko* 2008 JOL 21207 (N) par 39, *Cook Properties supra* n 73 par 28 and 29. The state is constitutionally empowered to use forfeiture, in addition to criminal procedures, to encourage individuals to act vigilantly with goods they own, and to abstain from using them in the commission of crime. Property owners must take reasonable steps to avoid implicating themselves or their property in the ambit of criminal conduct. See also in this regard Singer JW and Beermann JM “The Social Origins of Property” 1993 *Canadian Journal of Law and Jurisprudence* 220 where it is suggested that property should be seen as “shaping contours of relationships,” a formulation which shifts the focus from rights to obligations. The inference to be drawn is that owners have duties towards non-owners by not using their property in ways that would illegitimately harm others.

referred to in Schedule I, or (b) the proceeds of unlawful activities.¹⁵⁸

When a forfeiture order is sought, a two-stage enquiry is conducted by the court. The first is to establish whether the property, on a balance of probabilities, is an instrumentality of an offence. At this stage the owner's guilt or knowledge is irrelevant, and the only question to be established is whether or not a functional relation exists between the property and the crime. Once this has been established, the property is liable to forfeiture and the court will then approach the second stage of the enquiry in terms of sections 52(1) and 52(2A).¹⁵⁹ The national director must give notice of a preservation order to all known persons who have an interest in the property subject to the order, which notice must be published in the *Government Gazette*.¹⁶⁰ The object of section 38 and the standard of proof are well described in *National Director of Public Prosecutions v Starplex 47 CC: In re Ex parte Application of NDPP v Mamadou*.¹⁶¹

158 See the discussion of Schedule I offences and the definition of the "proceeds of unlawful activity" above at par 3.4.4.4 and 3.4.2.2 respectively. The constitutionality of s 38 and the correctness of the High Court's declaration of the invalidity of this section were in issue in *Mohamed 2 supra* n 68. The High Court ruled that s 38 precluded a court from granting a provisional preservation order and a consequent rule *nisi* where express provision for a provisional restraint order, with immediate effect, is provided for in s 26(3). The right to a fair trial and the *audi alteram partem* rule are discussed at par 4.6 below.

159 The enquiry is to establish whether certain interests in the property should be excluded from forfeiture. Persons opposing forfeiture on this ground must state that the property was legally acquired and that they did not know, nor had reasonable grounds to suspect that the property was used as an instrumentality of an offence. See in this regard *Cook Properties supra* n 73 par 21 and 22; *National Director of Public Prosecutions v Gerber* 2006 JOL 18856 (W) par 16 and 17; *Mohamed 2 supra* n 68 par [17] and [18]; *Prophet v NDPP supra* n 73 par 11; *National Director of Public Prosecutions v Madatt* 2008 JOL 21555 (C) par 4, Burchell *Criminal Law* 1009. The "innocent owner" defense is discussed at par 4.7.2.1 below.

160 S 39(1). S 39(4)(a) and (b) further stipulates that a person who has received such notice must submit an appearance to the national director 14 days after such service, and any other person 14 days after the notice was published in the *Gazette*. S 40 provides that the national director must then within 90 days of the grant of the order apply for the property to be forfeited.

161 2008 JOL 21553 (C) par 9. See also *National Director of Public Prosecutions v Van Heerden* 2004 2 SACR 26 (C) in this regard. The court stated that a preservation order is akin to an *interim* interdict with the aim of preserving the property for up to 90 days pending proceedings for a forfeiture order. The applicant needs only to establish a *prima facie* case that there are reasonable grounds to believe that the property is an instrumentality of the offence or proceeds of unlawful activity.

Section 47 conveys the power to the High Court which made a preservation order to vary or rescind the order, on application by a person affected by that order. The order may be varied or rescinded when it has been established that it will deprive the applicant of reasonable living expenses and will cause unnecessary hardship. The hardship that the applicant will suffer as a result of the order furthermore outweighs the risk that the property concerned may be lost, destroyed, damaged, concealed or transferred.¹⁶²

3.6.2 Instrumentality of the offence

POCA defines “instrumentality of an offence” as any property which is “concerned in the commission or suspected commission of an offence,” any time before or after its commencement, and applies to offences committed within the Republic or elsewhere.¹⁶³

The meaning of “reasonable grounds to believe”¹⁶⁴ that the property concerned is an instrumentality of an offence was analysed by the court in the *Madatt* decision.¹⁶⁵ According to the *dictum* in *Hurley v Minister of*

162 In *Carmel Trading v Commissioner, SA Revenue Services* 2007 RSA 160 (SCA) par 9-12, a preservation and anti-dissipation order was granted in relation to a private Falcon jet registered in SA but kept in France. The respondent, the Commissioner for SARS, wished to have the Falcon sold and the proceeds kept in a trust pending the outcome of an action instituted against the appellant. It was common cause that the Falcon was fast deteriorating, and considering the purpose of a preservation order, the court was asked to vary the restraint order and authorise the “conversion into cash of a deteriorating asset.” The appellant stood charges relating to tax evasion, fraud, money laundering and racketeering.

163 *Prophet v NDPP supra* n 73 par 1; *Van Heerden supra* n 160, *National Director of Public Prosecutions v Stander* 2008 1 SACR 116 (E) par 10. S 50 of *POCA* provides for the forfeiture of property once it is established on a balance of probabilities that the said property is an instrumentality of an offence. This standard of proof was also underscored by the Constitutional Court in *Prophet v NDPP supra* n 78 par [55]. See also in this regard *NDPP: In Re Appeal* 2005 2 SACR 610 (N) par 19 and 20, where the court held that the money had been employed for the purpose of bribing a police officer not to perform his duties, and therefore constituted an instrumentality to the offence of corruption.

164 See in this regard par 3.6.1 above.

165 *Supra* n 159 par 8 and 9.

*Law and Order*¹⁶⁶ the ordinary grammatical meaning “is a belief based upon (factual) reason,” and does not mean “thinks he has reason to believe.”

“Instrumentality of an offence” and “concerned in the commission of an offence” has been embarked upon and applied in numerous case law decisions by our courts. In *Cook Properties*¹⁶⁷ the court had to decide whether a hotel was an instrumentality of an offence as a result of ongoing drug and prostitution offences being committed on the property. In order to establish a rational connection between the deprivation of property and the object of *POCA*, the court held that the link between the crime committed and the property must be reasonably direct and that the use of the property must be functional to the commission of the crime. The property must facilitate or make possible the commission of the offence and “must be instrumental in, and not merely incidental to” the commission of the offence.¹⁶⁸ The court further explained that a crime committed at a certain location does not by itself constitute the location as a venue which is an instrumentality of an offence or concerned in the commission of an offence. A closer connection than mere presence on the property is required.¹⁶⁹

166 1985 4 SA 709 (D) 716J-717A. Clauses such as “reason to believe” require the fulfillment of certain preconditions before a court can exercise its discretion. See also in this regard *National Director of Public Prosecutions v Stander* 2008 1 SACR 193 (E) par 12. The court noted that this term has not judicially been interpreted in terms of s 38(2) of *POCA*, but in terms of s 25 dealing with restraint orders. See par 3.5.1 and n 124 above where restraint orders are discussed.

167 *Supra* n 73 par 31 and 32; *Prophet v NDPP supra* n 78 par [56], *Mohunram v NDPP supra* n 68 par [44].

168 This interpretation is adopted to ensure that the application of the forfeiture provision does not render the deprivation of property arbitrary in violation of s 25(1) of the *Constitution*. See in this regard *Mohunram v NDPP supra* n 68 par [44]; *National Director of Public Prosecutions v Van Staden* 2007 1 SACR 338 (SCA) par 25, *Ex Parte NDPP in re Preservation Orders* 2005 2 SACR 198 (SE) par 6. A detailed discussion of the constitutionality of Chapter 6 is discussed at par 4.1-4.4 below.

169 Par 34, where the court further held that the property must have been “appointed, arranged, organised, furnished and adapted or equipped” to make possible the commission of illegal activities. See also in this regard *NDPP v Cole supra* n 77 par 8; *NDPP v Parker supra* n 156 par 27; *Prophet v NDPP supra* n 73 par 26; *Prophet v NDPP supra* n 78 par [22] and [57]; *NDPP v Gerber supra* n 159 par 19; *Singh v National Director of Public Prosecutions* 2007 2 SACR 326 (SCA) par 17; *Mohunram v NDPP supra* n 68 par [44]; *NDPP v Madatt supra* n 159 par 11, *NDPP v Geyser supra* n 104 par 16.

It was accordingly held that although the hotel is likely to attract drug dealers who frequently visited the hotel, that does not imply that the hotel is a drug shop. No evidence was introduced to prove that the persons arrested during the various raids and searches were the same people, nor that the rooms were rented out or equipped for the purpose of drug dealing. The hotel was merely the place where drug offences were committed.¹⁷⁰

However, in *Prophet*¹⁷¹ the Constitutional Court upheld the decision of the Supreme Court of Appeal and granted the forfeiture of the immovable property irrespective of the fact that the appellant was acquitted on a technicality. Nkabinde J remarked that when measuring the strength and extent of the relationship between the offence and the property sought to be forfeited, as well as the involvement of the property in the offence, regard must be had to:

- (a) whether or not the use of the property in the offence was deliberate and planned or merely incidental;
- (b) the importance of the property in achieving success in the illegal activity;
- (c) the period in which the property was used for the offences and the spatial extent of its use;
- (d) whether the illegal use was an isolated incident, and
- (e) if the property was acquired, maintained or used to carry out the offence.¹⁷²

Although only a small quantity of the drug “tik” was found on the property and a small room in the house was converted into a mini-laboratory, the court held that the house was incidental to the offence. Virtually every

170 Par 49 and 50.

171 *Supra* n 78 par [66]. The court emphasised that the growing international problem in combating organised crime necessitated extraordinary measures such as civil forfeiture.

172 Par [22] read with *supra* n 73 par 27.

single room had been adapted to facilitate the manufacturing of drugs.¹⁷³

The *Parker*¹⁷⁴ decision, as was the case in *Prophet*, related to residential property to be forfeited as an instrumentality of the offence. The court in *Parker* was of the opinion that it must look at the whole picture and the totality of all the circumstances when determining whether the property was a substantial instrumentality in the commission of the offence.¹⁷⁵ The evidence revealed that the property was characterised as a place where drugs could be purchased, and the deals were regularly executed on the same portion of the property, namely in the private and secluded driveway.¹⁷⁶ Cameron JA observed that there was a persistent pattern of association between the dealers and the property, which could therefore be characterised as a drug shop.¹⁷⁷

It had in that manner been established that the property was a criminal

173 Par [23] and [67]. The court decided that the house was so closely linked to the equipment used in the manufacturing of drugs that the two were inseparable. The court took into account the fact that the applicant received rental income from immovable property owned by his late father and that the forfeiture of the property would not leave him destitute.

174 *Supra* n 156. Nkabinde AJA noted at par 17 that this case was distinguishable from *Cook Properties supra* n 73. In the latter the hotel business had a public character with frequent drug-dealing tenants which made it difficult for the owner to control. However, in *Parker* a house owner and his family could reasonably be expected “to act vigilantly and exercise control in relation to the property to prevent crime.” The respondent and owner of the property was an 82 year old woman who lived in a granny-flat on the said property. The court reiterated at par 17 that her son, as her representative and also a well-known drug dealer, was aware of the illegal use of the property as a drug outlet and permitted its use as such.

175 Par 18. The court submitted at par 31 that, unlike *Prophet*, the premises were not adapted to manufacture drugs or employed for that purpose. No drugs were found on the premises albeit the vacant municipal stand next door was used to store the drugs (par 44). The same argument surfaced in *National Director of Public Prosecutions v Fielies* 2006 1 SACR 302 (C) where two separate buildings on the property, of which one was the main house and the other a shebeen, were held to be an instrumentality of the offence of the unlawful sale of liquor. See a comprehensive discussion of this decision at par 4.4.1 below.

176 Par 20.

177 Par 39 and 43. The court held at par 41 that the premises had established features that were not evident in *Cook Properties*. Accordingly, the premises were reconcilable with the notion of a “shop,” which is defined as a building, or part of it, where goods or services are sold. At par 45, read with par 44 *supra* n 174, the court held that in order to operate as a trading business it is not a requirement that stock should be kept on site. See also *Mohunram v NDP supra* n 68 par [52].

instrumentality.¹⁷⁸

The court *a quo* in the *Geyser*¹⁷⁹ decision held that only the top floor of the property was an instrumentality of the offence of keeping a brothel. On appeal, however, the court ruled that the ground floor was an essential component of the brothel, as it contained ancillary facilities, namely a bar, a reception area and a venue for erotic dances. The whole building satisfied the requirement that the property was an instrumentality, and directly causally linked to facilitate the commission of the offence. It was therefore liable to forfeiture.¹⁸⁰

A similar difficulty pursuant to the indivisibility of immovable property was permeated in the case of *Mohunram*,¹⁸¹ where only a section of the property was used for illegal gambling.¹⁸² Forfeiture in this case involved a sectional title unit which could be subdivided only when a certificate

178 See also in this regard *NDPP v Braun supra* n 157 par 22. The court found that there were reasonable grounds to believe that the immovable property was an instrumentality of a Schedule I offence in contravention of s 20(1) of the *Sexual Offences Act 23* of 1957. The residential property made it possible for the commission of sexual offences with minors as it provided a secure and private environment without risk of detection. See also the discussion above at par 3.4.4.4.

179 *Supra* n 104.

180 Par 15 and 16. The complicity of partial forfeiture of immovable property was exacerbated by the court in *NDPP v Cole supra* n 77 par 15, where the court held that immovable property is usually indivisible, unless evidence to the contrary proves that a division would be feasible. *In casu* it meant that the approval of the local municipality had to be obtained. However, in terms of common law the original acquisition of ownership of a building is vested in the principle *superficius solo cedit*, which means that the whole of the immovable property must be confiscated and not only a part thereof. Permanent attachments, annexations or other structures of the building, according to this principle, become the property of the owner, and the property is accordingly indivisible. See in this regard Badenhorst, Pienaar and Mosterd *Silberberg's Property* 147.

181 *Supra* n 68.

182 The court held at par [50] that the property was an instrumentality of the commission of the relevant offences. The property was specifically adapted to operate as a casino: the premises were partitioned, the windows were tinted and 57 gambling machines were installed in a row. See also in this regard Carnelly M "Forfeiture of illegal gambling premises owned by a closed corporation: *National Director of Public Prosecutions v Mohunram* 2006 (1) SACR 554 (SCA)" 2006 SACJ 60-67. Although the property was found to be an integral part of the commission of the offences, the court embarked upon a proportionality enquiry. Accordingly it needs to establish whether or not the forfeiture of the property constituted an arbitrary deprivation of property in terms of s 25(1) of the *Constitution*. See the discussion below at par 4.3.2 in this regard.

was obtained from the local authority.¹⁸³ The court held that consideration should be given to the fact that one part of the property was used to facilitate illegal gambling activities whilst the other part was used to conduct a legitimate business. The very fact that the property was immovable and incapable of subdivision exacerbated the suggestion that forfeiture “extends beyond a legitimate reach,” a fact which necessitated a proportionality enquiry.¹⁸⁴

Sachs J emphasised that the primary objective of *POCA* in relation to the instrumentality of an offence is to deter people from using their property for illegitimate purposes, although the purpose of deterrence may not disproportionately prejudice the owner of the forfeited property.¹⁸⁵

3.7 Assessment of POCA and punishment

The purpose and assessment of an appropriate punishment or sentence are to serve as deterrent, preventative, reformatory and retributive measures.¹⁸⁶ Reminiscent of the two *Mohamed*¹⁸⁷ decisions, the court clearly emphasised that the overall purpose of *POCA* is to remove the

183 Par [98] *ibid* n 119. Subdivision of sectional titles is regulated by s 21 and 22 of the *Sectional Titles Act* 95 of 1986.

184 Par [136]. See also *NDPP v Geysers* *supra* n 104 par 24 to 27. The court reiterated four differences between this case and *Mohunram* as to why a forfeiture order of the whole of the property was allowed in the former and not in the latter case. Firstly, in *Mohunram* the property was bought and used for both a legitimate and an illegitimate purpose, and in this case the property was acquired for a criminal purpose only. Secondly, illegal gambling, as in the case of *Mohunram*, may have negative social consequences, but gambling is lawful provided that the necessary licenses are obtained. In the present case brothel-keeping would remain illicit and was regarded as “morally more reprehensible than operating unregistered gaming machines.” Thirdly, the gaming machines used to commit the offences had been removed and forfeited. The property could be used for the legitimate glass and aluminium business, whilst in this case the brothel-keeping and the property were inextricably linked. The forfeiture of the entire property would therefore stop the illegal business and it was not contended by Geysers that he ever had or would in future have another use for it. Lastly, a substantial fine was paid in *Mohunram* apart from losing the machines valued at R285 000, whilst Geysers refused to pay an admission of guilt fine, and accordingly had not been punished at all.

185 Par [146].

186 See the discussion on this aspect above at par 3.2.1 with reference to the *dictum* of Davis AJA in *R v Swanepoel*.

187 *Supra* n 75 par [15] and n 68 par [15] respectively, *Cook Properties* *supra* n 73 par 17.

incentive for crime and not to punish the offenders. The applicability of forfeiture legislation is justified where conventional criminal penalties are inadequate to serve the purpose of deterrence in instances where organised crime leaders are able to retain the proceeds of their crime, even when they are brought to justice.¹⁸⁸ Mary Cheh¹⁸⁹ noted that no different rules for forfeiture of instrumentalities should apply. Forfeiture accordingly serves a purpose distinct from that of punishment, namely to prevent the further illicit use of property.

Criticism of this type of legislation is two-fold: firstly, it is regarded as a punishment which should not be imposed without a criminal conviction, and secondly it constitutes “selective punishment,” where the state has a discretionary power of whom to target. This may result in abuse.¹⁹⁰

Of major concern, according to Van der Walt¹⁹¹ is that forfeiture

could constitute a separate, additional punishment that might push the aggregate beyond the limit of what is considered fair and normal punishment for the particular crime.

Therefore Van Heerden J pointed out in *Mohunram*¹⁹² that the nature and extent of criminal penalties, as well as any other penalties which already have been imposed on the respondent should also be considered. In the same decision Moseneke DCJ, for the majority, held that the question should be asked whether the crime requires extraordinary measures for

188 *Ibid* n 186. However, in *Prophet supra* n 73 par 7 the SCA held that “ordinary criminal law ought to be the first port of call to combat the evil.” See also in this regard *Mohunram v NDPP supra* n 68 par [71]. At par [126] Moseneke DCJ succinctly stated that when ordinary crime is in issue, “the sharp question should be asked” whether the applicable crime renders conventional penalties inadequate. The same argument was underscored by O’Regan ADCJ in *S v Shaik supra* n 69 par [57] with regards to Ch 5 of *POCA*. The court held that the primary purpose of these provisions is not to punish offenders, but rather to ensure that criminals do not benefit from the fruits of their crimes. The court did acknowledge that in achieving this purpose, it might have a punitive effect, but that does not necessarily mean that the primary purpose is punitive in nature. See also the discussion in this regard at par 3.5.2 above.

189 Cheh MM “Civil Remedies to Control Crime: Legal Issues and Constitutional Challenges” 1998 *Crime Prevention Studies* 58-59.

190 Redpath 2001 *supra* n 4.

191 Van der Walt 2000 *SAJHR* 4 n 14.

192 *Supra* n 68 par [65].

its successful detection, prosecution and prevention.¹⁹³ Cognisance should also be taken of the fact that the crime, in relation to which the “guilty property” was used in the commission thereof, could be subject to forfeiture provisions. If this were the case an important consequence would be that these provisions might become doubly punitive, especially when a criminal conviction had been obtained and the applicable law provided for a confiscation order.¹⁹⁴

In agreement, the court reiterated that although Chapter 6 of *POCA*¹⁹⁵ do have remedial objectives it could not be disputed that it operates as punishment, as sanctions often serve more than one purpose. Civil proceedings therefore may have a remedial as well as a punitive dimension.¹⁹⁶ However, the court ruled that the proceedings as provided for in section 37(1) of *POCA* were civil and not criminal, and therefore clearly remedial. Although these procedures contain punitive characteristics, that does not mean that the predominant object is to punish the implicated offenders.¹⁹⁷

Yet, another concern is that the application of *POCA*, as a supplement to criminal remedies in combating organised crime, may embroil or obliterate the traditional distinction between the purpose and enforcement of criminal law on the one hand, and those of civil law on the other hand.¹⁹⁸ When civil procedures are precipitated to penalise or combat antisocial behaviour, this distinction “may be collapsing across a

193 Par [126].

194 Par [127]. The possibility that forfeiture may exacerbate the notion of double jeopardy in violation of s 12(1)(e) is discussed at par 4.5 below. This afforded every person the right not to be treated or punished in a cruel, inhuman or degrading way. It is submitted that it may be of particular importance when *POCA* is applied in cases of individual wrongdoing, as analysed in par 4.4 below.

195 Civil or *in rem* forfeiture as discussed at par 3.6 above.

196 *Cook Properties supra* n 73 par 16 and 17; *NDPP v Parker supra* n 155 par 1, Burchell *Criminal Law* 1012. See also in this regard *Austin v United* 509 US 602 (1993) 609-610 where Balckmun J held that post-conviction civil forfeiture procedures are subject to the United States Constitution’s Excessive Fines Clause, which renders civil forfeiture unconstitutional when it constitutes an excessive fine; *Cook Properties supra* n 73 par 17 n 24; *NDPP v Gerber supra* n 159 par 27; *NDPP v Cole supra* n 77 par 9, Burchell *Criminal Law* 1015.

197 *Ibid* *Cook Properties, NDPP v Parker supra* n 196.

198 *Mohunram v NDPP supra* n 68 par [74], Van der Walt 2000 *SAJHR* 38.

broad front,”¹⁹⁹ resulting in the placement of unnecessary burdens on individual rights.²⁰⁰ In accordance with the *Mohunram* decision, Van Heerden J stated that the remedy of civil forfeiture under *POCA* may not be utilised as a substitute for the effective enforcement of ordinary criminal remedies.²⁰¹

Burchell²⁰² opines that it is not only the objectives of civil forfeiture legislation that constitute punishment, but that the entire proceedings are criminal in nature. With reference to the long title of *POCA*, the Act provides for the civil forfeiture of *criminal* assets without a conviction, or assets that were the proceeds of *unlawful activities* used in the commission of an *offence*. Suffice it to say that civil forfeiture must be linked to the specific property subject to the criminal activity. This argument is justified by the existence of the innocent owner defence where culpability or fault is absent, which clearly confirms the criminal and punitive nature of the forfeiture of assets.²⁰³

Pursuant to the primary purpose of *POCA*, namely to deter people from using their property for purposes of crime, Sachs J indicated that this purpose cannot justify every forfeiture of instrumentality of an offence. Deterrence as an objective may not serve “in an instrumental manner as examples to others” if these measures are unjust and unfair to those individuals.²⁰⁴ The circumstances of each case must be considered to ensure that the purpose of deterrence under *POCA* does not result in a disproportionate impact on the owner of the forfeited property.²⁰⁵

199 *Ibid* Van der Walt 2000 *SAJHR* 38.

200 *Supra* n 198. An example of cases which are inherently criminal although intrinsically civil occurs when the imposed punishment is so excessive as to depict the disapproval of society to such an extent that it can be legally justified only once a criminal conviction has been obtained.

201 *Mohunram v NDPP supra* n 68 par [72].

202 Burchell *Criminal Law* 1015-1016.

203 Burchell *Criminal Law* 1016. The innocent owner defense is discussed at par 4.7.2.1 below.

204 *Mohunram v NDPP supra* n 68 par [146].

205 *Ibid* n 204.

In *S v Dodo*²⁰⁶ the Constitutional Court warned that punishment must be proportionate to the deserts of the implicated offender, and all human beings should be treated “as ends in themselves, never merely as means to an end.”²⁰⁷

3.8 Concluding remarks

It has already been established in *FNB*²⁰⁸ that property may be confiscated without compensation when an appropriate relationship exists between means and ends, taking into account the sacrifice to be suffered by the affected person and the public purpose it needs to serve. Deprivation of property will be arbitrary and unconstitutional in terms of section 25(1) of the *Constitution* when the law does not provide sufficient reason for it or if it is procedurally unfair.

POCA was drafted in order to combat the increasing phenomenon of organised crime and corruption which, when allowed to go unpunished, posed an incontestable threat to South Africa’s new democracy.²⁰⁹

Procedures under the Act provide for asset forfeiture by depriving a wrongdoer of tainted property used as an instrument in the commission of a crime, as well as the proceeds of crime. These measures are designed to give criminals their just desert.²¹⁰ However, civil forfeiture²¹¹ is not aimed at wrongdoers, but on the property that is used to commit the implicated offence. The guilt of the owner or possessors of the

206 *Supra* n 41 par [37]; *S v Malgas* 2001 2 SA 1222 (SCA) par 25, *S v Vilakazi* (Reportable: Case 576/07: Decided 3 Sept 2008 (SCA)) par 3. At par 14 the court emphasised that a real risk exists that in some cases the imposed sentence may be so disproportionate that it renders it unconstitutional. As a safeguard, the determinative test for a court in deciding whether a prescribed sentence may be departed from “can be exercised well before the disproportionality between the mandated sentence and the nature of the offence becomes so great that it can be typified as gross.”

207 *S v Dodo supra* n 41 par [38], *S v Vilakazi ibid* n 206.

208 Par [98] *ibid* n 5.

209 *South African Association of Personal Injury Lawyers v Health* 2001 1 BCLR 77 (CC) par [4], *S v Shaik supra* n 69 par [72].

210 *Supra* n 57.

211 See par 3.6 above in this regard.

property is not particularly relevant to these proceedings.²¹²

The primary objective of forfeiture legislation is to remove the incentive to commit further crime, and not to punish the offender.²¹³ It is underscored by the court that the application of forfeiture procedures becomes inevitable when conventional criminal penalties are inadequate as measures of deterrence.²¹⁴ It is trite that professional criminals frequently conceal their criminal income, even when brought to justice.²¹⁵

It was stated by the court in the *Mohunram*²¹⁶ decision that the deterrent purpose of *POCA* “must be weighed against the effect on the individual owner, in the light of the relevant offence.” Of relevance also will be the extent of the forfeiture aimed at preventing organised crime. Sachs J expressed the opinion in the same decision that *POCA* has its own objectives “which should jealously be guarded” and should not be adopted to provide a substitute for conventional criminal remedies.²¹⁷

212 *Mohamed 1 supra* n 75 par [17]; *NDPP v Parker supra* n 156 par 13, Burchell *Criminal Law* 1001. See also in this regard *Prophet v NDPP supra* n 78 par [58] where the court held that the property is rendered guilty of the offence and not the owner, Van der Walt 2000 *SAJHR* 7. The point was made in *Prophet v NDPP supra* n 78 par [66] also that combating organised crime is a growing international problem which necessitates extraordinary procedures such as civil forfeiture.

213 *Mohamed 1 supra* n 75 par [28]. See also in this regard *S v Shaik supra* n 69 par [51] where the court held that the object of a confiscation order is not to enrich the state but to deprive the offender of the proceeds of his unlawful activities.

214 *Supra* n 213 par [15]. See also in this regard the discussion of the classification of theories of punishment above, at par 3.2.2. The inadequacy of conventional criminal penalties in justifying asset forfeiture under *POCA* is analysed below at par 4.4, in cases applicable to acts of individual wrongdoing.

215 See in this regard the most recent decision of the Constitutional Court in *S v Shaik supra* n 69 and the discussion above at par 3.5.2.

216 *Supra* n 68 par [146].

217 Par [152].

4 The constitutionality of forfeiture of property

4.1 Introduction

The Constitutional Court in *Mohunram v National Director of Public Prosecutions*¹ endorsed the notion that the state is constitutionally authorised to use forfeiture, in addition to criminal sanctions. Property owners cannot be indifferent in relation to property they own and are accordingly prompted to refrain from implicating themselves and their property in criminal activities. The right to property is not an absolute right² and imposes a duty on the owner of the property to manage it in a responsible manner compatible with the values enshrined in the Bill of Rights.³ The property rights of those who are actually involved in the commission of crime may therefore be forfeited, provided that the requirements in terms of section 25(1) of the *Constitution* have been met, namely that a proper balance between the public purpose of the deprivation and the interests of the affected person needs to be established.⁴

Although *POCA* embodies a serious attempt to combat organised crime, money laundering and criminal gang activities, the financial penalties and forfeiture of instrumentalities and proceeds of crime may constitute excessive and unreasonable consequences for people whose rights are adversely affected by these procedures.⁵ Forfeiture orders may directly affect the property rights of third parties, such as ordinary creditors of the defendant and victims with civil claims for compensation against the estate of the defendant. Children, who are often victims of their parents' or family's

1 2007 2 SACR 145 (CC) par [58].

2 See in this regard par 2.1.2 above with reference to *Gien v Gien* where Spoelstra JA held that the right of ownership is limited by the restrictions imposed by law. See also *Van Der Merwe v Taylor* 2008 1 SA 1 (CC) par [26], *Mohunram v NDPP supra* n 1 par [59] in this regard.

3 *Mohunram v NDPP supra* n 1 par [60].

4 Van der Walt *Constitutional Property* 195, *Mohunram v NDPP supra* n 1 par [86]. See a comprehensive discussion in this regard at par 2.3.1 above.

5 Van der Walt 2000 *SAJHR* 4 n 15.

criminal activities, are particularly vulnerable in forfeiture and confiscation orders. The mere fact that the entire estate of an offender may be forfeited to the state exacerbates the possibility, under certain circumstances, that the intrinsic rights of children, as protected under section 28 of the *Constitution*, may be violated.⁶

A serious constitutional question also arises as to whether forfeiture should be allowed in instances where the owner has committed no wrong, whether intentional, negligent, acquiescent or active.⁷

The court cautioned in *National Director of Public Prosecutions v Cole*⁸ that forfeiture orders may “easily become a weapon of terror rather than a weapon of justice.” An unrestrained application of Chapter 6⁹ of *POCA* may violate constitutional rights and in particular the right not to be arbitrarily deprived of property within the meaning of section 25(1) of the *Constitution*.¹⁰ Moseneke DCJ succinctly stated in the *Mohunram*¹¹ decision that civil forfeiture constitutes a serious interference with well-established civil protections such as those against arbitrary and excessive

6 Nel 2003 *Journal for Juridical Science* 98, 107, De Koker 2001 www.crimeinstitute.ac.za/2ndconf/papers/de_koker.pdf [5 Feb 2008]. It is submitted by De Koker that although s 38 of *POCA* provides for the protection of innocent third parties, these provisions are of very little value to children. See the discussion above at par 3.6.1 with regards to preservation orders. The impact of forfeiture procedures on the constitutional rights of children is analysed below at par 4.7.3.

7 *National Director of Public Prosecutions v Cook Properties; NDPP v 37 Gillespie Street Durban; NDPP v Seevnarayan* 2004 2 SA 208 (SCA) par 26 (hereafter *Cook Properties*); *National Director of Public Prosecutions v Gerber* 2006 JOL 18856 (W) par 25, Burchell *Criminal Law* 1018.

8 2005 2 SACR 553 (W). See also in this regard par 3.4.3 n 77 above. A significant note of caution was issued by the court in *Prophet v National Director of Public Prosecutions* 2007 BCLR 140 (CC) par [45]: “Courts should be vigilant to ensure that the statutory provisions in question are not used *in terrorem* and that there has been no overreaching and abuse”. See also *NDPP v Van Staden supra* n 16 par 8 below.

9 Forfeiture of the proceeds of and property used in the commission of an offence without a conviction is discussed at par 3.6 above.

10 *Prophet v NDPP supra* n 8 par [61]; *Mohunram v NDPP supra* n 1 par [122], *NDPP v Gerber supra* n 7 par 24. The possible violation of every accused person's right to a fair trial protected under s 35(3) of the *Constitution* is evaluated at par 4.6 below.

11 *Supra* n 1 par [120].

punishment,¹² and safeguards against the arbitrary forfeiture of property. The thrust behind forfeiture of the instrumentalities of crime can therefore constitute arbitrary and unjust consequences.

4.2 Arbitrary deprivation of property and the relevancy of POCA

Section 25(1) of the *Constitution* provides that no one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property. The object of the property clause is to establish a just and equitable balance between the protection of private property and the promotion of public interests. Although section 25 does protect and guarantee property, the Bill of Rights is not intended to isolate private property from state interference.¹³

It has already been established in *First National Bank of South Africa Ltd t/a Wesbank v Commissioner, South African Revenue Service*¹⁴ (hereafter *FNB*) that a deprivation of property will be arbitrary where the law does not

12 S 12(1)(e) of the *Constitution* stipulates that everyone has the right to freedom and security and may not be punished in a cruel, inhuman or degrading way.

13 Van der Walt *Property Clause* 31; *Mohunram v NDPP supra* n 1 par [59] and [60], *Cook Properties supra* n 7 par 15. See in this regard a comprehensive exposition of the property clause at par 2.2 above. Similarly, article 14 of the *Grundgesetz* (the German *Constitution*), states that “property and inheritance are guaranteed,” and s 2 stipulates that “ownership entails obligations. Its use should also serve the public weal.” The monetary value of property is guaranteed as well as the extent of ownership. See in this regard Alexander GS “Constitutionalising Property: Two Experiences, Two Dilemmas” in Mclean J (ed) *Property and Constitutions* 94, 99. The *Human Rights Act* 1998, which gave effect to the *European Convention on Human Rights* imposes certain obligations on the United Kingdom’s domestic and legal institutions. Article 8(2) stipulates that interference (with home interests) is justified when it is “in accordance with law and...in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.” See in this regard Fox L “The Idea of Home in Law” 2005 *Home Cultures* UK 2-3.

14 2002 4 SA 768 (CC) par [100]. See a detailed discussion of *FNB* in par 4.2 above. See also in this regard *Prophet v NDPP supra* n 8 par [61] and [62]; *Cook Properties supra* n 7 par 15; *Armbruster v Minister of Finance* 2007 12 BCLR 1283 (CC) par [70]; *Van Der Merwe v Taylor supra* n 2 par [28], Burchell *Criminal Law* 1017.

provide sufficient reason for the deprivation or is procedurally unfair.¹⁵ In purview of a valid deprivation of property the court held that an appropriate relationship must exist between means and ends, the sacrifice the person is asked to make, and the public purpose it is intended to serve.¹⁶ The enquiry is not limited to mere rationality, but requires a less strict rather than a full and exact proportionality examination.¹⁷

The proportionality standard laid down by Ackermann J in *FNB* on what constitutes arbitrary deprivation of property¹⁸ may equally apply to forfeiture procedures under *POCA*. An appropriate balance needs to be established between the purpose of *POCA*, namely to combat organised crime, and unwarranted interference with individual property rights, which could result in arbitrary punishment. The forfeiture must accordingly be weighed against the purpose it serves. Relevant factors to be taken into account in this regard are to determine whether the property is closely linked to the commission of the crime; whether the forfeiture will deter people from further wrongdoing and the social consequences thereof; whether the “innocent owner” defence is available to the applicant; the nature and use of the property; and the effect of the forfeiture on the property owner.¹⁹

For criminal confiscation (*in personam*) as provided for in Chapter 5²⁰ it is required that a sufficiently close link must exist between the crime and the proceeds of crime or any benefit derived from the crime. The confiscated amount may not exceed the value of the benefit that the defendant has

15 The factors that the court took into consideration when “sufficient reason” needed to be established are discussed at par 2.4.2.1 above.

16 Par [98]; *Mohunram v NDPP supra* n 1 par [62], *National Director of Public Prosecutions v Van Staden* 2007 1 SACR 338 (SCA) par 4.

17 *Ibid* n 16.

18 Par [98]. See also Burchell *Criminal Law* 1018, *S v Dodo* 2001 1 SACR 594 par [38] where the Constitutional Court held that failing to conduct an enquiry into the proportionality between the offence and punishment “is to ignore, if not to deny” the right to human dignity.

19 *Prophet v NDPP supra* n 8 par [63]; *Mohunram v NDPP supra* n 1 par [123], *NDPP v Gerber supra* n 7 par 24.

20 For a discussion of forfeiture of property after conviction, see par 3.5 above.

derived from the crime of which he or she has been convicted. An element of proportionality is accordingly required between the value of the proceeds of crime and the confiscated assets. For the civil forfeiture (*in rem*) of instrumentalities of an offence in terms of Chapter 6²¹ the link between the property to be forfeited and the crime must be reasonably direct and the property must be functional to the commission of the crime. In addition, a proportionality analysis²² may be appropriate in which the nature and value of the property to be forfeited is assessed in relation to the crime and the role it played in its commission.²³

4.3 Proportionality

The proportionality analysis, as an additional consideration, needs to be taken into account when forfeiture is sought within the context of *POCA* with due regard to the predominant purpose embodied in the Act.²⁴ However, proportionality is not a statutory requirement but a measure developed by the courts to elude excesses of civil forfeiture. It is imposed by a constitutional behest against arbitrary deprivation of property and double or unwarranted punishment.²⁵ A proportionality assessment is accordingly a legal one based on an evaluation of all of the factors and circumstances applicable to the particular case.²⁶ Although a proportionality analysis was not applied in *Cook Properties*²⁷ the Supreme Court of Appeal in the

21 For a discussion of forfeiture of property without a conviction, see par 3.6 above.

22 *Cook Properties supra* n 7 par 30.

23 Burchell *Criminal Law* 1018-1019; *Cook Properties ibid* n 22 par 31, *National Director of Public Prosecutions v Parker* 2006 3 SA 198 (SCA) par 27.

24 The purpose of *POCA* is discussed at par 3.4.3 above as formulated by the court in *National Director of Public Prosecutions v Mohamed* 2002 4 SA 842 (CC) par [15] and [16] (hereafter *Mohamed 1*). See also in this regard *Mohunram v NDPP supra* n 1 par [125].

25 *Mohunram v NDPP supra* n 1 par [130].

26 *Supra* n 25 par [75].

27 *Supra* n 7 par 31. The court held that it is sufficient to determine a reasonably direct link between the crime committed and the property and the role or function that the property played in the commission of the offence.

*Prophet*²⁸ decision found that such an analysis was necessary only at the second stage of a two-stage enquiry.²⁹

4.3.1 *The standard of proportionality applied in the Prophet decision*

In the majority judgement of the Supreme Court of Appeal, Mpati DP relied on American jurisprudence for guidelines in establishing the standard of proportionality.³⁰ In *United States v Bajakajian*³¹ the court held that in post-conviction forfeiture, the touchstone of any constitutional enquiry is based on the principle of proportionality. The amount forfeited must bear some relationship to the gravity of the offence. If the amount is grossly disproportional to the severity of the offence, it is unconstitutional.

The offence in *Prophet* provides for a sentence of 15 years and a criminal penalty. The court held that although only a small quantity of drugs was found on the property and only a small room in the house was converted into a mini-laboratory, the entire house and garage were used to store equipment and chemicals. Although the consequences of forfeiture may be harsh the court opined that it should guard against the danger of frustrating the purpose of *POCA*, and a “mere sense of disproportionality” should not prevent a court from granting a forfeiture order.³²

28 *Prophet v National Director of Public Prosecutions* 2006 1 SA 38 (SCA) par 11 and 16. See also in this regard par 3.6.1 read with n 158 above.

29 *Ibid* n 28. The first stage ascertains whether the property was an instrumentality of the offence, in which case the culpability of the owner is irrelevant, and once this has been confirmed the property is liable for forfeiture. The second stage enquiry relates to interests in the property which should be excluded from the operation of forfeiture, and includes ownership.

30 *Supra* n 28 par 36.

31 524 US 321 (1998); *Austin v United States* 509 US 602 (1993), Van der Walt 2000 *SAJHR* 16. See also in this regard *Cook Properties supra* n 7 par 30 n 35, *NDPP v Cole supra* n 8 par 12. In the latter decision the court held at par 15 that proportionality in this case “cannot be measured with fine legal calipers,” and that forfeiture will not result in “a sledgehammer being used to swat a gnat.” It is significant in this case is that drugs and textbooks on the manufacturing of drugs were found on the property. The court held that a judicial discomfort as to the consequences of forfeiture is insufficient to render it disproportional.

32 Par 37 and 38, *Mohunram v NDPP supra* n 1 par [67] and [68].

In order to ensure that the purpose of the law was not undermined, a standard of significant disproportionality ought to be applied for a court to decide that a deprivation of property was arbitrary and unconstitutional. In this case no disproportionality was shown in justifying a refusal of the forfeiture order, and the owner was required to place the necessary material before the court for a proportionality analysis.³³

The finding of the Supreme Court of Appeal was challenged in the Constitutional Court. It was contended that the evaluation of the standard was too strict, and that the “draconian effect of the Act would be exacerbated...were the elevated benchmark ‘significantly disproportionate’ to be applied.”³⁴ Nkabinde J reiterated the finding of Ackermann JA in *FNB* where he pointed out that the precise linguistic formulation of the proportionality analysis may be of little relevance.³⁵ Based on this premise the court held that in the light of the nature of the offence and the extent to which the property was used as an instrument in the commission of the offence, the forfeiture of property was neither significantly disproportionate nor disproportionate, and accordingly not an arbitrary deprivation of property. The question of incidence of the onus regarding the proportionality standard was left open by the court.³⁶

4.3.2 *The standard of proportionality applied in the Mohunram decision*

33 Par 37 and 41; *Mohunram v NDPP supra* n 1 par [68], *NDPP v Van Staden supra* n 16 par 6.

34 *Supra* n 8 par [69]. This is in accordance with the minority judgment of the SCA at par 47 *supra* n 28 where Ponnau VM held that *POCA* makes serious inroads into the common law rights of property ownership. This cannot be constitutionally defensible when the property owner bears the onus to place sufficient material before the court for a proportionality enquiry. The proper question should rather be whether the forfeiture of property in this case was “disproportionate” and not “significantly disproportionate.”

35 Par [69]. The court emphasised in *FNB* par [98] that it does not matter whether the approach is labelled as an “extended rationality” test or a “restricted proportionality” test, nor whether the relationship between that the means and ends are “reasonably proportional,” “roughly proportional” or “appropriate and adapted.”

36 *Ibid* par [69] and [70], *Mohunram v NDPP supra* n 1 par [70].

Van Heerden J, in her minority judgment, expressed the opinion that the approach adopted by the majority judgement of the Supreme Court of Appeal in *Prophet*³⁷ may lead to unnecessary complexity.³⁸ In addition to the factors established in *Prophet*,³⁹ cognisance should also be taken in *Mohunram* of the nature and gravity of the offence, the possible effectiveness of ordinary criminal measures in dealing with it, and its public impact in relation to possible social harm and disruption. These additional factors should be weighed in an enquiry to determine if the forfeiture of property would be unconstitutionally disproportionate.⁴⁰ Such a determination should include an assessment of the criminal penalties which had already been imposed on the offender.⁴¹

The complexity of a proportionality analysis was elucidated by Moseneke DCJ, for the majority. In deciding whether or not the forfeiture of property would be proportionate, it would be necessary to consider if the instrumentality of the offence was sufficiently connected to the main purpose of *POCA*:⁴²

the more remote the offence in issue is to the primary purpose of *POCA*, the more likely it is that the forfeiture of the instrumentality of the crime is disproportionate.

Care needs to be taken in each case to ensure that the purpose of deterrence that *POCA* serves does not result in a disproportionate impact

37 *Supra* n 28 par 37.

38 Par [71].

39 See in this regard *supra* n 19 above.

40 Par [72]. The court held at par [74] that only one evaluating standard therefore applied to all offences under *POCA*, namely whether or not the forfeiture was disproportionate, taking all of the circumstances of the case into account.

41 Par [42] and [65].

42 Par [126]. The court stated that the sharp question to be asked was if it was a crime that rendered conventional criminal penalties inadequate. See also in this regard *National Director of Public Prosecutions v Kleinbooij* 2008 2 All SA 250 (C) p 11; *National Director of Public Prosecutions v Vermaak* 2008 1 SACR 157(SCA) par 13, *NDPP v Duhanco supra* n 53 par 8 below.

on the owner of the forfeited property.⁴³ With regards to the disproportionate nature of the forfeiture order in this case, the court held that, besides receiving the stigma of a criminal conviction, Mr Mohunram had paid a fine of R88 500 and illicit monies and equipment valued at R420 000 had been forfeited, while not the whole of the property was used in the offence of illegal gambling.⁴⁴

The court had difficulty in accepting that a forfeiture order together with the penalties imposed was not disproportionate. It was accepted that from a public perspective gambling could be linked with money laundering and gangsterism. However, no evidence had been placed on record that Mr Mohunram had been involved in any gang activities, and his down-market casino would not have served the purpose for money laundering.⁴⁵ It was accordingly held that the forfeiture of the property was disproportionate. The offence was relatively far “from the heartland of organised crime” and ordinary criminal penalties were adequate to deal with the offence in question.⁴⁶

Against the background of the relevancy of the facts in this case, the court pre-eminently underscored the fact that if the forfeiture under Chapter 6 of *POCA* would amount to arbitrary deprivation of property, it would be unconstitutional in terms of section 25(1) of the *Constitution*. The application of the principle of proportionality, although not expressly required in *POCA*, is a governing principle which imposes limits on how the powers granted under *POCA* must be exercised.⁴⁷

43 Par [146].

44 Par [134] and [136].

45 Par [150]. The court also took into account, at par [151] that the *KwaZulu-Natal Gambling Act* 10 of 1996 under which he was prosecuted provides for severe penalties.

46 Par [151].

47 Par [141] and [142]. It is therefore indispensable that “it requires decisions that are highly contextualised and strongly congruent” within the constitutional dispensation and the interests of the public, *ibid* par [142].

4.4. A critical analysis of the courts' interpretation of "instrumentality and proportionality" in cases of individual wrongdoing

Any application of *POCA* to individual wrongdoing is necessarily concerned with the controversy of the courts' interpretation of the term "organised crime,"⁴⁸ as well as the common law and other statutory offences listed in Schedule I.⁴⁹

It is necessary at this stage to briefly outline the purpose and objectives of *POCA*, as formulated in its Preamble.⁵⁰ These measures were introduced to combat organised crime, money laundering, criminal gang and racketeering activities, to provide for the recovery of the proceeds of unlawful activity, and for the civil forfeiture of tainted assets that were used in the commission the offence. A further provision relates to cases where common and statutory law fail to deal effectively with organised crime, money laundering and criminal gang activity.

However, although the minority judgment of the court in *Mohunram*⁵¹ noted that *POCA* "is not a model of legislative clarity and coherence," the wording as a whole indicates that it reaches beyond the ambit of organised crime, money laundering and criminal gang activities.⁵² The interpretation of *POCA*, when applied to cases of individual wrongdoing, and in particular to

48 See the discussion in this regard at par 3.4.2 above.

49 See in this regard par 3.4.4.4 above.

50 See a more comprehensive discussion in this regard at par 3.4.3 above.

51 *Supra* n 1 par [25]. See also in this regard *National Director of Public Prosecutions v Geyser* 2008 2 All SA 616 (SCA) par 20.

52 Par [29] with reference to the amendment of par 9 of the Preamble of *POCA*, which stipulates that "no person convicted should benefit from the fruits" of any related offence, and "no person should benefit from the fruits of unlawful activities" or "use property for the commission of any offence." (My emphasis). See also in this regard *Prophet v NDPP supra* n 28 par 33, *Cook Properties supra* n 7 par 64 and 65. See also the discussion above at par 3.4.2 with reference to the *dictum* of the court in *Prophet*, namely that a narrow interpretation of *POCA* would "radically truncate the scope of the Act."

“instrumentalities of an offence,” could result in clearly disproportionate and unconstitutional forfeiture of property.⁵³

Moseneke DCJ, for the majority, contended that it would not be consistent with the purpose and text of *POCA* if the interpretation given to “offence” were to reach well beyond organised crime so as to include all acts of individual wrongdoing listed in Schedule I.⁵⁴ It would also be inconsistent with the right not to be arbitrarily deprived of property in terms of section 25(1) and the right not to be treated or punished in a cruel, inhuman or degrading way, as provided for in terms of section 12(1)(e) of the *Constitution*.⁵⁵

As with the proportionality analysis applied in the decisions discussed above,⁵⁶ the constitutional validity of the relevant civil forfeiture provisions in *POCA* and their interpretation have not yet been decided by either the Constitutional Court or the Supreme Court of Appeal.⁵⁷ This is ascribed to the fact that the conclusion reached on the proportionality analysis does not compel the court to decide on the constitutional validity where the issue is not advanced by the applicants themselves, and secondly, the proper scope of Chapter 6 and section 50(1) of *POCA* has not been debated before the High Court or the Supreme Court of Appeal.⁵⁸

Of importance, before granting a forfeiture order, a court must consider the nature and extent of any other criminal penalties which have already been

53 Par [56]. The courts must therefore always be on their guard against this. See also in this regard *National Director of Public Prosecutions v Duhanco Labour Contractors (Pty) Ltd* 2008 JOL (SE) par 8 and 11.

54 Amongst the vast common and statutory law offences listed, Item 33 provides for any offence of which the punishment may be a period of imprisonment exceeding one year without the option of a fine.

55 Par [115].

56 See the discussion at par 4.3 above.

57 *Mohunram v NDPP supra* n 1 par [116] read with n 13 *ibid*.

58 *Supra* n 57 par [114]. S 50(1) stipulates that a High Court shall make a forfeiture order when it finds on a balance of probabilities that the property was an instrumentality of the offence or the proceeds of unlawful activities. See the discussion above at par 3.4.4.2 and 3.6.2 in this regard.

imposed on the offender;⁵⁹ whether or not conventional criminal penalties are adequate as measures of deterrence;⁶⁰ if the forfeiture provisions are so exhaustive as to render them doubly punitive;⁶¹ that the purpose of *POCA* is not to provide a substitute for or a top-up of ordinary forms of law enforcement,⁶² and that the distinction between the purposes and methods of criminal and civil law are not to be blurred.⁶³

4.4.1 Instrumentality of offences listed under the Liquor Act 27 of 1989

In *National Director of Public Prosecutions v Fielies*⁶⁴ the forfeiture in terms of section 50(1)⁶⁵ of *POCA* of all or any of the immovable properties was in dispute.⁶⁶ *In casu* it had been contended by the respondents that the unlawful sale of liquor, as provided for in section 154(1)(a) of the *Liquor Act*, was not a Schedule I, Item 33 offence,⁶⁷ and therefore not susceptible to forfeiture procedures.

Upon conviction the offender might be liable to pay a fine or be sentenced for a period of imprisonment not exceeding five years.⁶⁸ The court held that

59 *Supra* n 57 par [65].

60 *Mohamed (1) supra* n 24 par [14]-[15], *Mohunram v NDPP supra* n 1 par [125] and [126]. It is submitted in the latter paragraph that the questions to be asked are if the crime requires extraordinary measures for its detection and prevention; is it a crime that justified extraordinary measures appropriate to organised crime as envisaged in *POCA*; and is the crime rationally linked with racketeering, money laundering and criminal gang activities. If not, this would constitute an important indication that forfeiture may be disproportionate. See also par [144] *ibid*.

61 *Mohunram v NDPP supra* n 1 par [127].

62 *Ibid* n 61 par [152]; *NDPP v Van Staden supra* n 16 par 7; *NDPP v Duhanco supra* n 53 par 8, *NDPP v Kleinbooie supra* n 42 p 16.

63 *Ibid* n 61 par [72]. See also in this regard par 3.7 read with n 198-201 above.

64 2006 1 SACR 302 (C).

65 See in this regard n 58 above.

66 Two separate buildings were erected on the premises, one of which was the main house, where the liquor was stored in a fridge, and the other a shebeen. The shebeen was divided into separate areas which served as a sales area, a public area and a storage room (par 6, 7 and 23).

67 See n 54 above in this regard.

68 Par 5, 17 and 18.

the unlawful sale of liquor was an offence contemplated in Item 33,⁶⁹ and although the main house was used for residential purposes, that was not a sufficient reason to exclude the house from the ambit of instrumentality and consequent forfeiture.⁷⁰

This case was decided in 2004, prior to the leading judgments in *Cook Properties, Prophet and Mohunram*.⁷¹ However, in the 2002 *Mohamed*⁷² decision the court had made it patently clear that the purpose of *POCA* is to combat organised crime and that common and statutory law had failed to deal adequately with it. It has also been decided in the earlier decision of the High Court in *National Director of Public Prosecutions v Prophet*⁷³ that the determining question was whether or not there was a sufficiently close link between the property that had been used in the commission of the offence, and if the property had a close enough relationship to the offence to render it an instrumentality to the offence. It is submitted that the failure of the court to take into consideration the guidelines available in the applicable case law⁷⁴ could have resulted in the arbitrary deprivation of the

69 Par 19 and 20, where the words “without the option of a fine” were interpreted. The court held that Parliament was dealing with reasonably serious offences, and accordingly provided for the maximum sentences for these broad categories of offences. It did not say that in the case of any offence where a fine was a possibility then *POCA* “could never apply.”

70 Par 24. The court disagreed with the earlier *Mohunram*, decision which was decided in 2004, where it was held that the entire building could not be regarded as an instrumentality of the offence. The whole building was not purchased for the purpose of running an illegal gambling enterprise.

71 *Supra* n 7, *supra* n 8 and 28, *supra* n 1 respectively.

72 *Supra* n 24 par [15].

73 2003 2 SACR 287 (C) par 26. See also in this regard *Ex Parte National Director of Public Prosecutions in re Preservation Orders* 2005 2 SACR 198 (SE) par 6, where the court applied a narrow interpretation of instrumentality based on the judgment in *S v Bissessue* 1980 1 SA 228 (N). In this case the court declared the motor vehicle and fishing rods used in illegal fishing, forfeited to the state, in addition to a criminal penalty already imposed on the offender. On appeal the forfeiture of the vehicle was set aside. The court held that the vehicle must play a reasonably direct part in the actual commission of the implicated offence.

74 *Ibid* n 72 and 73.

residential house in this particular case.⁷⁵

In pursuance of the courts' interpretation and ruling that *POCA* reaches far beyond organised crime and applies to individual acts of wrongdoing, two phenomena predominantly come to fore in contradictory case law, namely the so-called drunken driving cases, and the illegal trade in abalone.

4.4.2 Instrumentality and proportionality of forfeiture of motor vehicles in contravention of the National Road Traffic Act 93 of 1996

The intricacy of case law in this area of law centred on the establishment of whether or not there were reasonable grounds to believe that a motor vehicle was an instrumentality of an offence within the meaning of section 38(1) and (2)⁷⁶ of *POCA* and therefore liable to forfeiture to the state, and that the offence is referred to in Schedule I.⁷⁷ In terms of sections 63(1), 65(1) and 65(2) of the *National Road Traffic Act* it is a statutory offence to drive a motor vehicle in excess of the speed limit, recklessly or negligently, or to drive under the influence of intoxicating liquor or with an excessive amount of alcohol in the blood of the driver.⁷⁸ Section 89(2) provides for a fine or a maximum sentence of 6 years imprisonment in contravention of these provisions⁷⁹ which presumably places these offences within the jurisdiction of Schedule I, Item 33.⁸⁰

Having regard to the primary purposes of forfeiture orders as had been held

75 In terms of s 25(1) of the *Constitution*. It is also arguable that the forfeiture of the residential house may be inconsistent with the constitutional right to housing as provided for in s 26(1)-(3). See the discussion above at par 2.5 in this regard.

76 See the discussion above at par 3.6.1 in this regard.

77 *Ibid* n 54. See also in this regard *Ex Parte NDPP supra* n 73 par 2; *NDPP v Van Staden supra* n 16 par 3, *NDPP v Kleinbooij supra* n 42 par 6.

78 *Ex Parte NDPP supra* n 73 par 1; *NDPP v Van Staden supra* n 16 par 1 and 16, *NDPP v Kleinbooij supra* 42 p 2 and 4.

79 *Ex Parte NDPP supra* n 73 par 3, *NDPP v Van Staden supra* n 16 par 7.

80 *Ibid* n 54.

in the *Mohamed*⁸¹ and *Cook Properties*⁸² decisions, the legal meaning and interpretation of “instrumentality of an offence” and “concerned in commission of an offence”⁸³ became a predominant and indispensable focus of dispute in these cases. Succinctly, the property must play a reasonably direct role in the commission of an offence, the property must make the commission of the offence possible, and the property must be instrumental in and not merely incidental to the commission of the offence. If forfeiture were to occur in the absence of a rational link between the deprivation of property and the purpose of *POCA*, this Act would result in the imposition of additional penalties in relation to the crime.⁸⁴

4.4.2.1 The *Ex Parte NDPP in re Preservation Orders* decision

In *Ex Parte NDPP in re Preservation Orders*⁸⁵ the court adhered to a restrictive and constitutional application⁸⁶ of these principles. Accordingly the court concluded that the motor vehicles, whilst driven under the influence of intoxicating liquor, were not an instrumentality, nor concerned in the commission of the offence within the meaning of section 38(2)(a) of *POCA*, and therefore not liable to be forfeited to the state.⁸⁷ Cognisance was also taken of the purpose of the short title of *POCA*, which provides for

81 *Supra* n 24, *Ex Parte NDPP supra* n 73 par 5. It has been held that forfeiture procedures apply when criminal penalties are inadequate to address the problem, and that civil forfeiture is not focused on wrongdoers but on the property that was used in the commission of the offence.

82 *Supra* n 7 par 18, *Ex Parte NDPP supra* n 73 par 5, namely to remove the incentives for crime; to deter owners from using their property for crime; to remove the tainted property; and to advance the ends of justice by preventing the further use of the property involved in crime.

83 See a comprehensive discussion in this regard at par 3.6.2 above.

84 *Ex Parte NDPP supra* n 73 par 6, *NDPP v Van Staden supra* n 16 par 11.

85 *Supra* n 73.

86 Par 9, where the court emphasised that a deprivation of property requires a “strong rational basis” and “sound reasons of policy” in order to prevent an arbitrary deprivation of property contrary to s 25(1) of the *Constitution*.

87 Par 4 and 7. It has already been established in par 3 that section 65 of the *National Road Traffic Act* falls within the ambit of the offences listed in Schedule I, Item 33.

civil forfeiture of criminal assets that were used to commit an offence.⁸⁸ The court could find no justification for the existence of a functional relationship between the motor vehicles *in casu* and the commission of the offence. The nature of the vehicles and the manner of their utilisation failed to show that they were employed in a particular way to make possible or to facilitate the commission of the offence of drunken driving.⁸⁹ The vehicles were purely incidental and not an instrumentality to the commission of the offences. The only link was that the offences were committed by the driver driving at that specific time. No modifications were made to the vehicle to make the offence possible, or to facilitate and contribute to the commission of the offence. The offence would still have been committed had the driver chosen to drive a different car.⁹⁰

4.4.2.2 The *Van Staden* decision

The appeal in *Van Staden*⁹¹ arose from the five applications and the *dictum* of the High Court in the above decision of *Ex Parte NDPP in re Preservation Orders*. Nugent JA stated in this case that the belief that *POCA* was intended to combat “the special evils” derivative from organised crime was not entirely true. It is but one of its targets, and also applies to cases of individual wrongdoing also.⁹² The court observed that constitutional issues were raised in deciding whether or not a motor vehicle that had been driven

88 Par 7 and 9. The court thought that permitting *POCA* to address the social problem of drinking and driving and the increasing carnage on our roads “does not rest comfortably” within its framework as a measure to combat organised crime, gang syndicates and money laundering. If Parliament had intended that civil forfeiture should apply to all cases of drunken driving, it would have said so specifically, and put the necessary legislated measures in place to ensure that the deprivation was not arbitrary and unconstitutional in a particular case.

89 Par 7. See also the *dictum* of the court in *Cook Properties supra* n 7 par 34.

90 Par 7. It would have been instrumental to the commission of the offence if, for example, the vehicle had been modified to conceal drugs or weapons. See also *NDPP v Van Staden supra* n 16 par 12 in this regard.

91 *Supra* n 16.

92 Par 1; *Cook Properties supra* n 7 par 63; *Mohunram v NDPP supra* n 1 par [26]; *NDPP v Duhanco supra* n 53 par 7; *NDPP v Vermaak supra* n 42 par 5, Cowling M “Criminal Procedure” 2007 *SACJ* 394.

by a drunken driver constituted an instrumentality of the offence as stipulated in section 65 of the *National Road Traffic Act* and therefore liable to be forfeited to the state.⁹³ Furthermore, the court enunciated that the difficulties inherent in combating organised crime, such as its detection and successful prosecution, were not present to the same degree in relation to ordinary crime. That was patently true of drunken driving cases, which were not the result of criminal activity and which posed no difficulty in their detection and prosecution. Substantial penalties were already provided for,⁹⁴ and the ordinary criminal law “ought to be the first port of call” in combating this evil. The predominant purpose of *POCA* is to supplement criminal remedies in particular cases, and it should not be applied as a convenient substitute.⁹⁵

The approach adopted by Nugent JA to prevent an arbitrary order of forfeiture in these cases conforms with the principle that the deprivation must not be disproportionate to the ends that it seeks to achieve. The extent of the remedial rather than the penal purpose should be considered, taking due cognisance of the ordinary criminal penalties capable of addressing the latter function.⁹⁶ The court held that not only is the presence of a motor vehicle indispensable to the commission of the offences but that it also makes the offences possible, and is therefore not merely incidental to the commission of the offences.⁹⁷ Nugent JA succinctly enumerated that a

93 Par 4, where the court cautioned that civil procedures might have the potential to violate the constitutional guarantee against arbitrary deprivation of property. See also in this regard *Cook Properties supra* n 7 par 15 and 16, where the court held that non-arbitrariness requires a rational relationship between the deprivation and the legislative ends that are sought to be attained. See also the relevant guidelines incorporated in *FNB*, n 14 and 18 above, and their application in case law.

94 *Supra* n 79.

95 Par 7; *Mohunram v NDPP supra* n 1 par [71] and [153]; *NDPP v Kleinbooij supra* n 42 p 7 and 8, Cowling 2007 SACJ 395.

96 Par 8.

97 Par 12 and 13. This finding is founded on the premise of the decision of the SCA in *National Director of Public Prosecutions v Mohunram* 2006 1 SACR 554 (SCA) par 4 where it was held that “without the use of premises, there are no crimes.”

motor vehicle is indeed an instrumentality of the offence of driving under the influence of intoxicating liquor:⁹⁸

A motor vehicle is not merely the unique venue at which the activity becomes criminal, and thus incidental to the commission of the offence, nor is it merely the subject of a criminal activity. The essence of the offence is the use of the vehicle while the driver is in a particular state. The vehicle is the very means, or instrument, that is used to commit the offences.

The court stressed that the validity of a forfeiture order depends on the proximity of the property to the offence as well as the proportionality of the deprivation. A court still has the discretion to refuse a forfeiture order when the deprivation is so disproportionate that it renders it arbitrary.⁹⁹ This case was regarded as a test case and the applications were remitted to the High Court for reconsideration.¹⁰⁰

When this case is perused it is noticeable that Nugent JA propounded that ordinary criminal law ought to be the first port of call when sufficient legislative penalties are at hand in addressing the applicable offences.¹⁰¹ However, it is submitted that severe penalties are provided for in terms of section 63(1) of the *National Road Traffic Act*, which penalties were apparently not addressed by the court. It is suggested that the cancellation or suspension of a driving licence would have been more appropriate in combating this evil than the forfeiture of the motor vehicle in this particular case.¹⁰²

The dual purpose of cancelling or suspending a driver's licence, namely to protect the public and to punish the offender, was evident in *S v Nkosi*,¹⁰³ where it was held that the withdrawal of an offender's right to drive a vehicle

98 Par 14; *NDPP v Kleinbooï supra* n 42 p 5, Cowling 2007 SACJ 395.

99 Par 4.

100 Par 2 and 16.

101 *Ibid* n 96.

102 Hooror S "Sentencing Reckless or Negligent Driving" 2007 *Obiter* 114.

103 1972 4 SA 542 (N) par 543G, Hooror 2007 SACJ 112 and 114.

for three years is in itself severe punishment. The main purpose of such a severe penalty was “to keep potentially dangerous drivers off the road in the interests of other road users.”¹⁰⁴

One has to agree with the *dictum* of Jones J in *Ex Parte NDPP in re Preservation Orders*,¹⁰⁵ that the forfeiture of a motor vehicle used in the commission of the offence of drunken driving would not necessarily deter the driver from committing the same offence again, had he chosen to drive another motor vehicle.

4.4.2.3 The *Vermaak* decision

The respondent in *Vermaak*¹⁰⁶ has been convicted on two counts of driving under the influence of intoxicating liquor. She was sentenced on each count to a fine of R8 000 or three years’ imprisonment suspended for five years on condition that she received treatment for a minimum period of six months, and her driving licence was suspended for a period of 12 months.¹⁰⁷

The court recognised that rules of precedent were necessary to maintain legal certainty, which is an element of the rule of law,¹⁰⁸ and that it had to adhere to the *ratio decidendi* of the Constitutional Court in *NDPP v*

104 *Ibid* n 103. In determining the appropriateness of a cancellation or suspension of a driving license the court should take into account the financial circumstances of the accused in order not to deprive him of a livelihood.

105 *Supra* n 73 par 7.

106 *Supra* n 42. This case, as well as *Van Staden*, was decided by Nugent J in the same court, but notably a different decision was reached in the former.

107 Par 1 and 18.

108 See Louw L ‘The Rule of Law under siege in South Africa?’ *The Free Market Foundation* 17 March 2007 for a more detailed discussion on this aspect with reference to the extreme powers afforded under *POCA*. See also in this regard *National Director of Public Prosecutions v Stander* 2008 1 SACR 116 (E) par 23 where the court underscored that the founding constitutional value of the rule of law constitutes a rational and not arbitrary application.

Mohunram.¹⁰⁹ The court found it necessary to revisit the *Van Staden* decision based on the doubt of its findings which emanated in *Mohunram*.¹¹⁰ If *POCA* applied to offences as envisaged in *Mohunram*¹¹¹ then *Van Staden* was wrongly decided. The court, however, did not find it necessary to question the *Van Staden* decision and held that it was bound by the decision in *Prophet*, where there were no special features which brought offences listed in the *Drugs and Drug Trafficking Act*¹¹² within the ambit of organised crime. If *POCA* was accordingly only confined to organised crime, the court would not have granted the forfeiture order.¹¹³

In casu the court had to establish whether the forfeiture of the vehicle would be proportionate in relation to the commission of the offence, with due regard to the sentences already imposed on the respondent, or could constitute an additional penalty.¹¹⁴ The court distinguished between two situations, one being where the offence had been committed in the course of a continuing criminal business enterprise, in which case the withdrawal of property would have the necessary inhibiting and remedial effect, and the other being where the offence had not been committed as an ongoing criminal activity, as was in this case, where ordinary criminal remedies were capable of addressing the offence and serving the purpose of deterring the commission of further offences.¹¹⁵ Accordingly the court decided that *POCA* should supplement criminal remedies and not be applied as a substitute. The court could find no justification for the forfeiture of the respondent's

109 Par 2 and 3, *supra* n 1. The court noted that in *Mohunram* the Constitutional Court was unable to find that *POCA* applies to cases of individual criminal wrongdoing, and the question was expressly left open by the majority. See the discussion at par 4.3.2 and 4.4 read with n 114 above, where the court held at par [115] that if "offence" is interpreted so as to reach far beyond the ambit of organised crime, that would be inconsistent with the purpose of *POCA*. This is reminiscent of the fact that "organised crime" is not defined in *POCA*, which is discussed at par 3.4.2 above.

110 Par 3.

111 *Supra* n 110 with reference to the applicable par.

112 140 of 1992.

113 Par 6 and 7.

114 Par 14.

115 Par 11 and 12.

vehicle, which was in a dilapidated condition. Forfeiting it would constitute an additional penalty for the commission of the offences, and the problem in this case was envisaged as an illness of alcohol abuse rather than deliberate reckless conduct.¹¹⁶

4.4.2.4 The *Kleinbooi* decision

In *Kleinbooi*¹¹⁷ the court ordered the AFU to return the vehicle which had been forfeited in terms of section 48(1)¹¹⁸ of *POCA*. The key issues were to establish if the vehicle was an instrumentality of the offences as contemplated in sections 65(1)(a) and 65(2)(a) of the *National Road Traffic Act*, and if the ordinary remedies provided for were adequate.¹¹⁹

Based on the finding of the court in *Van Staden*¹²⁰ Davis J held in this case that although Nugent JA adopted a broader approach to the scope of *POCA*,¹²¹ it is bound by its finding that the vehicle did constitute an instrumentality of the offence, as required by section 50 of *POCA*. The court underscored, with cognisance of the careful application of *POCA* and the establishment of what constitutes an instrumentality of an offence in *Van Staden*, that this was however only the first stage of the enquiry. The second stage required a far more comprehensive and “intimidating” proportionality test before an application of a forfeiture order would succeed.¹²²

116 Par 19. See in this regard at par 4.4.2.3 above the penalties already imposed on the respondent.

117 *Supra* n 42.

118 The provision stipulates that if a preservation order is in force, the NDPP may apply to a High Court for an order forfeiting to the state the property that is subject to the preservation order.

119 P 1 and 3.

120 See the discussion in this regard at par 4.4.2.2 above with emphasis on par 7, 10, 14 and 15 of this decision.

121 Par 10, where it was held that the offences in issue fell within the clear ambit of Schedule I, Item 33 offences.

122 P 8. The application of a proportionality test to this dispute was adopted from *Mohunram v NDPP supra* n 1. See the discussion at par 4.3.2 above in this regard.

Reminiscent of the minority judgement in *Mohunram*, a proper proportionality analysis required a balance between the forfeiture and in particular its effect on the owner concerned, and the purpose the forfeiture needed to serve, which included removing the incentives for crime and deterring owners from using their properties in crime.¹²³ After a careful evaluation of the majority judgements of Moseneke DCJ and Sachs J, the court held in concurrence that the closer the criminal activities are to the objects of *POCA* as stipulated in its preamble,¹²⁴ the more compelling the case for a successful application for a forfeiture order. Also to be taken into account is the extent to which ordinary criminal and common law provisions are inadequate in dealing with the offences.¹²⁵

The crisp question, the court held, was to establish whether or not the crimes committed in contravention of sections 65(1) and (2) of the *National Road Traffic Act* justified the forfeiture of the vehicle, with due regard to the severe penalties provided for in this Act. Properly promulgated legislation was therefore available empowering the applicant to successfully prosecute offenders such as the respondent. But the question remained, in the application of the proportionality test, if those penalties were inadequate in the case at issue.¹²⁶ The court predominantly stated that no proof had been submitted that the forfeiture of the vehicle would successfully prevent the offender from taking to the roads again while, in comparison, imprisonment would just do that.¹²⁷ This case then clearly fell within the approach

123 P 9, *Mohunram v NDPP supra* n 1 par [57].

124 See the discussion in this regard at par 3.4.3 above.

125 P 12.

126 P 14 and 15. The penalties include *inter alia* a term of imprisonment not exceeding six years.

127 P 16. See also the same argument conveyed by the court in *Ex parte Preservation Orders supra* n 73 par 7, as discussed in par 4.4.2.1 above.

adopted by the court in *Mohunram*,¹²⁸ and it was accordingly held that the offence was relatively far from the “heartland of organised crime.”¹²⁹

It is submitted that this decision should be welcomed, as it sends out a clear warning by the court that the extreme powers characterised by the provisions of *POCA* and conveyed to the AFU may not undermine the rule of law, due process, and its contribution to constitutionalism.¹³⁰ But most importantly the right not to be arbitrary deprived of property as provided for in section 25(1) of the *Constitution* should be defensively protected.

What clearly comes to the fore in the *Mohunram* decision is that¹³¹

if the AFU is to accomplish the important functions attributed to it, it should not unduly disperse the resources it has at its command. Its manifest function as defined by statute is to serve as a strongly-empowered law enforcement agency going after powerful crooks and their multitude of covert or overt subalterns. The danger exists that if the AFU spreads its nets too widely so as to catch the small fry, it will make it easier for the big fish and their surrounding shoal of predators to elude the law. This would frustrate rather than further the objectives of *POCA*.

4.4.3 *Illegal trade in abalone in contravention of the Marine Living Resources Act 18 of 1998*

The same controversy about the interpretation and application of an

128 P 16, par [152] of *Mohunram v NDPP supra* n 1 where Sachs J held that the objective of *POCA* is not to provide a substitute or top-up of ordinary criminal remedies, and its objective should be jealously guarded.

129 P 17, *Mohunram v NDPP ibid* n 128 par [154]. See also in this regard *NDPP v Stander supra* n 108 par 23 where the emphasis was placed on the undisputable fact that *POCA* may represent a draconian response to organised crime and other forms of crime, including offences such as driving a motor vehicle whilst under the influence of alcohol.

130 Judgement against the Asset Forfeiture Unit, Law Review Project 2007, available at <http://www.moneyweb.co.za/mw/view/mw/en/page1639?oid=178634&sn=Detail> [16 April 2008]. See also in this regard Louw *New Market Foundation 2* who warns that this power, which is intended to protect the public from sophisticated criminal syndicates, could be used against ordinary citizens.

131 Par [155]. See also in this regard *Zuma v National Director of Public Prosecutions* (Reportable: Case 8652/08: Decided 12 Sept 2008 (N)) par 154.

instrumentality and proportionality analysis by the courts is evident *in casu* here as in the drunken driving cases. The disputes focused on the forfeiture of motor vehicles and diving equipment used in the unlawful trade in abalone.¹³² As opposed to the offences and penalties listed in the *National Road Traffic Act*, which fall within the ambit of Schedule I, Item 33 of *POCA*, offences listed in the *Marine Living Resources Act* (hereafter the *MLRA*) fall within the ambit of Schedule I, Item 33 offences as well as Item 25 of *POCA*.¹³³ Section 58(1) of the *MLRA* provides for a fine not exceeding R2 million or imprisonment for a period not exceeding five years. Regulation 96 of the same Act imposes a penalty including a fine or imprisonment for a period not exceeding two years.¹³⁴

It is trite that the illicit trade in abalone became endemic to the vast coastline of South Africa stretching from Table Bay to the Eastern Cape, where overexploitation threatened the abalone with extinction.¹³⁵ The rapid growth in this industry is attributed to the highly efficient Chinese organised crime networks, using the well-established illicit trade routes between South Africa and East Asia.¹³⁶ Upon consideration, this seems to be precisely the kind of criminal activity to which *POCA* was designed to react.¹³⁷ However,

132 The limited scope of this dissertation prevents a detailed discussion of the applicable case law.

133 Item 25 makes it an offence for “dealing in, being in possession of or conveying endangered, scarce and protected game or plants or remains thereof in contravention of a statute or provincial ordinance.”

134 *National Director of Public Prosecutions v Engels* 2005 3 SA 109 (C) par 30. *Ibid* at par 40 the court held that the boat, motor vehicle and trailer were liable to forfeiture. They played a direct role in the commission of the offence of unlawfully harvesting and possessing abalone and facilitated or made possible the commission of the offence.

135 Steinberg J “The illicit abalone trade in South Africa” 2005 *ISS* 1.

136 Steinberg 2005 *ISS* 2. In 1993, the Organised Crime Intelligence Unit exposed the 14K and Wo Shing Wo, a Hong Kong based organised crime syndicate, as well as a Taiwanese criminal organisation called the Table Mountain Gang, with established networks through-out the country. Abalone shrinks to one-tenth of its original size when dried, and can be preserved for months or years. This is crucial to the smuggling process, since the dried abalone can be rehydrated and returned to its natural state. *Ibid* 3, 4 and 5.

137 *Supra* n 50.

the application of *POCA* to individual wrongdoing in cases of illegal trade in abalone is fraught with the same difficulties as those encountered in the drunken driving cases. Salient in the *Van Staden*¹³⁸ decision was the *dictum* of Nugent JA, where he held that a court has discretionary powers to refuse a forfeiture order when the deprivation is so disproportionate that it is rendered arbitrary. Ordinary criminal law should therefore be the first port of call. It is submitted, after analysing these judgments, that this has not always been the case.¹³⁹

4.5 The rule against double jeopardy

It was pointed out by the court in *S v Radebe*¹⁴⁰ that the rule against the duplication of convictions is “a salutary one” and that the courts should guard against it in cases where the accused person is charged with multiple offences derived from the same culpable acts. The primary objective of this rule is to ensure fairness and to prevent prejudice to the accused person in the form of double jeopardy. *Ipsa facto* an accused person may not be

138 *Supra* n 16 par 4 and 8.

139 In *National Director of Public Prosecutions v Gouws* 2005 2 SACR 193 (SE) the respondent was convicted on a guilty plea of unlawful possession of abalone which was in the boot of his car. The application for the forfeiture of his car, valued at R17 000, was dismissed. As a first offender, he conveyed abalone with a value of R5 400 in return for remuneration of R300. The court held that the purpose of *POCA* was not to punish the offender but to prevent criminal activity. The deprivation of his car for two and a half years had augmented the punishment already imposed upon him. By applying a proportionality analysis the court justified its finding by taking into account his personal circumstances and his right to protection of property afforded to him by law. An application for the forfeiture of a motor vehicle was granted in *National Director of Public Prosecutions v Swart* 2006 4 All SA 290 (SE). The respondent pleaded guilty in contravention of certain regulations promulgated in the *MLRA* and paid a fine of R5 000. The respondent contended that he was unemployed and had conveyed the illicit abalone with a value of R160 000 in return for a R500 remuneration. The court held that the imposed penalty did not sufficiently serve the purpose of deterrence. A VW Microbus which had been used in the poaching operation was also declared forfeited to the state in *NDPP v Stander supra* n 108. The black market value of the illicit abalone recovered from the sea bed was estimated at R43 000.

140 2006 2 SACR 604 (O) par 3. See also in this regard Cowling M “Criminal procedure” 2007 *SACJ* 274.

convicted and punished twice for the same offence, where in fact only one offence has been committed.¹⁴¹

It has already been established in *Mohunram*¹⁴² that once demands of the instrumentality enquiry have been met the evaluation of the standard of proportionality in civil proceedings should follow. The forfeiture should not be tantamount to arbitrary deprivation of property or punishment in violation of section 12(1)(e) of the *Constitution*.¹⁴³ The ambit of this right was delineated by the Constitutional Court in *S v Dodo*¹⁴⁴ composite in the phrase “cruel, inhuman or degrading.” An infringement of this right will occur when the punishment evinces any of these three characteristics. These characteristics are not easily distinguishable from one another, and some degree of the infringement of the right to human dignity is apparent in all three. The test for proportionality must be applied as a precaution not to infringe a section 12(1)(e) right and render it inconsistent with the *Constitution*.¹⁴⁵ It is therefore strictly necessary to be attentive to the principle of the separation of powers which forms part of the checks and balances procedure, to prevent the state from abusing the power allocated to it. This is accomplished through a “check” on the legislature by an independent judiciary.¹⁴⁶

The proportionality analysis, as an additional consideration, is required in forfeiture procedures, to establish if the property that was used in the commission of the crime is subject to forfeiture. It is particularly important, in

141 Par 5.

142 *Supra* n 1 par [121]. See in this regard a more detailed discussion on the standard of proportionality at par 4.3 above.

143 S 12(1)(e) stipulates that everyone has the right to freedom and security, including the right not to be punished in a cruel, inhuman or degrading way.

144 2001 1 SACR 594 (CC) par [35]. See also in this regard par 3.2.3 n 41 and par 3.7 n 206 above.

145 Par [40].

146 Par [41]. In *Mohunram v NDPP supra* n 1 par [130] Mosenke DCJ emphasised that the proportionality requirement is a constitutional imperative imposed against arbitrary deprivation of property and excessive punishment.

order not to render forfeiture under *POCA* doubly punitive, to take into account a criminal conviction already imposed on the offender, and the operative law that also provides for confiscation of the property used in the commission of the crime.¹⁴⁷ In the *Prophet*¹⁴⁸ decision it was contended that the forfeiture of property will amount to the duplication of punishment of the alleged crime, of which the applicant was acquitted on a technicality. It was argued that Chapter 6 of *POCA*¹⁴⁹ should be invoked only in the narrowest of circumstances, where the criminal charges deal with the same facts. However, the court held that the acquittal is indicative of the difficulty the state has in endeavouring to combat drug-related crimes, and that a conviction and sentence is no bar to the contention that Chapter 6 cannot be invoked under these circumstances.¹⁵⁰ Double jeopardy in criminal forfeiture of proceeds of crime¹⁵¹ could be justified as a natural part of punishment.¹⁵²

But the problem is exacerbated in civil forfeiture proceedings.¹⁵³ *POCA* clearly stipulates that both criminal and civil forfeiture are civil in nature, and also refers to the implicated offender as the “defendant” rather than the “accused”.¹⁵⁴

147 *Mohunram v NDPP supra* n 1 par [127].

148 *Supra* n 28 par 31, *supra* n 8 par [66].

149 For a discussion of forfeiture without conviction, see par 3.6 above.

150 *Ibid* n 148 par 32 and [66].

151 See the discussion at par 3.5 above relating to criminal confiscation in terms of Chapter 5 of *POCA*, applicable after conviction.

152 Burchell *Criminal Law* 1013-1014 is of the view that criminal confiscation is punitive in nature as it forms part of the sentencing stage and invokes due process rules such as those against excessive punishment. Even if this procedure is not regarded as punitive in nature, a proportionality enquiry lies inherently at the heart of the prohibition against cruel, inhuman or degrading punishment. If a proportionality enquiry is disregarded, an offender's right to a fair trial might be invoked when the confiscation of the property was sought.

153 Van der Walt 2000 *SAJHR* 10 n 38, Burchell *Criminal Law* 1015. In *Cook Properties supra* n 7 par 17 the court noted that although Chapter 6 has remedial objectives, this did not diminish the fact that forfeiture operates as punishment. See also in this regard see Burchell *Criminal Law* 1012.

154 Burchell *Criminal Law* 1011. S 13 of *POCA* regulates criminal forfeiture and stipulates that civil rules of evidence apply, on a balance of probabilities. S 37, applicable to civil forfeiture, does not expressly require proof of facts on a balance of probabilities.

Burchell¹⁵⁵ states that the use of the word “defendant” in matters of criminal and civil forfeiture could reflect the intention of the legislature to alleviate the burden of proof on the state and to exclude the operation of due process problems. This is based on an assumption that the fair trial rights provided for in section 35 of the *Constitution* apply to “arrested, detained and accused” persons, not to “defendants” in civil proceedings.

When the possibility of double jeopardy is apparent, the court’s approach should be functional rather than formal, which means in effect that constitutional protection measures such as due process should apply to all civil cases, and the protective measures operative in criminal procedure should be restricted to criminal cases. The constitutional problems created by dual proceedings could be mitigated by extending constitutional protection to civil cases. The wide scope of injustices characterised by civil forfeiture procedures may therefore require more stringent due process measures, especially when forfeiture implies criminal or penal remedies that reach far beyond “rough remedial action or legitimate regulatory action.”¹⁵⁶ An owner or holder of property liable to civil forfeiture, which could also be characterised as a form of punishment, may therefore not be given the benefit of a criminal trial and its due process rights.¹⁵⁷

4.6 The right to a fair trial

The applicability of the right to a fair trial in forfeiture procedures is

155 Burchell *Criminal Law* 1016.

156 Van der Walt 2000 *SAJHR* 38-39. This is to ensure that remedies are subject to disciplined and “rigorous civil law due process protection.”

157 Burchell *Criminal Law* 1014-1015. At 1012 Burchell referred to the decision of the United States Supreme Court in *United States v Ursery* 518 US 267 (1996) where it was held that forfeiture is not *prima facie* punishment with regards to double jeopardy, but in exceptional cases it could have a punitive element and be subject to the double jeopardy clause. However, in *Austin v United States supra* n 31 the Supreme Court held that forfeiture does constitute punishment when the excessive fines clause is invoked.

embodied in sections 34 and 35(3)(h) of the *Constitution*.¹⁵⁸ Two Constitutional Court decisions have underscored that this right is deeply rooted in our law. In *S v Manamela*¹⁵⁹ the court held that the right to silence and the presumption of innocence are indisputably linked with the right not to incriminate oneself. It is accordingly not unreasonable or oppressive in asking an accused who was found in possession of stolen goods to produce evidence to the effect that he had reasonable cause to believe that the goods were obtained from the rightful owner.

Ackerman J held in *S v Dzukuda; S v Tshilo*¹⁶⁰ that the right to a fair trial is a comprehensive and integrated right, and the purpose “is for justice to be done and also seen to be done.” Cognisance should be taken of the fact that dignity, freedom and equality lie at the heart of a fair trial, to ensure that innocent people are not wrongly convicted. These are *inter alia* specified elements in terms of section 35(3) of the *Constitution*.¹⁶¹

According to Redpath¹⁶² there is a clear sense of unease surrounding the idea of asset forfeiture, not only with regards to arbitrary deprivation of the property of offenders who have not been convicted of the implicated crime,

158 S 34 stipulates that everybody has the right to have disputes resolved by the application of law before a court. This was emphasised by the Constitutional Court in *President of the Republic of SA v Modderklip Boerdery (Pty) Ltd* 2005 5 SA 3 (CC) where it stated at par [41] that the state has a duty to provide the necessary mechanisms for citizens to resolve their disputes. See the discussion above at par 2.5.2 in this regard. S 35(3)(e) provides that every accused person has the right to a fair trial, which includes the right to be presumed innocent, to remain silent and not to testify during the proceedings. The *nullem crimen, nulla poena sine lege* principle (no crime, no punishment without law) which encompasses the freedom and protection of a person, is discussed at par 3.2.3 above.

159 2000 3 SA 1 (CC). See in this regard a detailed discussion on this aspect, Van der Walt T and De la Harpe “The right to pre-trial silence as part of the right to a free and fair trial: An overview” 2005 *African Human Rights Law Journal* 81-84.

160 2000 2 SACR 443 (CC) par [456b-e], Van der Walt T “The right to a fair trial revisited: *S v Jaipal*” 2006 *SACJ* 317. In pursuance of the *Jaipal* decision, which is comprehensively discussed by the author, it is evident that this right requires fairness to the accused as well as to the public, and confidence in the justice system, *ibid* 318.

161 *Ibid* n 160.

162 Redpath 2000 <http://www.iss.co.za/ASR/9No5And6/Redpath.html> [11 Feb 2008].

but also with the *audi alteram partem* rule (hereafter the *audi* rule).¹⁶³

In the *Mohamed 2*¹⁶⁴ decision the constitutionality of section 38 of Chapter 6 of *POCA* was in dispute. Section 38(2) provides for an *ex parte* application for a preservation of property order but not for a rule *nisi*, as opposed to section 26(3)(a) of Chapter 5, which makes express provision for a provisional restraint order and a rule *nisi*.¹⁶⁵ *In casu* the court pointed out that the rights of persons with respect to their interest in property which is subject to a preservation order are extremely limited. This underscores the fundamental importance to jurisprudence of the *audi* rule, which should give the affected party an opportunity to be heard in court before such an order is made.¹⁶⁶ The *audi* rule is regarded as one of the main pillars of the section 34 right to a fair hearing, which lies at the heart of the rule of law and constitutes a founding value of the Constitutional order.¹⁶⁷ The court held that the *audi* rule should be enforced unless the legislature has expressly or by necessary implication enacted that it should not apply, or that exceptional circumstances exist in justifying a refusal to give effect to it.¹⁶⁸ The court stated that there was in principle no procedural bar to a High

163 Of further concern is the standard of proof required for civil forfeiture, namely “on a balance of probabilities” rather than “beyond reasonable doubt.” See also the discussion in Burchell *Criminal Law* 1011-1012 in this regard.

164 *National Director of Public Prosecutions v Mohamed* 2003 4 SA 1 (CC). See also in this regard par 3.6.1 n 158 above.

165 See the discussion above at par 3.5.1 and 3.6.1 respectively. The High Court held that s 38 was invalid and unconstitutional because it made no provision for a rule *nisi* and accordingly unjustifiably limited the right to a fair trial in terms of s 34 and 35(3) of the *Constitution*. This ruling came before the Constitutional Court in *Mohamed 1 supra* n 24 for confirmation. The order of the High Court was set aside on the basis that a notional severance order cannot remedy the constitutional invalidity caused by an *omission* to provide for a rule *nisi* (par [25] and [26]). See also in this regard Burchell *Cases and Materials* 1074.

166 Par [20] and [21]. At par [28] it was emphasised that the common law has recognised the importance of the *audi* rule, as well as the need for flexibility in circumstances where the rigid application of the rule would infringe the rights that need to be protected. A rule *nisi* is accordingly issued calling upon interested parties to appear before court to submit reasons why the rule should not be made final.

167 Par [36].

168 Par [37] and [38]. In construing s 38, where no express provision is made for the *audi* principle, the court did not ask whether the rule is implied in the section, but whether it had expressly or by necessary implication been excluded.

Court hearing an *ex parte* section 38 application *in camera* and granting a rule *nisi*, together with an *interim* preservation and seizure order, pending the return date.¹⁶⁹ The rule *nisi* and *interim* preservation orders are thus applicable to section 38.

In the *Prophet*¹⁷⁰ decision the constitutionality of Chapter 6 of *POCA* was questioned on the grounds that the applicant had a right to a fair trial and the right to be presumed innocent until proven guilty. It was submitted that the forfeiture proceedings ran concurrently with the criminal proceedings, a fact which prejudiced his right to a fair trial. In support it was pointed out that an application had been submitted to the High Court for a stay of the forfeiture proceedings pending the outcome of the criminal proceedings against Prophet, which could impact on his right to be presumed innocent. However, the court found that the proceedings were not unfair due to the fact of an *omission* on his part to lodge further explanatory affidavits in support. The attack on the constitutionality of *POCA* was also raised for the first time in the Constitutional Court.¹⁷¹

The right to have justiciable disputes settled by a court of law in the context of Regulation 3(5) promulgated under the *Currency and Exchanges Act*¹⁷² was in dispute in *Armbruster v Minister of Finance*.¹⁷³ A large amount of foreign currency had been seized at an international airport and forfeited to the Treasury. The court held that the operation of the Regulation involved an administrative decision of a Treasury official that was subject to review by a court of law on grounds of procedural fairness and substantive

169 Par [32]. S 173 of the *Constitution* provides that the Constitutional Courts, the SCA and the High Courts have the inherent power to protect and regulate their own process and to develop the common law in the interest of justice.

170 *Supra* n 8 par [49] and [72].

171 The court noted at par [50] that in his written argument in the SCA he specifically accepted that *POCA* passes constitutional muster.

172 9 of 1933.

173 2007 12 BCLR 1283 (CC).

reasonableness, and that the forfeiture did not constitute an infringement of section 34 of the *Constitution*.¹⁷⁴

4.7 Protection of innocent owners and third parties against forfeiture of property

A discernible aspect of forfeiture procedures is their potential to cause serious damage or loss to innocent persons where a strong financial incentive is at stake. The urge by authorities to combat crime and to adhere to the public opinion exacerbates the underlying prejudice caused by the forfeiture of tainted property.¹⁷⁵ It is therefore arguable whether or not *POCA* addresses the legitimate concerns of and provides sufficient protection to innocent owners, third parties and victims of crime.¹⁷⁶

4.7.1 Protection and Chapter 5 of POCA

The protection afforded to third parties in terms of Chapter 5¹⁷⁷ of *POCA* regarding confiscation orders after conviction is regulated by section 30. Section 30(3) stipulates that property may not be realised unless all known persons with an interest in the realisable property have been afforded the

174 Par [61]. Although reference is made to Chapter 6 of *POCA* at par [53] and [54], the disputes in this decision are focused mainly on the applicable provisions of the *Promotion of Administrative Justice Act* 3 of 2000, which do not fall within the ambit of this dissertation.

175 Van der Walt 2000 *SAJHR* 44.

176 Kok *Legal City* 1. The urgent need to protect victims of crime emanates from *The Services Charter for Victims of Crime*, which was signed and accepted by Parliament in November 2004. Key rights available to victims in their interaction with the criminal justice system include the right to be treated with fairness, respect, dignity and privacy, the right to receive and offer information, the right to protection and assistance, and the right to compensation and restitution. The right to protection includes the right to be free from intimidation, harassment, fear, bribery and corruption. See in this regard N'Dri K *Victim's Rights* 16; Hargovan 2007 *Acta Criminologica* 117, Frank C "Quality Services Guaranteed? A Review of Victim Policy in South Africa" 2007 *ISSM* 35-38. Frank C however is of the opinion that the *Charter* is framed in such a way that the onus is placed on the victims to apply for services. This is problematic as many victims may not effectively articulate their needs, for example because of their age.

177 The proceedings under Chapter 5 are discussed at par 3.5 above.

opportunity to make representations to the court. Any such persons may also make representations to the court in terms of section 30(4) when damages to or loss of the property have occurred as a result of the criminal activity. The confiscation order may also be suspended in terms of section 30(5) for a fixed period when the court is satisfied that the victim has instituted civil proceedings against the offender in respect of damages suffered as a result of the offence.¹⁷⁸ Furthermore, section 26(1) authorises the NDPP to apply to a High Court *ex parte* for a restraint order prohibiting any person from dealing in any manner with any property.¹⁷⁹

In *National Director of Public Prosecutions v Rebutzi*¹⁸⁰ Goldstein J held that although the proceeds of confiscation orders accrue to the state, a complainant would be deprived of the benefit of obtaining payment of its loss if the respondent were to be convicted and a consequent confiscation order were to follow.¹⁸¹ However, on appeal the court held that sections 30(5) and 31(1) make it clear that a confiscation order should not be withheld merely because an identifiable victim has an equivalent claim for the recovery of his loss.¹⁸²

4.7.2 Protection and Chapter 6 of POCA

The concept of civil forfeiture is far more controversial and powerful where

178 De Koker 2001 www.crimeinstitute.ac.za/2ndconf/papers/de_koker.pdf [5 Feb 2008].

179 See a more detailed discussion in this regard at par 3.5.1 above. In *Fraser v ABSA Bank* 2007 3 SA 484 (CC) par [56], [63] and [70] the court held that an obligation to satisfy a judgment claim and to allow the intervention of a creditor had to be considered when the court has to exercise its discretion in terms of s 26(6).

180 2000 2 SA 869 (W) par 875C-D.

181 At par 875E-F the court found it inconceivable that a confiscation order could be made where a known complainant is entitled to compensation of money stolen that far exceeds the total assets under restraint. It would accordingly be absurd to grant a confiscation order which would deprive an innocent third party of a resource. See also De Koker *supra* n 178 in this regard.

182 *National Director of Public Prosecutions v Rebutzi* 2002 2 SA 1 (SCA) par 17. In pursuance of the discretion provided for in s 30(5) the court ruled that the realisation may be suspended until a victim's claim has been met, and where the property has been realised s 31(1) enables the High Court to distribute the proceeds as it deems fit.

tainted property could be permanently forfeited to the state without prior conviction.¹⁸³ Section 38 constitutes a complex two-stage enquiry leading to the forfeiture of property. Firstly it needs to be established that there are reasonable grounds to believe that the property was an instrumentality of the offence or the proceeds of unlawful activity.¹⁸⁴ When forfeiture is being sought by the state, the second stage of the enquiry obliges the court in terms of section 52(2A)(a) to exclude certain interests. An owner can at this stage claim as a defence that the property was obtained legally and for value, that he neither knew nor had reasonable grounds to suspect that the property in which the interest is held constituted an instrumentality of the offence or proceeds of crime, and that all reasonable steps had been taken to prevent the illegal use of the property.¹⁸⁵

4.7.2.1 The “innocent owner” defence

It was observed by Moseneke DCJ in the *Mohunram*¹⁸⁶ decision that too many innocent owners were “caught up in a net cast too wide” as a result of the inherent dilemma of civil forfeiture in incisively attempting to combat organised crime, money laundering and drug trafficking. The Constitutional Court in *Prophet*¹⁸⁷ also took into account that for a deprivation of property not to be arbitrary, the court needed to establish if the innocent owner defence was available to the applicant.¹⁸⁸

183 A comprehensive discussion with the applicable provisions of *POCA* is discussed at par 3.6 above. See also in this regard De Koker *supra* n 178.

184 *Mohamed 1 supra* n 24 par [17], *Cook Properties supra* n 7 par 21.

185 *Supra* n 184, par [18] and 23 respectively, *NDPP v Gerber supra* n 7 par 20.

186 *Supra* n 1 par [119]. See also in this regard Scott M “Assets forfeiture-what about the innocent party?” *Deneys Reitz* 13 June 2007.

187 *Supra* n 8 par [63]. Additional factors are to be considered: if the property is integral to the commission of the offence, would forfeiture prevent the further commission of crime, and the effect of the forfeiture on the applicant. See also *NDPP v Gerber supra* n 7 par 24 in this regard.

188 Burchell *Criminal Law* 1016 expresses the opinion that the very existence of the innocent owner defence, which constitutes the absence of culpability or fault, is “tacit recognition of the criminal and punitive nature of forfeiture of assets.”

Where the owner had done all that reasonably could be expected to prevent the unlawful use of the property, in *Cook Properties*¹⁸⁹ the court held that to avoid forfeiture section 52(2A)(a) should be read by applying the common law *maxim* that the law does not demand the impossible.

The innocent owner defence was deliberated in two divergent court decisions. In *National Director of Public Prosecutions v Parker*¹⁹⁰ the 82-year-old respondent and owner of the house applied for an order excluding her property from the operation of the forfeiture order in terms of section 39(3).¹⁹¹ The court observed that the premises had an undeniably residential character, as almost twenty people lived on the property.¹⁹² However, *in casu* the court embarked on a scrutiny of the character of the premises, which had been persistently associated with drug dealing, to conclude that the property had been instrumental to the commission of the offence and liable to be forfeited.¹⁹³ Furthermore, the respondent's son, a well-known drug dealer and gangster who occupied the house, had exercised personal control and supervision over it on her behalf. An unavoidable inference could therefore be drawn that his control and supervision included all of the residents on the property as well as the activities conducted on it.¹⁹⁴

In *National Director of Public Prosecutions v Gerber* the residential property

189 *Supra* n 7 par 26; *NDPP v Parker supra* n 23 par 23, *NDPP v Gerber supra* n 7 par 18. In *NDPP v Gerber ibid* par 22 this is known as the principle *lex non cogit ad impossibilia*.

190 *Supra* n 23. See also the facts of this decision and the application of the instrumentality enquiry by the SCA at par 3.6.2 read with n 173 above.

191 Par 23 and 41. Oral evidence in support of her claim that she neither knew nor had reasonable grounds to suspect that the property was an instrumentality was allowed by the court. The respondent did not apply for her property to be excluded, and the court relied on the common law *maxim* underscored in *Cook Properties ibid* n 189.

192 Par 37. None of the inhabitants was implicated in any of the drug stings.

193 Par 26 and 39.

194 Par 41

of the second respondent was liable for forfeiture in terms of section 50.¹⁹⁵ She submitted that she, her foster child and mother would be punished for acts to which she was an unwilling party if the forfeiture of her property were to be ordered.¹⁹⁶ As in *Cook Properties*, the court ruled that the owner's state of mind comes into play only at the second stage of the enquiry, which burdens the owner with the onus to prove on a balance of probabilities that the exclusion was justified.¹⁹⁷ The court found that the property was an instrumentality of the committed offence but considered a proportionality analysis with a note of caution that an unrestrained application of Chapter 6 of *POCA* might violate the right not to be arbitrary deprived of property within the meaning of section 25(1) of the *Constitution*.¹⁹⁸

The court held that the first respondent had been powerless to prevent the unlawful use of her property as an instrumentality for illegal activities, in support of a report submitted by a clinical psychologist on her behalf.¹⁹⁹ What ameliorated her situation was the serious constitutional question of whether or not forfeiture should be allowed "when the owner has committed no wrong of any sort, intentional or negligent."²⁰⁰ The court found that it would not be appropriate to grant a forfeiture order that would leave her, her

195 *Supra* n 7 par 1. The second respondent, her mother and foster child and her partner, the first respondent, lived on the property, where a well-established dagga plantation was grown in the backyard (par 4). The first respondent pleaded guilty for unlawfully cultivating dagga plants but contended that he was a habitual dagga user (par 5). The second respondent was not charged, and continuously tried to stop the illegal conduct, which inevitably led to numerous arguments, emotional abuse and threats by him to leave her (par 11).

196 Par 12.

197 Par 17 and 18. This burden derives from s 52(2A)(a), which created the innocent owner defence. It is suggested in *Cook Properties* (par 24) and reiterated in this case that innocence will not suffice if the owner fails to prove absence of knowledge or suspicion even when he or she was unable to do anything about the implicated offence or its continuation.

198 Par 23 and 24, *Prophet v NDPP supra* n 8 par [61]. The application of the proportionality test *in casu* is in accordance with the decision in *FNB* par [98]. See also the discussion above at par 4.2 and 4.3.

199 Par 26.

200 Par 21 and 25. This *dictum* is well established in *Austin v United States* 509 US 602 (1993) 629. See also in this regard n 31 above.

her foster child and her mother homeless.²⁰¹

4.7.2.2 The “innocent owner” defence and spouses married in community of property

Section 52(2A)(a) of *POCA* was in dispute in *National Director of Public Prosecutions v Mazibuko*,²⁰² where the wife, who was married in community of property, was entirely an innocent party and unaware of the fact that the drug mandrax was manufactured on the farm. The immovable property was an asset in the joint estate, and the court had to decide whether the whole of the property should be forfeited rather than the respondent’s half share.²⁰³ It was underscored by the court that universal community of property entails that the husband and wife become tied owners in undivided and indivisible half-shares of the assets and liabilities which are merged into the joint estate for the duration of the marriage.²⁰⁴

With due regard to the sympathy that was felt towards her innocence and the possibility that the forfeiture might violate the constitutional values of equality and dignity, as well as the fundamental principle that the innocent should not be punished, the court nevertheless granted the forfeiture order.²⁰⁵ The court indicated that a more appropriate remedy was to be found in the *Matrimonial Property Act*,²⁰⁶ where mechanisms are established for the disposal of the property of either spouse in

201 Par 28. See also the detailed discussion of Freedman W “Constitutional application” 2007 *SACJ* 297-301 applicable to this case.

202 2008 JOL 21207 (N).

203 Par 42 and 68.

204 Par 55 and 56. This has been confirmed in *Ex Parte Mentzies et Uxor* 1993 3 SA 799 (CPD). See also in this regard *National Director of Public Prosecutions v Moronyane* (Not Reported: Case 1351/04: Decided 27/05/2005 (NC)), which is discussed at par 3.5.1 n 136 above. At par 65 the court observed that the effect of forfeiture of the farm would result in the forfeiture of her undivided half share in only one of the assets of the joint estate, and it would therefore not preserve her half share in the whole estate.

205 Par 60, 66 and 75.

206 88 of 1984, see par 49 and 72 in this regard.

circumstances where a spouse acted in a manner to the prejudice of the joint estate.²⁰⁷

Ad idem with the *ratio decidendi* of the court in the *Gerber*²⁰⁸ decision, and the defence available to innocent owners in terms of section 52(2A) of *POCA*, it is submitted that the courts should take cognisance of all the circumstances applicable to each case when a forfeiture order of immovable property is considered. The effect thereof may result in the arbitrary deprivation of property, which could leave parties who had no involvement in the crime destitute and homeless.

4.7.3 *Children as victims of crime and their constitutional rights*

Since the downfall of apartheid the adoption and protection of children's rights in terms of section 28 of the *Constitution* has come to the fore.²⁰⁹ The thrust in protecting these rights emanated from the *United Nations Convention on the Rights of the Child* (hereafter the *UN Convention*), which was signed by South Africa on 29 January 1993 and ratified on 16 June 1995, and the *African Charter on the Rights and Welfare of the Child* (hereafter the *African Charter*), signed by South Africa on 10 October 1997 and ratified on 7 January 2000.²¹⁰ Articles 19 and 32 of the *UN Convention* provide that children have the right to be protected from abuse and neglect

207 Par 49 and 72. The court referred to s 20 of the *Matrimonial Property Act* (par 53) which stipulates that a court may on the application of a spouse, order the immediate division of the joint estate in equal shares when it is satisfied that the interest of that spouse in the joint estate will be seriously prejudiced by the conduct of the other spouse.

208 *Supra* n 7, read with n 195 above.

209 S 28(1)(b), (c) and (d) provides for the right to family or parental care, basic nutrition, health and social services, shelter and to be protected from maltreatment, neglect, abuse or degradation. S 28(2) underscores that "a child's best interests are of paramount importance in every matter concerning the child."

210 De Koker *supra* n 178; Nel 2003 *Journal for Juridical Science* 107; Badenhorst C and Conradie H "Children's Perspectives on Crime and the Criminal Justice System: Main Findings" 2008 *Acta Criminologica* 77, Rosa S and Dutsckhe M "Child Rights at the Core: The Use of International Law in South African Cases on Children's Socio-Economic Rights" 2006 *SAJHR* 224.

and economic exploitation, and Articles 21, 26 and 27 of the *African Charter* protect children from *inter alia* discrimination and drug abuse.²¹¹ In terms of Article 3(1) of the *UN Convention* the best interests of the child “shall be a primary consideration” in all actions taken by public or welfare institutions, courts of law, administrative and legislative bodies.²¹²

The Constitutional Court in *M v S (Centre for Child Law Amicus Curiae)*²¹³ emphasised the importance of the principles embodied in the *UN Convention* as they strengthened the provisions of section 28(2), which should guide all policy in South Africa, namely survival, development, protection and participation. These principles lie at the heart of section 28, “the right of a child to be a child,” to enjoy special care and to live in a secure and nurturing environment.²¹⁴ The court also observed that it is not the sanction or sentence *per se* that could threaten to violate the interests of children, but the imposition of the sentence without having regard to the children’s interests. Innocent children should be protected from avoidable harm as far as is reasonably possible.²¹⁵ The state has a constitutional duty to protect “life, limb and property by diligently prosecuting crime.” However, in doing so the court has to balance two competing considerations, based on the context and standard of proportionality applicable to each individual case.²¹⁶ The first is to maintain the integrity of the family, as the well-being of children depends on the effective functioning of the family. These values are important and contribute to a sense of belonging between family members. The second consideration relates to the duty of the state to punish criminal conduct, and the tension is between these two

211 Rosa and Dusckhe 2006 *SAJHR* 231.

212 Rosa and Dusckhe 2006 *SAJHR* 232.

213 2008 3 SA 232 (CC).

214 Par [17].

215 Par [35].

216 Par [37].

considerations.²¹⁷

It was further observed by the court that the character of section 28 presupposes that in our new dispensation children cannot be treated as a mere extension of their parents, “umbilically destined to sink or swim with them.”²¹⁸ However, the court also stated that regard must be had to the fact that parents should not be allowed to use their children as means to escape the just consequences of their own criminal conduct.²¹⁹

The forfeiture of a family’s assets or property may constitute an intolerable burden on those with no or few other financial resources, and may leave them vulnerable to the vicissitudes of life. The Centre for Crime Prevention conducted the National Youth Victimization Study in 2005, which found that 41,5% or 4,3 million children aged between 12 and 22 were victims of crime.²²⁰ The question that arises is to what extent the constitutional rights of children are disregarded or protected when the confiscation or forfeiture of parents’ property is considered by the courts in terms of *POCA*. It is possible that the loss of parent’s property under these circumstances could exacerbate their inability to care for their dependent children.²²¹

Although the provisions of *POCA* provide some form of protection to innocent owners and the interests of third parties,²²² it is hardly of any value to children. The protection so afforded in terms of section 52 of *POCA*, which allows the court to exclude certain interests, cannot be legally utilised by minor children. As a result of the nature of the relationship between parents and children, “these children often receive property without proper

217 Par [38] and [39]. It was contended by the *amicus* at par [42] that children are innocent of the crime and their needs and rights received relatively little attention when a primary caregiver was sent to prison.

218 Par [18].

219 Par [34].

220 Frank 2007 *ISSM* 7-8.

221 Nel 2003 *Journal for Juridical Science* 108.

222 See the discussion in this regard at par 4.7 above.

and adequate consideration.”²²³ Children are innocent third parties who are particularly vulnerable to forfeiture procedures and are therefore often the victims of the criminal conduct of their parents or family. Their parents’ estates could be abused by hiding the proceeds of crime, for example by the creation of a trust with the children as nominated beneficiaries and the tainted property transferred in their names. The lack of adequate protection may be ascribed to the fact that the criminal administers the property and money and therefore remains the true owner. In circumstances where the entire estate is forfeited, no safety is provided for the protection of the children’s interests by any welfare system in South Africa.²²⁴

It could also be argued that the limitation of the fundamental rights of children in terms of *POCA* is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom as provided for in terms of section 36(1) of the *Constitution*. This was underscored by the Constitutional Court in *M v S*,²²⁵ where it held that a literal interpretation of the phrase “in every matter concerning the child” as provided for in section 28(2) of the *Constitution* may have far-reaching consequences. It would cover virtually all legislation and all forms of public action, since very few measures would not have a direct or indirect impact on the rights of children. However, it is submitted by Nel and De Koker²²⁶ that this argument is not sustainable, as the limitation of children’s fundamental rights under *POCA* “cannot be justified morally or legally because the object of *POCA* is to provide a necessary tool in combating crime.”²²⁷

223 De Koker *supra* n 178, Nel 2003 *Journal for Juridical Science* 109.

224 *Ibid* n 223. De Koker observed that the *English Criminal Justice Act* 1988 provides for the protection of victims in confiscation orders, where a court may grant an order for compensation simultaneously. S 72(2) applies when the defendant is unable to meet both orders. S 72(7) stipulates that a court may under these circumstances order any shortfall in payment of the compensation order to be paid out of the proceeds of the confiscation order.

225 *Supra* n 213 par [25] and [26].

226 *Supra* n 223.

227 *Ibid* n 223.

POCA legislation does not specifically provide for the protection of the rights of children as innocent third parties, as provided for in the *Constitution* and in conformity with the provisions stipulated in the *UN Convention* and the *African Charter*. A possible way of addressing this anomaly, according to Nel,²²⁸ is that a minor amendment of *POCA* should apply *mutatis mutandis* to the provisions of the *Mediation in Certain Divorce Matters Act*²²⁹ in certain cases where property is forfeited. In terms of section 6(1) the court may appoint a family advocate to enquire into the interests of a minor or dependant child. Accordingly, when the court has to consider an application for the forfeiture of property and the interests of dependent children are involved, an enquiry by a family advocate could be justified under these circumstances. A clear distinction should be drawn between cases where the forfeited property is identified and distinguishable from legally obtained assets, and cases where this is not possible.²³⁰

Of major concern is a media statement recently released by Sheila Camerer, a spokesperson for the Democratic Alliance,²³¹ with reference to nine township children who were allegedly sexually abused by the German immigrant Werner Braun.²³² These children had no legal representation but for the status of complainants. The funds deposited in CARA,²³³ which are estimated at approximately R200 million, can be applied for by victims of crime, albeit only R3,5 million has been allocated for this purpose. A report on establishing a compensation fund for victims of crime had been submitted to the former Minister of Justice, Brigitte Mabandla, in 2004.

228 Nel 2003 *Journal for Juridical Science* 115-116.

229 24 of 1987.

230 *Ibid* n 228. From a different perspective, Prof Conradie from the Department of Criminology at UNISA avers that to enhance the best interest of a child, a lawyer and social worker should be available to professionally assess the situation of the family involved in crime. See in this regard Conradie H "Are We Failing to Deliver the Best Interest of the Child?" 2003 *Crime Research in South Africa* 4.

231 Camerer S 'Child victims' case cries out for Victim's Fund' *Mail and Guardian* 2008.

232 *National Director of Public Prosecutions v Braun and Another* 2007 4 SA 72 (CPD).

233 See also in this regard par 3.4.4.5 n 114 above. Once the forfeiture order of Braun's (*supra* n 232) assets worth R4 million is made final, it will be deposited into CARA.

Repeated requests by the DA and other parties to the Minister to release the report or to give access to it had been to no avail. In a strongly worded argument the DA stated that in the case of these nine children, should they have access to the Braun assets once forfeited, this would enable them to employ legal assistance in any claims for damages against the estate of the perpetrator. As things stood, “they are all dirt poor, powerless and without legal representation, victims of beastly crimes who will probably land up on the scrap heap of South Africa’s legal system.”²³⁴

Section 28 of the *Constitution* plainly states that the courts must have the interests of children at heart in every executive action, judicial decision or legislative decree which could directly or indirectly impact on their constitutional rights. If *POCA* neglects to provide for what is in the best interests of children, or gives rise to action against their interests, “South Africa will sacrifice the fundamental rights of children in the name of law enforcement.”²³⁵

4.8 Concluding remarks

The aim and scope of *POCA* is a serious attempt by the legislature to combat the increasing incidence of organised crime, corruption, money laundering and criminal gang activities. However, as shown above, a great deal of intricate controversy has developed on the subject of the interpretation and application of its forfeiture provisions. It is evident that an unrestrained application of *POCA* may violate well-established constitutional rights such as the right not to be arbitrarily deprived of property,²³⁶ the right not to suffer excessive punishment,²³⁷ and the right to

234 *Ibid* n 231.

235 De Koker *supra* n 178, Nel 2003 *Journal for Juridical Science* 117.

236 *Prophet v NDPP supra* n 8 par [61]; *Mohuram v NDPP supra* n 1 par [122], *NDPP v Gerber supra* n 7 par 24.

237 *Mohunram v NDPP supra* n 1 par [120].

a fair trial.²³⁸

The proportionality test was applied in *Mohunram*,²³⁹ where the *dictum* of Moseneke DCJ for the majority should be accepted as giving our courts a crucial guideline. He held that the more remote the offence is to the objects of *POCA*, the greater the possibility that the forfeiture of the instrumentalities of the offence will be disproportionate. The courts should also weigh the adequacy of existing conventional penalties before granting the forfeiture of tainted property.²⁴⁰ This issue predominated where the “instrumentality of an offence” test was applied to cases of individual wrongdoing.²⁴¹ The decision to rule that the property in question is in most instances an “instrumentality of the offence” seems to have been based on the understanding that forfeiture is not intended to punish the offender, but to remove the incentive to commit further crime.²⁴²

Succinctly, the Constitutional Court in *Mohunram*²⁴³ held that prior to the granting of a forfeiture order the court should take into account the extent of the penalties already imposed on the offender, if the forfeiture would amount to double jeopardy, and if conventional penalties were inadequate to serve the purpose of deterrence. The aim of *POCA* was not to provide a substitute or top-up of ordinary forms of adjudication.²⁴⁴ Moseneke DCJ²⁴⁵ *in casu* compels assent when he says that if the word “offences” in *POCA* were to be interpreted as reaching far beyond the ambit of organised crime and to include all acts of individual wrongdoing listed in Schedule I,²⁴⁶ this

238 See the discussion above at par 4.6. It was emphasised by the Constitutional Court in *Mohamed 2 supra* n 164 par [20] and [21] that the *audi alteram partem* principle lies at the heart of the rule of law.

239 *Supra* n 1 par [126].

240 *Ibid* n 42.

241 The controversy on this aspect has been critically analysed at par 4.4 above.

242 *NDPP v Mohamed supra* n 24 par [28].

243 *Supra* n 1 par [65].

244 Par [125], [127] and [152] respectively.

245 *Supra* n 1 par [115].

246 *Supra* n 54.

would be inconsistent with the text of *POCA* as a whole and a violation of a person's property rights in terms of section 25(1) of the *Constitution*, as well as the right not to be punished in a cruel, inhuman or degrading way, as inscribed in section 12(1)(e) of the *Constitution*.

Although the innocent owner defence is available to owners in terms of section 52(2A)(a) of *POCA*,²⁴⁷ contradictory decisions were evident in the *Parker*²⁴⁸ and *Gerber*²⁴⁹ decisions. In *Parker* the emphasis was placed by the court on the character of the residential property, which showed an ongoing pattern of drug dealing. The immovable property was declared forfeited to the state, irrespective of the fact that the residents on the property were not linked to the criminal offences.²⁵⁰ It is submitted that the court in the *Gerber* decision, after considering a proportionality analysis, correctly decided that the forfeiture of the immovable property would constitute an arbitrary deprivation of property where the owner had done no wrong, either intentionally or negligently, and that a consequent forfeiture order would leave the owner and other dependents homeless and destitute.²⁵¹

Crucially, what is most striking in the uncertain and inconsistent interpretation and application of forfeiture measures demonstrated above is that a child's best interests as provided for in terms of section 28 of the *Constitution* could be disregarded. Section 28(1)(b) places a duty to provide care and support to children not only on parents and families but also by implication on the state. It accordingly inhibits any legislative or administrative action that would prevent proper parental care and that could result in the separation of children from their parents.²⁵²

247 See the discussion in this regard at par 4.7.2.1 above.

248 *Supra* n 23, read with n 190 above.

249 *Supra* n 7, read with n 195 above.

250 Par 41.

251 Par 21 and 22.

252 De Koker *supra* n 178.

However, as was observed by the Constitutional Court in *M v S*,²⁵³ the “paramountcy principle” in terms of section 28(2)²⁵⁴ is capable of limitation.

253 *Supra* n 225 par [25] and [26].

254 S 28(2) stipulates that the best interests of a child are of paramount importance in all matters concerning the child.

5 Conclusions and recommendations

5.1 *The constitutional right to property*

As discussed in paragraphs 2.3.1 and 2.3.1.1, two predominant and important requirements are embodied in section 25(1) of the *Constitution*, namely that a deprivation must take place in terms of law of general application, and that no law may permit arbitrary deprivation of property. The aim of section 25 is to establish a just and equitable balance between the promotion of public interest and the protection of private property. Although section 25 guarantees and protects property, the Bill of Rights does not by necessary implication insulate private property from state interference. However, unjustified and “purely judicial activism”¹ would render such conduct inconsistent with the protection afforded by the *Constitution*.

It was clearly stated by the Constitutional Court in *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service*² (hereafter *FNB*) that the starting point of any constitutional enquiry and possible infringements of property rights must be section 25(1). If a deprivation infringes section 25 and cannot be justified under section 36, then that is the end of the matter, and the provision is unconstitutional. It was also established in *FNB* that a deprivation will be arbitrary when the law does not provide sufficient reason for the deprivation or is procedurally unfair. Sufficient reason invokes a proportionality standard in establishing what constitutes arbitrary deprivation of property. Ackermann J held that there must be a rational connection between means and ends, the sacrifice the individual is asked to make and the public purpose it is intended to serve. Subject to this proportionality analysis, it is permissible for legislation

1 Van der Walt *Constitutional Property* 33.

2 2002 4 SA 768 (CC) par [58]-[60].

to confiscate property without compensation.³ This will inevitably apply to forfeiture procedures in matters where the owner was involved in, and used his property in the commission of a criminal offence.⁴

The constitutional interrelatedness between section 25, which protects property rights, and section 26, which protects the right to housing, were confirmed by the Constitutional Court in *Port Elizabeth v Various Occupiers*⁵ and the *Modderklip*⁶ decisions.⁷ This requires that eviction orders undertaken by the state should be applied within a defined constitutional matrix, which underscores the *dictum* of the court in *PE*: “[T]he stronger the right to land, the greater the prospect of a secure home.”⁸

It may be concluded that ownership lies at the heart of our constitutional concept of property, including the nature and the object of the right. One’s right to property imposes a duty on the owner to use and manage it in a responsible manner and accordingly the constitutional right to property may be limited by restrictions imposed thereupon by law.

5.2 The application of POCA and forfeiture of property

The importance of forfeiture legislation, as discussed in paragraph 3.3.2 and 3.4, reflects the desperation of the criminal justice system to successfully deal with sophisticated criminals. Although the proportionality standard in *FNB* did not deal with the forfeiture of tainted property obtained through criminal activities, it may equally apply to criminal and civil forfeiture procedures under *POCA*. Criminal confiscation (after conviction) as

3 Par [100] and [98]. See par 2.4 above and the discussion of *FNB*.

4 Badenhorst, Pienaar and Mostert *Silberberg’s Property* 271-272, *National Director of Public Prosecutions v Rebuzzi* 2002 2 SA 38 (SCA) par 11.

5 *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC).

6 *President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd (Agri SA and Others, Amici Curiae)* 2005 5 SA 3 (CC).

7 See in this regard par 2.5.1 and 2.5.2 above.

8 Par [19].

regulated by Chapter 5, requires a sufficiently close link between the crime and the proceeds of crime or any benefit derived from the crime. An element of proportionality between the value of the proceeds of crime and the confiscated assets needs to be established. For civil forfeiture of the instrumentalities of an offence in terms of Chapter 6, where conviction is not a pre-requisite, the link between the property to be forfeited and the crime must be reasonably direct, and the property must have been functional to the commission of the offence.⁹

A balance needs therefore to be established between the objects of *POCA*, namely to combat organised crime, money laundering and criminal gang activities, and unwarranted interference with private property rights, which could result in arbitrary deprivation of property and excessive punishment. The purpose behind these powerful forfeiture measures is predominantly to target the rapid growth of organised crime and corruption which, when allowed to go unpunished, pose a national and international security threat to the democracy of South Africa. Habitual and professional criminals often conceal the profits of crime and operate on different levels of sophistication, even when brought to justice. This threat was underscored by O'Regan ADCJ in the *Shaik*¹⁰ decision:

Corruption and maladministration are inconsistent with the rule of law and the fundamental values of our Constitution. They undermine the constitutional commitment to human dignity, the achievement of equality and the advancement of human rights and freedoms. They are antitheses of the open, accountable, democratic government required by the Constitution. If allowed to go unchecked and unpunished they will pose a serious threat to our democratic state.

Furthermore, the South African common law and statutory law have failed to deal adequately with this phenomenon, as conventional criminal penalties do not serve the desired purpose of being a deterrent. The primary purpose of *POCA*, which is civil in nature, is not to punish the offender but to remove

⁹ See in this regard par 3.5 and 3.6 above.

¹⁰ *S v Shaik* 2008 1 SACR 1 (CC) par [72].

the incentive to commit further crimes. The property used in the commission of the offence is rendered guilty of the offence and not the owner.

It is submitted that civil forfeiture of tainted property may constitute punishment which should not be imposed without a criminal conviction. A word of caution is given to us in *Mohunram*,¹¹ where Sachs J observed that a deterrent purpose cannot justify every case of the forfeiture of an instrumentality of an offence, and that such forfeiture may not serve as an example to others when these measures are unjust to individuals. The deterrent purpose of *POCA* must be weighed against the relevant offence and its effect on the individual owner, bearing in mind that the extent of forfeiture is aimed at combating organised crime. The opinion is also expressed that the state's discretionary power of whom to target with forfeiture measures may unjustifiably constitute an additional, separate punishment which may push it beyond the limit of what is considered fair and reasonable for the particular crime.

5.3 *The constitutionality of forfeiture of property*

The application of a proportionality analysis, which lies at the heart of any constitutional enquiry as regards post-conviction forfeiture, was discussed at paragraph 4.3. The proportionality analysis should encompass the establishment of the nature and gravity of the offence, the effectiveness of ordinary criminal measures in the successful detection and prosecution of the offence, the severity of the penalties already imposed on the offender, and its public impact in relation to social harm and disruption. The question to be asked in deciding whether or not forfeiture would be disproportionate is to establish whether the instrumentality of the offence is sufficiently linked

11 *Mohunram v National Director of Public Prosecutions* 2007 2 SACR 145 (CC) par [146]. See also the discussion on this aspect at par 3.7 above, as well as the rule against double jeopardy at par 4.5.

to the main objectives of *POCA*. The more remote the offence is from these objectives, the more likely it is that the forfeiture is disproportionate, and accordingly unconstitutional.

By analysing numerous court decisions it was found that it is incontestable that an unrestrained application of *POCA* may violate well-established constitutional rights such as the right not to be arbitrarily deprived of property, excessive punishment and the right to a fair trial.¹² It is of paramount importance that the best interests of children are protected in terms of section 28 of the *Constitution*. However, in the *Gerber*¹³ decision, where the innocent owner defence was applicable, the court did take into account that the forfeiture of the residential property would be an arbitrary deprivation of property which would leave the foster child and other dependents homeless. Notably, the same transparency was not evident in the *Parker*¹⁴ decision, where the residential property was declared forfeited irrespective of the fact that the residents had no relation to the offences committed on the property. Although the Constitutional Court in *M v S*¹⁵ underscored that the section 28 rights of children are capable of limitation, and that measures which impact on these rights should not in all cases oust all other considerations, it is submitted that not only does *POCA* fail to provide sufficient protection for the interests of children, but also for other dependants and innocent third parties. It is accordingly recommended that a court should use its discretion, when deciding an application for forfeiture of property, to appoint a family advocate to investigate and propose efficacious recommendations. An equitable and proportionate balance may then be established between means and ends and the public purpose the forfeiture is intended to serve.

12 See in this regard par 4.2, 4.5 and 4.6 above.

13 *National Director of Public Prosecutions v Gerber* 2006 JOL 18856 (W).

14 *National Director of Public Prosecutions v Parker* 2006 3 SA 198 (SA). See the discussion in this regard at par 4.7.2.1 above.

15 *M v S (Centre for Child Law Amicus Curiae)* 2008 3 SA 232 (CC) par [25].

What clearly surfaces from the *Mohunram* decision is that the Constitutional Court underscored the importance of taking due cognisance of the following factors when considering a forfeiture order:¹⁶ the extent of the penalties already imposed on the offender; if conventional criminal penalties are inadequate as measures of deterrence; and whether the forfeiture would amount to the provision of double jeopardy. Ordinary forms of law enforcement should therefore be the first port of call, and *POCA* should not be applied as a top-up of criminal penalties. Consequently, if so applied, *POCA* could blur the distinction between the purposes of criminal and civil law.

In the assessment of the application of *POCA* to cases of individual wrongdoing, and more specifically to the drunken driving judgments, it is submitted that available alternative criminal penalties, which could have served the same purpose of deterrence, were not in all cases taken into consideration when the forfeiture of property was sought. The controversy and the contradictory judgements pertained to the interpretation of the term “organised crime” as well as to the offences listed in Schedule I and Item 33.¹⁷

5.4 Final remarks and recommendations

The *Mohunram* decision can be regarded as the leading, most prestigious decision of the Constitutional Court. *In casu* an assessment and indication of what would render forfeiture measures disproportionate and unconstitutional clearly comes to the fore. The crisp question to be asked is whether the crime in question requires extraordinary measures for its detection and prevention. Is it a crime that justifies extraordinary measures

¹⁶ *Mohunram v NDPP supra* n 11 par [65]. See in this regard par 3.7 and 4.4 above.

¹⁷ This aspect is critically analysed and discussed at par 4.4.1-4.4.3 above. The problem emanated from the interpretation by the courts that the aim of *POCA* reaches far beyond organised crime and also targets individual wrongdoing.

appropriate to organised crime as provided for in *POCA*, and is the crime rationally linked with racketeering, money laundering and criminal gang activities. The closer the crime is to the objectives of *POCA*, the more compelling the case for a successful forfeiture order. This decision should be applauded as it conveys a clear message and warning that the extreme powers of forfeiture legislation and its adjudication by the AFU may not be permitted to undermine the rule of law and due process, and the rights enshrined in the *Constitution*, particularly the right not to be arbitrarily deprived of property.

It is of concern that the wide interpretation of the scope and ambit of *POCA* and the failure to distinguish clearly between organised crime and ordinary crime may lead to legal uncertainty in future. In the most recent *Zuma*¹⁸ decision the court held the following:

The primary rule in the construction of statutory provisions is to ascertain the intention of the Legislature. One does so by attributing to the words of a statute their ordinary, literal, grammatical meaning. Where the language of a statute, so viewed, is clear and unambiguous effect must be given thereto, unless to do so...would lead to absurdity so glaring that it could never have been contemplated by the Legislature, or where it would lead to a result contrary to the intention of the Legislature, as shown by the context or by such other considerations that the Court is justified in taking into account.

The intention of the Legislature was clear when *POCA* was drafted and promulgated. Measures were introduced to combat the increasing incidence of organised crime, money laundering and criminal gang activities. These criminal activities pose a serious threat to political and economical stability, good governance and democracy, and ordinary, common and statutory law is inadequate to effectively deal with these phenomena.

In nuce, what stands out in this research is the intricacy of the controversy that has developed around the interpretation and application of the

18 *Zuma v National Director of Public Prosecutions* (Reportable: Case 8652/08; Decided 12 Sept 2008 (N)) par 67.

instrumentalities of the offence, the proportionality standard and the application of forfeiture measures in cases of individual wrongdoing. This has inevitably had the result that forfeiture procedures have sometimes resulted in the arbitrary deprivation of property, as protected under section 25(1) of the *Constitution*, the right to housing as protected under section 26, as well as a violation of other well-established constitutional rights.¹⁹

POCA should therefore be used sparingly. If it is not the danger may be exacerbated that “if the AFU spreads its nets too widely so as to catch the small fry, it will make it easier for the big fish...to elude the law.”²⁰

Judges in our constitutional dispensation have a duty to uphold and protect the *Constitution*, and the courts are safeguards or guardians of every individual’s protected constitutional rights. People should have the necessary confidence to approach a court of law when appropriate relief is sought regarding any actual or threatened infringements of their constitutional rights.²¹

19 *Prophet v National Director of Public Prosecutions* 2007 BCLR 140 (CC), discussed at par 4.3.1; *National Director of Public Prosecutions v Fielies* 2006 1 SACR 302 (C), discussed at par 4.4.1; *NDPP v Parker supra* n 14; *National Director of Public Prosecutions v Van Staden* 2007 1 SACR 338 (SCA), discussed at par 4.4.2.2; *National Director of Public Prosecutions v Stander* 2008 1 SACR 116 (E), discussed at par 4.4.3 above.

20 *Mohunram v NDPP supra* n 9 par [155].

21 *Glenister v President of the Republic of South Africa* (Reportable: Case CCT 41/08: Decided 22/Oct/2008 (CC)) par [37].

6 Bibliography

6.1 Books

A

Alexander "Constitutionalising Property"

Alexander GS "Constitutionalising Property: Two Experiences, Two Dilemmas" in McLean J (ed) *Property and Constitutions* (Hart Publishing 1999)

B

Badenhorst, Pienaar and Mosterd *Silberberg's Property*

Badenhorst PJ, Pienaar JM and Mostert H *Silberberg and Schoeman's The Law of Property* 5th ed (LexisNexis Butterworths Durban 2006)

Burchell *Cases and Materials*

Burchell J *Cases and Materials on Criminal Law* 3rd ed (Juta Cape Town 2007)

Burchell *Criminal Law*

Burchell J *Principles of Criminal Law* 3rd ed (Juta Lansdowne 2005)

C

Cilliers *The Choice*

Cilliers C *The Choice The Gayton Mckenzie Story* 2nd ed (ABC Press Cape Town 2007)

Currie and de Waal *Bill of Rights*

Currie I and de Waal J *The Bill of Rights Handbook* 5th ed (Juta Cape Town 2005)

Currie and de Waal *Constitutional and Administrative Law*

Currie I and de Waal J *The New Constitutional and Administrative Law* 1st ed (Juta Landsdowne 2001)

R

Roux and Davis "Property"

Roux T and Davis D "Property" in Cheadle MH *et al* (eds) *South African Constitutional Law: The Bill of Rights* 2nd ed (LexisNexis Butterworths 2005)

Roux "Property"

Roux T "Property" in Woolman S *et al* (eds) *Constitutional Law of South Africa: Student Edition* 2nd ed (Juta 2002)

S

Snyman *Criminal Law*

Snyman CR *Criminal Law* 4th ed (LexisNexis Butterworths 2002)

V

Van der Walt *Casebook for Students*

Van der Walt AJ *Casebook for Students Law of Property* 6th ed (Juta 2006)

Van der Walt *Constitutional Property*

Van der Walt AJ *Constitutional Property Law* 1st ed (Juta Cape Town 2005)

Van der Walt *Property Clause*

Van der Walt AJ *The Constitutional Property Clause* 1st ed (Juta Kenwyn 1997)

Van der Walt and Pienaar *Property Law*

Van der Walt AJ and Pienaar GJ *Introduction to the Law of Property* 4th ed (Juta Landsdowne 2002)

Van Zyl *History of Roman Law*

Van Zyl DH *History and Principles of Roman Private Law*
(Butterworths Durban 1983)

6.2 Case law

Armbruster and Another v Minister of Finance and Others 2007 12 BCLR
1283 (CC)

Austin v United States 509 US 602 (1993)

*Carmel Trading Co Ltd v Commissioner, South African Revenue
Services and Others* 2008 2 SA 433 (SCA)

*Ex Parte Chair Person of the Constitutional Assembly: In re Certification
of the Constitution of the Republic of South Africa, 1996* 1996 4 SA 744
(CC)

Ex Parte Menzies et Uxor 1993 3 SA 799 (CPD)

*Ex Parte National Director of Public Prosecutions in re Preservation
Orders* 2005 2 SACR 198 (SE)

*Ferreira v Levin and Others; Vryenhoek and Others v Powell NO and
Others* 1996 1 SA 948 (CC)

*First National Bank of SA Ltd t/a Wesbank v Commissioner, South
African Revenue Service* 2002 4 SA 768 (CC)

*Fraser v ABSA Bank Ltd (National Director of Public Prosecutions as
Amicus Curiae)* 2007 3 SA 484 (CC)

Gien v Gien 1979 2 SA 1113 (T)

Glenister v President of the Republic of South Africa and Others
(Reprtable: Case CCT 41/08: Decided 22 October 2008 (CC))

Harksen v Lane 1998 1 SA 300 (CC)

Hurley and Another v Minister of Law and Order 1985 4 SA 709 (D)

Mngomezulu and Others v National Director of Public Prosecutions 2008
1 SACR 105 (SCA)

Mngomezulu and Another v Van Den Heever NO and Another 2007 2
SACR 266 (SCA)

*Mohunram v National Director of Public Prosecutions (Law Review
Project as Amicus Curiae)* 2007 2 SACR 145 (CC)

*Mkontwana v Nelson Mandela Metropolitan Municipality; Bissett and
Others v Buffalo City Municipality; Transfer Rights Action Campaign and
Others v Member of the Executive Council for Local Government and
Housing, Gauteng and Others* 2005 1 SA 530 (CC)

M v S (Centre for Child Law Amicus Curiae) 2008 3 SA 232 (CC)

National Director of Public Prosecutions v Basson 2002 1 SA 419 (SCA)

National Director of Public Prosecutions v Braun and Another 2007 4 SA
72 (CPD)

National Director of Public Prosecutions v Carolus 2000 1 SA 1127
(SCA)

National Director of Public Prosecutions v Cole and Others 2005 2
SACR 553 (W)

National Director of Public Prosecutions v Duhanco Labour Contractors (Pty) Ltd and Another 2008 JOL 22065 (SE)

National Director of Public Prosecutions v Engels 2005 3 SA 109 (C)

National Director of Public Prosecutions v Fielies and Another 2006 1 SACR 302 (C)

National Director of Public Prosecutions v Gerber 2006 JOL 18856 (W)

National Director of Public Prosecutions v Geyser and Another 2008 2 All SA 616 (SCA)

National Director of Public Prosecutions v Gouws 2005 2 SACR 193 (SE)

National Director of Public Prosecutions v Hlongwa; In Re National Director of Public Prosecutions v Nkosi and Others 2006 2 All SA 486 (T)

National Director of Public Prosecutions: In Re Appeal 2005 2 SACR 610 (N)

National Director of Public Prosecutions v Kleinbooi 2008 2 All SA 455 (C)

National Director of Public Prosecutions v Kyriacou 2003 2 SACR 524 (SCA)

National Director of Public Prosecutions v Madatt 2008 JOL 21555 (C)

National Director of Public Prosecutions v Mazibuko and Others 2008 JOL 21207 (N)

National Director of Public Prosecutions v Mcasa and Another 2000 1 SACR 263 (TK)

National Director of Public Prosecutions v Mohamed NO and Others 2002 4 SA 843 (CC)

National Director of Public Prosecutions v Mohamed NO 2003 4 SA 1 (CC)

National Director of Public prosecutions v Mohunram 2006 1 SACR 554 (SCA)

National Director of Public Prosecutions v Moronyane and Others (Not Reported: Case 1351/04: Decided 27 May 2005 (NC))

National Director of Public Prosecutions v Mtungwa 2006 1 SACR 122 (N)

National Director of Public Prosecutions v Naido and Others 2006 2 SACR 403 (T)

National Director of Public Prosecutions v Ncogwane and Others 2005 2 SACR 377 (N)

National Director of Public Prosecutions v Parker 2006 3 SA 198 (SCA)

National Director of Public Prosecutions v Prophet 2003 2 SACR 287 (C)

National Director of Public Prosecutions v Rautenbach 2005 1 All SA 412 (SCA)

National Director of Public Prosecutions v Rebuzzi 2000 2 SA 869 (W)

National Director of Public Prosecutions v Rebuzzi 2002 2 SA 1 (SCA)

National Director of Public Prosecutions v RO Cook Properties (PTY) Ltd; NDPP v 37 Gillespie Street Durban (Pty) Ltd; NDPP v Seevnarayan 2004 2 SA 208 (SCA)

National Director of Public Prosecutions v Seevnarayan 2003 2 SA 178 (C); 2003 1 SACR 260

National Director of Public Prosecutions v Stander and Others 2008 1 SACR 193 (E)

National Director of Public Prosecutions v Starplex 47 CC and Others: In re Ex Parte Application of NDPP v Mamadou and another 2008 JOL 21553 (C)

National Director of Public Prosecutions v Swart 2006 4 All SA 290 (SE)

National Director of Public Prosecutions v Van Heerden 2004 2 SACR 26 (C)

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

National Director of Public Prosecutions v Van Zyl and Others (Not Reportable: Case 39358/2007: Decided 3 June 2008 (W))

National Director of Public Prosecutions v Vermaak 2008 1 SACR 157 (SCA)

Phillips v National Director of Public Prosecutions 2003 6 SA 447 (SCA)

Plascon-Evans Paints v Van Riebeeck Paints 1984 3 SA 623 (A)

Port Elizabeth Municipality v Various Occupiers 2005 1 SA 217 (CC)

President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd (Agri SA and Others, Amici Curiae) 2005 5 SA 3 (CC)

Procopos v National Director of Public Prosecutions (Reportable: Case 401/07: Decided 29 September 2008 (SCA))

Prophet v National Director of Public Prosecutions 2006 1 SA 38 (SCA)

Prophet v National Director of Public Prosecutions 2007 2 BCLR 140 (CC)

R v Swanepoel 1945 AD

Singh v National Director of Public Prosecutions 2007 2 SACR 326 (SCA)

South African Association of Personal Injury Lawyers v Heath 2001 1 BCLR 77 (CC)

Stellenbosch Farmers Winery Ltd v Stellenvale Winery (Pty) Ltd 1957 4 SA 234 (C)

S v Bissessue 1980 1 SA 228 (N)

S v Dodo 2001 1 SACR 594 (CC)

S v Dos Santos and Others 2006 JOL 18028 (C)

S v Dzukuda; S v Tshilo 2000 2 SACR 443 (CC)

S v Eyssen (Reportable: Case 746/2007: Decided 17 September 2008 (SCA))

S v Khumalo 1984 3 SA 327 (A)

S v Lawrence; S v Negal; S v Solberg 1997 4 SA 1176 (CC)

S v Makwanyane and Another 1995 3 SA 391 (CC) 423B

S v Malgas 2001 2 SA 1222 (SCA)

S v Manamela and Another (Director of Justice Intervening) 2000 3 SA 1 (CC)

S v Nkosi 1972 4 SA 542 (N)

S v Radebe 2006 2 SACR 604 (O)

S v Shaik 2008 1 SACR 1 (CC)

S v Thebus 2003 6 SA 505 (CC)

S v Vilakazi (Reportable: Case 576/07: Decided 3 September 2008 (SCA))

S v Williams 1995 7 BCLR 861 (CC)

United States v Bajakajian 524 US 321 (1998)

United States v Ursery 518 US 267 (1996)

Van der Merwe and Another v Taylor and Others 2008 1 SA 1 (CC)

Vryhoek v Powell 1996 1 SA 948 (CC)

Zuma v National Director of Public Prosecutions (Reportable: Case 8652/08: Decided 12 September 2008: (N))

6.3 Internet

D

De Koker J 2001 The Constitutional Rights of Children and the Prevention of Organised Crime Act 121 of 1998 [Found on Internet] http://http://www.crimeinstitute.ac.za/2ndconf/papers/de_koker.pdf [Date of use 5 February 2008]

Du Plessis J 2008 SA to target organised crime [Found on Internet] <http://www.southafrica.info/about/democracy/crime010708b.htm> [Date of use 4 July 2008]

H

Hilton L 2007 Contemporary Slavery: Sex trafficking in South Africa and suggested solutions [Found on Internet] <http://www.africanstudies.uct.ac.za/postamble/vol3-1/slavery.pdf> [Date of use 27 January 2008]

I

Issue Paper 11 (Project 82): Sentencing Mandatory Minimum Sentences 2005 [Found on Internet] <http://www.saflii.org/za/other/zalc/ip/11/11-CHAPTER-2.html> [Date of use 14 June 2008]

J

Judgement Against Asset Forfeiture Unit, Law Review Project 2007 [Found on Internet] <http://www.moneyeb.co.za/mw/view/mw/en/page1639?oid=178634&sn=Detail> [Date of use 16 April 2008]

K

Kempen A (undated) Taking the Profit out of Crime – The Asset Forfeiture Unit [Found on Internet]

<http://www.npa.gov.za/UploadedFiles/FAQs%20on%20AFU.pdf> [Date of use 15 February 2008]

M

Marè R Criminal Law and the Bill of Rights in *Butterworth's Bill of Rights Compendium* 1997 LexisNexis Butterworths [Found on Internet] <http://www.bohss.co.za> [Date of use 6 November 2008] (Licensed membership required)

Mostert H and Badenhorst PJ Property and the Bill of Rights in *Butterworth's Bill of Rights Compendium* 2007 LexisNexis Butterworths [Found on Internet] <http://www.bohss.co.za> [Date of use 6 November 2008] (Licensed membership required)

Money laundering legislation in South Africa [Found on Internet] <http://www.libcorpben.co.za/legal/briefs/brief053.html> [Date of use 9 July 2008]

O

Organised crime prosecutions top 85% 2007 [Found on Internet] http://www.sagoodnews.co.za/crime/organised_crime_prosecutions_top_85_.html [Date of use 13 June 2008]

R

Redpath J 2000 Forfeiting Rights? Assessing South Africa's asset forfeiture laws [Found on Internet] <http://www.iss.co.za/ASR/9No5And6/Redpath.html> [Date of use 11 February 2008]

Redpath J 2001 Papering over the Cracks: The Law and Organised Crime [Found on Internet] http://www.crimeinstitute.ac.za/2ndconf/papers/redpath_2.pdf [Date of use 12 Feb 2008]

Roux T 2007 Principles and Pragmatism on the Constitutional Court of South Africa [Found on Internet]
http://www.saifac.org.za/docs/res_papers/RPS%20NO.%2040pdf [Date of use 13 Feb 2008]

S

South African Government Information 2008 Budget Speech by Western Cap [Found on Internet]
<http://www.search.gov.za/info/previewDocument.jsp?dk=%2Fdata%2Fstatic%2Finfo> [Date of use 8 August 2008]

South African Government Information 2006 Justice and Constitutional Development on Criminal Assets Recovery Account [Found on Internet]
<http://www.info.gov.za/speeches/2006/06101912151001.htm> [Date of use 16 June 2008]

South African Government Information 2007 What is Human Trafficking? [Found on Internet]
<http://www.info.gov.za/issues/humantrafficking/what/background.htm> [Date of use 13 Feb 2008]

Standing A 2006 Organised crime: A study from the Cape Flats [Found on Internet]
http://www.iss.co.za/index.php?link_id=28&slink_id=4121&link_type=12&slink_type=12&tmpl_=3 [Date of use 6 Aug 2008]

V

Viljoen F The Law of Criminal Procedure and the Bill of Rights in *Butterworth's' Bill of Rights Compendium 2000* LexisNexis Butterworths [Found on Internet] <http://www.bohss.co.za> [Date of use 6 November 2008] (Licensed membership required)

6.4 Journal articles

A

Alexander 2007 *ESR Review*

Alexander G "The potential of the right to property in achieving social transformation in South Africa" 2007 (8) *ESR Review* 2-9

B

Badenhorst and Conradie 2008 *Acta Criminologica*

Badenhorst C and Conradie H "Children's Perspectives on Crime and the Criminal Justice System: Main Findings" 2008 (21) *Acta Criminologica* 77-86

Breetzke 2008 *Acta Criminologica*

Breetzke GD and Horn AC "Key Requirements in the Development of a Spatial-Ecological Theory in South Africa" 2008 (21) *Acta Criminologica* 123-143

C

Carnelly M 2006 *SACJ*

Carnelly M "Forfeiture of illegal gambling premises owned by a closed corporation: *National Director of Public Prosecutions v Mohunram* 2006 (1) SACR 554 (SCA)" 2006 (20) *SACJ* 60-67

Cassella 2004 *SACJ*

Cassella SD "Overview of asset forfeiture law in the United States" 2004 (17) *SACJ* 347-367

Cheh 1998 *Crime Prevention Studies*

Cheh MM "Civil Remedies to Control Crime: Legal Issues and Constitutional Challenges" 1998 (9) *Crime Prevention Studies* 45-66

Conradie 2003 *Crime Research in South Africa*

Conradie H "Are We Failing to Deliver the Best Interest of the Child?" 2003 (5) *Crime Research in South Africa* 1-8

Cowling 2007 *SACJ*

Cowling M "Criminal procedure" 2007 (2) *SACJ* 270-288

D

Dendy 2006 *De Rebus*

Dendy M "Watching your back A guide to Fica and Poca" 2006 *De Rebus*

Du Plessis and Penfold 2005 *Annual Survey of SA Law*

Du Plessis M and Penfold G "Bill of Rights Jurisprudence" 2005 *Annual Survey of SA Law* 27-77.

F

Fox 2005 *Home Cultures*

Fox L "The Idea of Home in Law" 2005 (2) *Home Cultures UK* 1-26

Frank 2007 *ISSM*

Frank C "Quality Services Guaranteed? A Review of Victim Policy in South Africa" *ISSM* 2007 1-42

Freedman 2007 *SACJ*

Freedman W "Constitutional application" 2007 (20) *SACJ* 292-301

Freedman 2006 *TSAR*

Freedman W "The constitutional right not to be deprived of property: the constitutional court keeps its options open" 2006 (1) *TSAR* 83-100

G

Goredema 2007 *ISSM*

Goredema C "Confronting Money Laundering in South Africa: An Overview of Challenges and Milestones" 2007 *ISSM* 72-92

Goredema 2006 *ISS*

Goredema C "Money Laundering Experiences, A Survey" 2006 *ISS* 1-7

Goredema 2004 *ISS*

Goredema C "Money laundering in Southern Africa incidence, magnitude and prospects for its control" 2004 *ISS* 1-11

Goredema 2001 *Nedbank ISS Crime Index*

Goredema C "Organising against organised crime: Does South Africa have what it takes?" 2001 (5) *Nedbank ISS Crime Index* 1-4

H

Hargoven 2007 *Acta Criminologica*

Hargovan H "Restorative Justice: Yesterday, Today and Tomorrow - Making Sense of Shifting Perspectives in Crime Control and Criminal Justice in South Africa" 2007 (20) *Acta Criminologica* 79-90

Hopkins and Hofmeyer 2003 *SALJ*

Hopkins K and Hofmeyer K "New Perspectives on Property" 2003 (120) *SALJ* 48-62

Hocor 2007 *Obiter*

Hocor S "Sentencing Reckless or Negligent Driving" 2007 (28) *Obiter* 111-116

K

Kelley - Louw 2005 *SALJ*

Kelly-Louw M "Selling or Leasing Property? Beware of Municipal Debts! A Note in Two Parts (Part II)" 2005 (122) *SALJ* 778-792

M

Moshi 2007 *ISS*

Moshi PB "Fighting money laundering The challenges in Africa" 2007 *ISS* 1-12

Mostert 2003 *SAJHR*

Mostert H "The Distinction between Deprivations and Expropriations and the Future of the 'Doctrine' of Constructive Expropriation in South Africa" 2003 (19) *SAJHR* 567-592

N

Nel 2003 *Journal for Juridical Science*

Nel JY "The constitutional rights of children and the Prevention of Organised Crime Act 121 of 1998" 2003 *Journal for Juridical Science* 97-119

P

Pienaar and Mostert 2006 *TSAR*

Pienaar JM and Mostert H "Uitsettings onder die Suid-Afrikaanse grondwet: die verhouding tussen artikel 25(1), artikel 26(3) en die uitsettingswet" 2006 (3) *TSAR* 522-536

Potgieter, Ras and Naser 2008 *Acta Criminologica*

Potgieter PJ, Ras JM and Naser JJ "Can Private Security Stand Up to the Challenges of Crime and Crime Prevention in South Africa? A Contemporary Perspective" 2008 (1) *Acta Criminologica* 33-37

R

Robinson 2005 *Obiter*

Robinson JA "The Evolution of the Concept of Marriage in South Africa: The Influence of the Bill of Rights in 1994" 2005 *Obiter* 488-505.

Rosa and Dutschke 2006 *SAJHR*

Rosa S and Dutschke M "Child Rights at the Core: The Use of International Law in South African Cases on Children's Socio-Economic Rights" 2006 (22) *SAJHR* 224-260

Roux 2004 *SALJ*

Roux T "Continuity and Change in a Transforming Legal Order: The Impact of Section 26(3) of the Constitution on South African Law" 2004 (121) *SALJ* 466-492

S

Singer and Beermann 1993 *Canadian Journal of Law and Jurisprudence*

Singer JW and Beermann JM "The Social Origins of Property" 1993 (VI) *Canadian Journal of Law and Jurisprudence* 217-248

Sloth-Nielson and Ehlers 2005 *ISS*

Sloth-Nielson J and Ehlers L "A Pyrrhic victory? Mandatory and minimum sentences in South Africa" 2005 *ISS* 1-20

Standing 2005 *ISS*

Standing S "The threat of gangs and anti-gangs policy" 2005 *ISS* 1-7

Stassen and Stassen 2008 *De Rebus*

Stassen S and Stassen K "New legislation" March 2008 *De Rebus* 39-42

Steinberg 2005 *ISS*

Steinberg J "The illicit abalone trade in South Africa" 2005 *ISS* 1-16

V

Van der Merwe and Pienaar 2005 *Annual Survey of SA Law*

Van der Merwe CG and Pienaar JM "Law of Property (Including Real Security)" 2005 *Annual Survey of SA Law* 363-401

Van der Walt 2004 *SAPL/R*

Van der Walt AJ "An overview of developments in constitutional property law since the introduction of the property clause in 1993" 2004 (19) *SAPL/R* 46-89

Van der Walt 2000 *SAJHR*

Van der Walt AJ "Civil Forfeiture of Instrumentalities and Proceeds of Crime and the Constitutional Property Clause" 2000 (16) *SAJHR* 1-45

Van der Walt 2002 *SAJHR*

Van der Walt AJ "Notes and Comments Negating Grotius - The Constitutional Validity of Statutory Security Rights in Favour of the State: *First National Bank of SA t/a Wesbank v Commissioner for the South African Revenue Services* 2001 (7) BCLR 715 (C)" 2001 (17) *SAJHR* 86-113

Van der Walt 2005 *SALJ*

Van der Walt AJ "Retreating from the *FNB* Arbitrary Test Already? *Mkontwana v Nelson Mandela Metropolitan Municipality; Bissett v Buffalo Municipality; Transfer Rights Action Campaign v MEC for Local Government and Housing, Gauteng*" 2005 *SALJ* 75-89

Van der Walt 1998 *THRHR*

Van der Walt AJ "Roman law, fundamental rights, and land reform in Southern Africa" 1998 (61) *THRHR* 400-422

Van der Walt 2004 *SALJ*

Van der Walt AJ "Striving for the better interpretation – a critical reflection on the Constitutional Court's *Harksen* and *FNB* decisions on the property clause" 2004 (121) *SALJ* 854-878

Van der Walt 1997 *SAPL/R*

Van der Walt AJ "The limits of constitutional property" 1997 (12) *SAPL/R* 275-330

Van der Walt 2005 *SAJHR*

Van der Walt AJ "The State's Duty To Protect Property Owners v The State's Duty To Provide Housing: Thoughts On The *Modderklip* Case" 2005 (21) *SAJHR* 144-161

Van der Walt 2005 *TSAR*

Van der Walt AJ "Transformative constitutionalism and the development of South African property law (part 1)" 2005 (4) *TSAR* 655-689

Van der Walt 2006 *SACJ*

Van der Walt T "The right to a fair trial revisited: *S v Jaipa!*" 2006 (19) *SACJ* 315-319

Van der Walt and De la Harpe 2005 *African Human Rights Law Journal*

Van der Walt T and De la Harpe S "The right to pre-trial silence as part of the right to a free and fair trial: An overview" 2005 (5) *African Human Rights Law Journal* 70-88

Van Jaarsveld 2006 *Fundamina*

Van Jaarsveld IL "The History of *In Rem* Forfeiture-A Penal Legacy of the Past" 2006 (12) *Fundamina* 137-147

Vermaak 2008 *De Rebus*

Vermaak L "Crime and Punishment in South Africa *Correctional supervision as an alternative to imprisonment*" 2008 *De Rebus*

6.5 Legislation

Aliens Control Act 91 of 1996

American Racketeer Influenced and Corrupt Organisations Act of 1970

California Street Terrorism Enforcement and Prevention Act of 1988

Child Care Act 74 of 1983

Children's Act 38 of 2005

Constitution of the Republic of South Africa 2000 of 1993

Constitution of the Republic of South Africa, 1996

Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007

Currency and Exchanges Act 9 of 1933

Customs and Excise Act 91 of 1964

Drugs and Drug Trafficking Act 140 of 1992

English Criminal Justice Act of 1988

Financial Intelligence Centre Act 38 of 2001

Human Rights Act of 1998

Insolvency Act 24 of 1936

KwaZulu-Natal Gambling Act 10 of 1996

Liquor Act 27 of 1989

Local Government Municipal Systems Act 32 of 2000

Marine Living Resources Act 18 of 1998

Matrimonial Property Act 88 of 1984

Mediation in Certain Divorce Matter Act 24 of 1987

National Road Traffic Act 93 of 1996

*Prevention of Illegal Eviction from and Unlawful Occupation of Land Act
18 of 1998*

Prevention of Organised Crime Act 121 of 1998

Prevention of Organised Crime Second Amendment Act 38 of 1999

Promotion of Just Administrative Act 3 of 2000

Sectional Titles Act 95 of 1985

Sexual Offences Act 23 of 1957

South African Police Service Act 68 of 1995

6.6 Newspaper reports

Camerer Mail and Guardian

*Camerer S 'Child victims' case cries out for Victims Fund' Mail
and Guardian 2008*

Louw *New Market Foundation*

Louw L 'The Rule of Law under siege in South Africa?' *The Free Market Foundation* 22 March 2005 1-2

Kok *Legal City*

Kok L 'Protection of Innocent Owners against Civil Forfeiture of their Assets' *Legal City* 25 October 1999 1-4

Scott *Deneys Reitz*

Scott M 'Assets forfeiture - what about the innocent party?' *Deneys Reitz* 13 June 2007

6.7 Theses and dissertations

Berg *Reflections on Organised Crime*

Berg J *Reflections on Organised Crime, International Debates and Local Developments* (B.SOC.SCI Honours Degree UCT 1998)

N'dri *Critical Analysis of Victim's Rights*

Kouadio N'Dri *Critical Analysis of Victim's Rights Before International Criminal Justice* (LLM-thesis University of the Western Cape 2006)