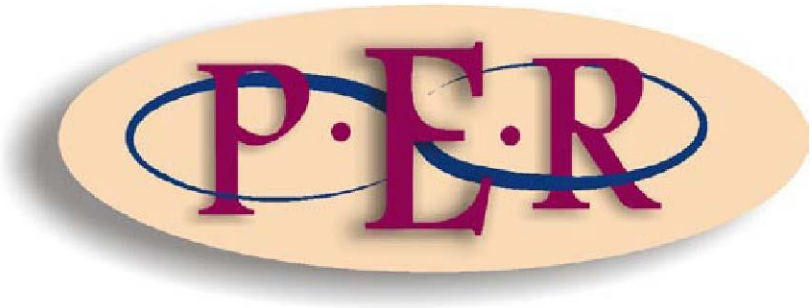
Author: V Basdeo

THE LAW AND PRACTICE OF CRIMINAL ASSET FORFEITURE IN SOUTH AFRICAN CRIMINAL PROCEDURE: A CONSTITUTIONAL DILEMMA

ISSN 1727-3781



2014 VOLUME 17 No 3

http://dx.doi.org/10.4314/pelj.v17i3.06

THE LAW AND PRACTICE OF CRIMINAL ASSET FORFEITURE IN SOUTH AFRICAN CRIMINAL PROCEDURE: A CONSTITUTIONAL DILEMMA

V Basdeo*

1 Introduction

The practice of criminal asset forfeiture does raise a serious impasse between public interest and constitutional rights. Though the proportions of South Africa's current organised crime problem is daunting and threatening,[1] law enforcement measures threatening individual rights must withstand vigilant constitutional scrutiny lest South Africa's transition entail a shift from one oppressive regime to another. At the root of the tension pertaining to criminal asset forfeiture are certain principles which are generally accepted in societies that embrace liberal democratic values. These are the right to private property, which encompasses that the state may seize property only in terms of a law of general application; criminal guilt must be shown beyond a reasonable doubt; the guilty may be punished only by the state; and all should be treated equally before the law.[2] In this article it is submitted that in circumstances where criminal asset forfeiture is employed as a law enforcement tool, the fulfilment by the state of its public responsibility ultimately results in a conflict between its public responsibility and its responsibility to respect the individual rights of persons whose property are subjected to asset forfeiture proceedings.

Although criminal asset forfeiture is seen as the newly emerged tool for controlling criminal behaviour in the twenty-first century, it is said to have been in existence even during biblical times as a penal or a remedial action.[3] The benefits of criminal asset forfeiture are indisputable. Criminal asset forfeiture enhances the ability of law

* Vinesh Basdeo. BA (Hons) LLB LLM LLD (Unisa). Associate Professor, College of Law, University of South Africa. E-mail: mbasdeo@unisa.ac.za. This article is based on a doctoral thesis submitted by the author for the completion of the degree Doctor of Laws at the University of South Africa, Pretoria.

1 De Koker 2002 *Journal of Money Laundering Control* 27-29. See further Redpath 2000 *African Security Review* 14-16.

2 See for example the South African *Bill of Rights*, Chapter 2 of the *Constitution*.

3 For a historical account of forfeiture, see Greek Date Unknown http://www.fear.org/history/Greek_History_of_Fort_England_ColonialAmerica.html 40.

enforcement to combat organised criminal activity. This is of vital importance in South Africa, a country intensely threatened by organised crime.[4]

2 Requirements and substantive legal provisions for criminal asset forfeiture

2.1 The restraint stage

In South Africa the restraint stage of criminal forfeiture proceedings involves the granting[5] of a restraint order, which prohibits any person affected by the order from dealing in any manner with the property to which it applies.[6] The restraint order is granted over realisable property,[7] which includes any property held by the defendant concerned, as well as any property held by any third party who may have received affected gifts from the defendant.

Sections 25 and 26 of POCA provide for the making of a restraint application and an order prior to or subsequent to a conviction. Such an application may be brought by the NDPP on behalf of the state *ex parte*, at a High Court, for an order prohibiting any person from dealing in any manner with any property to which the restraint order relates.[8] In cases where there are victims, the state relies on their affidavits in support of the application. The short-term purpose of a restraint order is to preserve property[9] which in due course will be realised in satisfaction of a confiscation order.[10] In the long term it provides for a recovery mechanism for the proceeds of unlawful activities.[11] A court granting a restraint order may, amongst other directions, appoint

---

4 Shereda 1997 *Geo Wash J Int'l L & Econ* 297.

5 Only High Courts can grant restraint orders. See further Keightley *Asset Forfeiture* 36-39.

6 S 26 of the *Prevention of Organised Crime Act* 121 of 1998 (hereafter referred to as POCA or the *Prevention of Organised Crime Act*).

7 Ss 26-29 of POCA. Property is referred to in s 14 of the POCA. The category of realisable property is widely framed and extends beyond property owned by the defendant. It is therefore possible to obtain a restraint order over property which is technically owned by someone else, provided that the defendant has an interest in it. The wide ambit of realisable property is necessary in order to deal with criminals who in an effort to protect and conceal their property place it in the name of third parties and family members.

8 S 26(1) of POCA.

9 This may, in terms of s 26(2) of POCA, include property specified in the restraint order and held by a defendant, or unspecified property held by a defendant, and all property transferred by a defendant to another person after the order was made.

10 *NDPP v Kyriacou* 2003 2 SACR 524 (SCA).

11 *NDPP v Rautenbach* 2005 1 SACR 530 (SCA).

a curator from private practice[12] to take charge of the property; order any person to surrender the property to the curator; authorise the police to assist the curator in seizing the property; and place restrictions upon the encumbering or transferring of immovable property.[13]

It is submitted that, in the light of the fact that once a restraint order is granted or is confirmed, prior to a conviction, absent requirements for variation or rescission laid down in section 26(10)(a) of POCA, a restraint order is not capable of being changed, and thus the defendant is stripped of the restrained assets and any control or use of them, and therefore pending the conclusion of the trial or the confiscation proceedings he is remediless. This has grave constitutional consequences which will be expounded upon in chapter 6 of this article. The period from the date of granting the restraint order to the granting of a confiscation order may be a very lengthy period which may take months or years. In current times criminal cases are known to be postponed several times.[14] Where a defendant decides to appeal a conviction or sentence, the period of being "remediless" may be far longer.[15] Where the curator removes a defendant's property for storage, the costs related thereto are likely to be huge and the condition of the property may deteriorate, if not properly maintained, over such a long period. This could have an adverse impact on the defendant's financial position, which would inevitably have a profound effect on his human rights detailed in the Bill of Rights.

The NDPP does not have to establish a threat of dissipation of property in order to obtain a restraint order.[16] The inherent purpose of a restraint order is to preserve property on the premise that there is a strong possibility that the property in question may be realised in satisfaction of a confiscation order.[17] The restraint order ensures that property is preserved so that the property might in due course be

12 It is essential that a curator should not be attached to the state and must comply with the requirements of the *Administration of Estates Act* 66 of 1965 (as amended).
13 Part 3 of Ch 5 of POCA.
14 *ABSA Bank Ltd v Fraser* (CC) unreported case number 66/05 of 15 December 2006 para 11-12.
15 *Phillips v NDPP* 2003 2 SACR 410 (SCA) 414.
16 *NDPP v Phillips* 2002 4 SA 60 (W).
17 *NDPP v Rautenbach* 2005 1 SACR 530 (SCA).

realised in satisfaction of a confiscation order.[18] The property which is restrained is held as security against the confiscation order which is anticipated.[19] This means that realisable property is not necessarily limited to property which is tainted by the alleged offence.[20] Property which was legitimately acquired by the defendant may also be restrained.[21] The latter principle is also applicable to the legitimate property of a third party who received an affected gift from a defendant, because such property is realisable property, and it may be subject to realisation in satisfaction of a confiscation order granted against a defendant.[22] It is submitted that this stance of POCA is constitutionally questionable because it essentially amounts to the arbitrary deprivation of legitimate property. A restraint order may be made over property specified in the restraint order or over all the realisable property of a defendant, irrespective of whether it is specified in the restraint order or not.[23] In addition it may also be made over property which will be transferred to the defendant in the future.[24] Thus, where a restraint order is appropriate the NDPP may seek to restrain all of the defendant's assets, including unknown assets, and in addition may request the court to order the defendant to divulge the whereabouts and all relevant details of any unknown assets.

Furthermore, even before a criminal prosecution has been instituted the NDPP may apply for a restraint order. However it is a jurisdictional requisite that if the prosecution against the defendant has not yet been instituted the court must be satisfied that the defendant is to be charged with an offence.[25] The prosecution need not be imminent nor is a charge sheet a prerequisite for the latter jurisdictional requisite.[26] The NDPP must set out its case in such a manner that the defendant is

18 *NDPP v Rebuzzi* 2002 1 SACR 128 (SCA).
19 *NDPP v Rebuzzi* 2002 1 SACR 128 (SCA).
20 *NDPP v Rebuzzi* 2002 1 SACR 128 (SCA).
21 *NDPP v Rebuzzi* 2002 1 SACR 128 (SCA).
22 S 32 of POCA.
23 S 26(2) of POCA.
24 S 26(2) of POCA.
25 S 25(1)(b)(i) of POCA.
26 S 25(1)(b)(i) of POCA.

fairly informed of the case that he or she is called upon to meet, but that does not mean that it must be presented in any particular form.[27]

It is submitted that there is no apparent reason why POCA does not contain a specific provision which spells out clearly the details of the case. This practice has the potential for the abuse of the defendant's rights. It is submitted that the defendant should be given full details as to why such an action against him is being contemplated on the basis of the fundamental rights he enjoys in terms of the *Constitution*, such as the right to privacy. Furthermore, it is a jurisdictional requirement that it must appear to the court that there are reasonable grounds for believing that a confiscation order "may" be made against the defendant.[28] This means that a court considering an application for a restraint order is required to assess what "may" occur in the future, that is, whether the criminal court "may" convict the defendant and whether it "may" find that the defendant benefitted from the relevant criminal offences or criminal activities related thereto. It is submitted that such a practice is constitutionally questionable because the basis for the deprivation of the defendant's rights is weak.

It is also submitted that there is uncertainty regarding what the standard of "reasonable grounds for believing" entails. A restraint order can be made only once the NDPP "has discharged the onus of showing a reasonable prospect of obtaining both a conviction in respect of some or all of the charges levelled against the accused person and a subsequent confiscation order".[29] Where there are multiple charges, the NDPP will have to show that the defendant could derive a benefit from the offences with which he or she is charged.[30] The court making the restraint order does not have to determine that the offences were probably committed. The court need only determine that there are reasonable grounds for believing that a court

27 *NDPP v Rautenbach* 2005 SACR 530 (SCA) 541.
28 Ss 25(1)(a)(ii) and 25(1)(b)(ii) of POCA.
29 *NDPP v Tam* 2004 1 SACR 126 (W).
30 *NDPP v Tam* 2004 1 SACR 126 (W).

might find that the offences were committed.[31] This is a "comparatively light onus of proof on the NDPP".[32]

In *NDPP v Kyriakou*,[33] it was held that the reasonable grounds for believing standard did not require the NDPP to factually prove that a confiscation order will be made, and therefore there were no grounds for determining the existence of reasonable grounds for the application of the principles and the onus that applies in ordinary motion proceedings.[34] In *NDPP v Rautenbach*[35] the court held that in determining whether there were reasonable grounds for believing that a confiscation order might be made, the court needed to ask only if there was evidence that might reasonably support a conviction and a consequent confiscation order, even if all the evidence had not been brought before it, and whether that evidence might reasonably be believed.[36] This means that the latter will not be the case where the evidence sought to be relied upon proves unreliable. The above two judgements reveal that the reasonable grounds for believing standard is rather weak when compared with the standard that an applicant in ordinary motion court proceedings is expected to meet.

Persons affected by a restraint order are deprived of property rights pertaining to property to which the restraint order applies.[37] They are prohibited from dealing in any manner with the property.[38] Furthermore the restraint order usually entails an order directing the defendant and other affected persons to surrender their property to a *curator bonis* appointed under section 28 of POCA. It is submitted that there are constitutional safeguards against the arbitrary deprivation of property rights,[39] and therefore the discretion granted to the court in granting restraint orders is questionable. There are no tangible safeguards in POCA to ensure that the court does not exercise a purely subjective discretion. The constitutional protection against

31 *NDPP v Rautenbach* 2005 SACR 530 (SCA) 544.
32 *NDPP v Mtungwa* 2006 1 SACR 122 (N).
33 *NDPP v Kyriakou* 2003 2 SACR 524 (SCA).
34 *NDPP v Kyriakou* 2003 2 SACR 524 (SCA).
35 *NDPP v Rautenbach* 2005 SACR 530 (SCA).
36 *NDPP v Rautenbach* 2005 SACR 530 (SCA) 550-551.
37 *NDPP v Rautenbach* 2005 SACR 530 (SCA) 550-551.
38 *NDPP v Rautenbach* 2005 SACR 530 (SCA) 550-551.
39 S 25(1) of the *Constitution*: No one may be deprived of property except in terms of a law of general application and no law may permit the arbitrary deprivation of property.

the arbitrary deprivation of property rights requires that there should be a rational relationship between means and ends.[40] This implies that as far as criminal forfeiture is concerned there must be a rational relationship between the purpose served by a restraint order and the effect of the order on the individuals concerned. There should be no arbitrary deprivation of property rights.

2.2 The confiscation and the realisation stage[41]

The criminal forfeiture scheme set out in Chapter 5 of POCA is closely modelled on that found in the United States and in the United Kingdom's *Criminal Justice Act,*[42] and South African courts draw assistance and have cited with approval from judgements of American and English courts in a number of cases.[43]

In South Africa the "confiscation stage" entails an enquiry by the court convicting a defendant into any benefit that he derived from any of the offences in respect of which he has been convicted or from any related criminal activity. If successful, this stage of proceedings manifests in a confiscation order, which takes the form of a money judgement against the defendant, and in terms of which he is required to pay a specific sum of money to the state.[44] Unless the court is able to determine the issue of confiscation on the basis of evidence and the proceedings of the trial,[45] or on the basis of further oral evidence,[46] it will direct the prosecutor and the defendant to deliver statements contemplated in section 21 of POCA.

The confiscation stage of proceedings begins only after a defendant has been convicted. Here the term "confiscation" is used in a broad sense. During the confiscation stage the public prosecutor in the criminal case may apply to the court to conduct what is generally referred to as a confiscation inquiry. The primary

40 S 25 of the *Constitution*.

41 In this article the terms "assets" and "property" are used interchangeably. See further Keightley *Asset Forfeiture* 36-39.

42 *United Kingdom Criminal Justice Act*, 1998.

43 See for example *Shaik v State* 2007 2 All SA 150 (SCA) 155, where the court relied on the decision in *R v Simpson* 1998 2 CR App R (S) 111 on the issue of the possibility of multiple restraint orders; and *Shaik v State* 2007 2 All SA 150 (SCA) 158, where the court relied on *R v Smith* 2002 1 All ER 367 (HC) in finding that "benefit" means gross, as opposed to net benefit.

44 Ss 18-24 of POCA.

45 S 18(6)(a)(i) of POCA.

46 S 18(6)(a)(ii) of POCA.

purpose of the confiscation inquiry is to determine whether the defendant has benefited from any of the offences in respect of which he or she was convicted or from any criminal activity which the court finds to be sufficiently related to those offences.[47] This is determined according to the civil standard of a balance of probabilities.[48]

Where the court conducting the confiscation enquiry finds that the defendant benefited, the court may make an order against the defendant for the payment to the state of any amount that it considers appropriate.[49] This generates the second phase of the confiscation inquiry, which is directed at determining if and for what amount a confiscation order should be made. Section 18(2) of POCA indicates the amount the court may order the defendant to pay the state.

In addition to specifying what the upper limit of a confiscation order may be, it lies with the discretion of the court to determine any appropriate amount below the upper limit. The discretion of the court at a confiscation inquiry is wide,[50] and largely depends on the facts of each case. The court must exercise its discretion rationally.[51] The court must ensure and also be satisfied that the confiscation order it makes is rationally connected to the purpose sought to be achieved by the confiscation order.[52]

The underlying purpose of a confiscation order is to ensure that criminals do not enjoy the fruits of their criminal conduct.[53] The confiscation order is intended to be a deterrent against criminality and to deprive convicted persons of ill-gotten gains.[54] It is further directed at removing from criminals the financial means of committing further crimes.[55] The confiscation order is in addition to any punishment the court

47 S 18(1) of POCA. See further *NDPP v Niemoller* (WLD) unreported case number A560/04 of 15 November 2004.
48 S 18(1) of POCA.
49 S 18(1) of POCA.
50 *Shaik v State* 2007 2 All SA 150 (SCA) 158.
51 *Shaik v State* 2007 2 All SA 150 (SCA) 158.
52 *Shaik v State* 2007 2 All SA 150 (SCA) 158.
53 *Shaik v State* 2007 2 All SA 150 (SCA) 159.
54 *NDPP v Rebuzzi* 2002 1 SACR 128 (SCA) 133.
55 *Shaik v State* 2007 2 All SA 150 (SCA) 159.

may impose for an offence.[56] A confiscation order which has the effect of being punishment is contrary to the law.[57]

The confiscation order is directed at confiscating benefits that have accrued to the defendant, regardless of whether he or she is still in possession of the proceeds in question.[58] It has been held that the purpose of a confiscation order is to ensure that a defendant loses the fruits of his or her criminal actions, in addition to acting as a deterrent.[59] Despite the fact that the deterrent purpose may have punitive consequences for a defendant, this will not in itself render the confiscation order illegal or unjustifiable in the sense of being an arbitrary deprivation of property.[60]

The definition of "proceeds of unlawful activities"[61] applies both for the purposes of Chapter 6 of POCA regarding civil forfeitures and confiscation inquiries. The choice of language for the purposes of criminal forfeiture is questionable, as it borrows directly from the provisions of Chapter 6 regarding civil forfeitures. In *NDPP v Mtungwa*,[62] Hunt J maintained that the definition of "proceeds of unlawful activities" was widely worded.[63] He rejected the NDPP's submission that sections 18 and 22 of *POCA* become operational when the "unlawful activities" are a *causa sine qua non* of the benefits, maintaining rather that the court is constitutionally bound to apply the more stringent test, which is the *causa causans* test.[64]

Section 20 of POCA provides for the amounts which may be realised at the time of making a confiscation order against a defendant. Section 20(1) of POCA allows the court the discretion to allow or disallow claims. The obligations subtracted in terms of section 20(1) are those which have "priority and which the court may recognise

56 S 18(1) *POCA*.
57 *NDPP v Rautenbach* 2005 SACR 530 (SCA) 552.
58 *NDPP v Rautenbach* 2005 SACR 530 (SCA) 552.
59 *NDPP v Rautenbach* 2005 SACR 530 (SCA) 552.
60 *Shaik v State* 2007 2 All SA 150 (SCA) 159-160.
61 Section 1 of POCA: the definition of "proceeds of unlawful activities" for the purposes of a confiscation inquiry includes benefits received both directly and indirectly. In *Shaik v State* 2007 2 All SA 150 (SCA) para 64, it was held that the proceeds of the defendant's unlawful activities included benefits derived by a shareholder of a company that was enriched through the shareholders' criminal activities.
62 *NDPP v Mtungwa* 2006 1 SACR 122 (N).
63 *NDPP v Mtungwa* 2006 1 SACR 122 (N) 129.
64 *NDPP v Mtungwa* 2006 1 SACR 122 (N) 129.

for this purpose". An assessment of the facts surrounding alleged priority in relation to an asset in the defendant's estate will guide the court in deciding whether or not to have that asset forfeited. Section 30(5) of POCA provides for possible steps that may be taken by the creditors of the defendant. Any of the defendant's expenses in connection with an asset and with regard to which the court finds some form of "priority" may be deducted by the court when it makes a confiscation order. Section 18(2) of POCA clearly provides that a confiscation order is not limited to a net amount. A confiscation order can be made in respect of any property which falls within the ambit of the broader definition of "property".[65]

In South Africa as soon as it is established that a material benefit was derived, the fact that some of the assets to be confiscated or restrained were acquired by the defendant before the offence was committed is irrelevant.[66] In South Africa the "realisation stage" of criminal asset forfeiture is initiated when a defendant fails to satisfy a confiscation order. The "realisation stage" in essence is a specialised form of execution against affected property.[67] An application for the realisation of property takes place after a confiscation order has been granted. The objective of such an application is to obtain a court order directing any person who holds realisable property to hand such property to the *curator bonis*.[68] The court order empowers the *curator bonis* to obtain property which is not included in the confiscation order. Where a *curator bonis* has not been appointed when an application for a realisation order serves before the court, the court hearing the application makes that appointment.[69] A realisation of property order broadens the application of the confiscation order.

Part 4 of POCA[70] deals with the selling of restrained assets by the curator in satisfaction of a confiscation order. The state can apply to the High Court for a realisation order only if: (i) a confiscation order has been granted and has not been settled by the defendant; (ii) a confiscation order is not subject to an appeal or

65 *Shaik v State* 2007 2 All SA 150 (SCA) para 60.
66 *NDPP v Rautenbach* 2005 SACR 530 (SCA) 552.
67 Ss 30-36 of POCA.
68 S 30 of POCA.
69 S 30(2)(a) of POCA.
70 Ss 30-36 of POCA.

review; and (iii) a defendant has not been acquitted or the criminal charges against him have not been withdrawn.[71] All persons known to have interests in the restrained assets should be given notice of the application for realisation.[72] This includes both creditors and victims. It is submitted that such a notice should be given by the state. POCA is not clear on what form this notice should take and who should monitor compliance.

2.3 Constitutional concerns about the practice of criminal asset forfeiture in South Africa

The role of the Bill of Rights, which was introduced in South Africa shortly before the establishment of the National Prosecuting Authority and the adoption of POCA, is of insurmountable importance and significance in the development of the law regarding asset forfeiture in South Africa. The Bill of Rights contains and demands far reaching protections for individual rights, including the right to equality,[73] the right to human dignity,[74] the right to freedom and security of the person,[75] and the protection of property rights.[76] The South African *Constitution* places a positive duty on the state to respect, protect, promote and fulfil these rights.[77] This duty imposes an obligation on the state to implement appropriate law enforcement measures in the interests of protecting the rights of society.

It is submitted that in South Africa, a state which is afflicted by high levels of crime, this duty can prove to be daunting. Where asset forfeiture is implemented as a law enforcement measure, the fulfilment by the state of its public obligation inevitably gives rise to a conflict between its public duty and its duty to respect the individual rights of persons whose property is affected by asset forfeiture proceedings. The

71 S 30(1) of POCA.
72 S 30(3) of POCA.
73 S 9 of the *Constitution*: the right to equality includes the right to equal protection and benefit of the law.
74 S 10 of the *Constitution*.
75 S 12 of the *Constitution*: this includes the right not to be punished in a cruel, inhuman or degrading way.
76 S 25 of the *Constitution*.
77 S 7(2) of the *Constitution*.

courts are guided by constitutional imperatives in determining when asset forfeiture is justifiable.

Two recent Constitutional Court cases explored the tension between the robust asset forfeiture measures provided for by POCA and the need to avoid arbitrary deprivations of property. The first case, *Prophet v National Director Public Prosecutions*,[78] involved the use of a residential house as a mini laboratory for the manufacture of the drug known as "tik". The second case, *Mohunram v National Director of Public Prosecutions*,[79] involved the use of a business premises for the running of an unlicensed casino. Both cases concerned applications to forfeit immovable property as instrumentalities of an offence. In both cases the Constitutional Court confirmed the importance of proportionality in the assessment of the constitutional validity of asset forfeiture in terms of POCA, in other words weighing the severity of the interference with individual rights to property against the extent to which the property was used for the purposes of the commission of the offence, taking cognisance of the nature of the offence.[80] Proportionality is not a statutory requirement but an equitable requirement that has been formulated by the courts to curb the excesses of forfeiture. This implies that the requirement of proportionality is a constitutional imperative.[81] In the light *Mohunram v NDPP*[82] *and Prophet v NDPP*[83] it is submitted that in South Africa there are generally two policy rationales for asset forfeiture. First, the gains from unlawful activity should not accrue and accumulate to those who commit unlawful activity. Those individuals should not be accorded the rights and privileges normally attendant to property law. In the case of fraud and theft, the proceeds should be retrieved and redistributed to the victims. Second, the state as a matter of policy is endeavouring to suppress the conditions that lead to unlawful activities. In South Africa the courts have accepted a policy rationale based on the fact that it is often impossible to bring the leaders of organised crime to book in view of the fact that they invariably ensure that they are

78 *Prophet v NDPP* 2005 2 SACR 670 (SCA). See further Kruger *Organised Crime* 15-25.
79 *Mohunram v NDPP* 2007 4 SA 222 (CC).
80 *Prophet v NDPP* 2005 2 SACR 670 (SCA) 678; *Mohunram v NDPP* 2007 4 SA 222 (CC) 230.
81 *Mohunram v NDPP* 2007 4 SA 222 (CC) 237.
82 *Mohunram v NDPP* 2007 4 SA 222 (CC).
83 *Prophet v NDPP* 2005 2 SACR 670 (SCA).

far removed from the overt criminal activity involved. An effective operation against organised crime generally succeeds in bringing only the eminently replaceable foot soldiers to book. Asset forfeiture circumvents and bypasses this problem by allowing the gains of an unlawful enterprise to be brought to justice.

The three judgements in *Mohunram* are in agreement that the objective of combating organised crime is a relevant factor in the proportionality analysis. Where the judgements are in disagreement is with regard to the weight to be given to POCA's underlying objective in the proportionality analysis, and in the application of the proportionality principle to the facts of the case. In assessing the impact *Mohunram* will have on the future development of the law relating to asset forfeiture in South Africa, cognisance ought to be taken of two factors. The first is that much will always depend on the facts of each case as they are presented in court. An interpretation of the judgements in *Mohunram* reveals that both the majority and minority of the court took into account an array of factors.[84] The office of the *NDPP* will certainly be guided by *Mohunram* in the manner in which it presents future cases, and no doubt will select its cases accordingly. The second is that the arguments by the *amicus* in *Mohunram* focussed specifically on the future of instrumentalities under Chapter 6, rather than on proceeds under Chapter 6, or on criminal forfeiture under Chapter 5. There are specific and significant differences between forfeitures aimed at the proceeds of crime and at the benefits derived from criminal activity on the one hand, and at forfeitures aimed at instrumentalities on the other. It is submitted that it is less complicated to justify the forfeiture of property which a person derived from criminal activity or to require a convicted defendant to pay to the state an amount equivalent to what he or she benefitted from the relevant criminal activity. Undoubtedly, Chapter 6 civil forfeitures aimed at proceeds, and criminal forfeitures under Chapter 5 must survive constitutional scrutiny and should not be arbitrary.

---

[84] *Mohunram v NDPP* 2007 4 SA 222 (CC) 234-236, where the following factors are listed: "the nature and gravity of the offence, the extent to which ordinary criminal law measures are effective in dealing with it, the public impact and the potential for widespread social harm and disruption".

3 Concluding remarks and recommendations

In South Africa criminal asset forfeiture law is an integral part of criminal law enforcement. The reasons advanced for including the forfeiture of assets as part of criminal law enforcement are varied. Primarily, law enforcement agents and the courts want not only to arrest the offender and sentence him or her to imprisonment for a period of time, but also to remove the instruments of crime from circulation either by the offender himself or herself or by members of his or her organisation.

In the South African criminal justice system criminal asset forfeiture is a measure which is intended to restore the *ex ante* legal situation by depriving the offender of what is not legally his. Systems of criminal law and criminal procedure are based on certain principles. In South Africa certain legal provisions of criminal asset forfeiture are inconsistent with important principles of substantive and procedural law. Among them are the presumption of innocence and the principle that someone can be convicted for explicitly indicted and proven criminal offences only. It is debatable and questionable whether the serious infringement of these principles can be justified. When government creates new laws the focus of these laws should not be limited to individual provisions. From a constitutional perspective the following specific submissions are made together with recommendations for reform in the area of criminal asset forfeiture in terms of POCA:

(1) From the short title of POCA[85] it appears as if POCA deals only with organised crime and an impression is created that a definition of "organised crime" can be found in POCA. In fact POCA does not define organised crime.[86] Its purpose as reflected in the short and the long titles and in the preamble is to prevent organised crime. POCA introduces new offences of racketeering,[87] money laundering[88] and criminal gang activities,[89] which are known organised crimes,

---

85 POCA does not define the concept "organised crime". See *NDPP v Vermaak* 2008 1 SACR 157 (SCA) para 4, where Nugent JA used the concept to describe offences that have organisational features of some kind that distinguish them from individual criminal wrongdoing.

86 De Koker "Organised Crime" 45-46.

87 Ch 2 of POCA.

88 Ch 3 of POCA.

89 Ch 4 of POCA.

but it also has a list of 33 pre-existing common law and statutory offences referred to in schedule 1, which may be committed by individuals. POCA therefore also applies to cases of individual wrongdoing. The Supreme Court of Appeal confirmed in *NDPP v Geyser*[90] that POCA also applies to crimes that cannot be categorised as organised crimes. Although the issues covered by POCA may appear to be disparate, it can be inferred that POCA intends to prevent serious crimes committed by individuals, groups or syndicates. It is recommended that a more appropriate title will be "The Prevention of Organised and Serious Crimes Act", because such a title will cover organised crimes as well as cases of serious wrongdoing by individuals.

(2) In POCA the *in rem fiction* gives rise to constitutional concerns and can lead to legal complications for asset forfeiture. The fiction, which is constitutionally problematic, has been criticised internationally, and can lead to unsightly paradox in the canon of South African case law. It is recommended that since South Africa does not have a binding tradition of forfeiture, the South African Constitutional Court should down play the *in rem fiction* and focus instead on criminal doctrinal arguments that illuminate POCA's constitutionality.

(3) Section 25(1) of the *Constitution* states that "no law may permit arbitrary deprivation of property". There is very little South African jurisprudence expounding the concept of arbitrariness. The High Court addressed "arbitrariness" in the area of warrants for search and seizure. In *Deutschmann v Commissioner for the Revenue Service*,[91] the state after an *ex-parte* proceeding issued a warrant to seize property believed to represent the proceeds of tax fraud. The constitutionality of the issuance of the warrant was questioned.[92] The defendants objected on the ground of arbitrariness and the court maintained that:

---

90 *NDPP v Geyser* 2008 ZASCA 15 [25 March 2008] para 19.

91 *Deutschmann v Commissioner for the Revenue Service* 2000 2 SA 106 (E).

92 *Deutschmann v Commissioner for the Revenue Service* 2000 2 SA 106 (E).

> The provisions in terms of which the warrant was sought and obtained in both matters do anything but permit arbitrary deprivation of property - these provisions require an application supported by information supplied under oath and the exercise of a discretion by a Judge. The Judge who authorises the warrant does not thereby affect the property or the rights to such property vesting in an individual. Any party remains free, in terms of the statute, to establish his entitlement and claim delivery.[93]

Thus the three pillars enumerated by the court were an informative application; discretionary judicial authorisation; and an opportunity to establish entitlement. In POCA deprivation is achieved only after an application and the exercise of judicial discretion.[94] The opportunity to establish entitlement is left with the owner on the basis of an innocent owner defence proceeding. On the basis of the above analysis, under the South African judiciary's conception of arbitrariness, POCA would probably pass constitutional muster with relative ease.

(a) Joint liability in cases where several persons committed a criminal offence can lead to a situation where the forfeited amount goes beyond the amount of the individual's interest. This is not consistent with the requirement in POCA that only the defendant's interest can be forfeited, and it may lead to a situation where the defendant has to forfeit more than he actually obtained. It is therefore recommended that where a criminal offence has been committed by several persons, the proceeds should be divided proportionally between them. Each offender should be held liable for his *pro rata* share of the proceeds.

(b) Once a restraint order is granted or confirmed prior to conviction, absent requirements for variation or rescission laid down in section 26(5)(a) of POCA, a restraint order is not capable of being changed, and thus the defendant is stripped of the restrained assets and any control or use of them, and therefore pending the conclusion of the trial or the confiscation proceedings he is remediless. It is recommended that the defendant should be afforded a remedy to reclaim restrained assets during the restraint stage of POCA proceedings, because not affording him such a remedy is tantamount to arbitrary deprivation of property, a situation which section 25 of the Constitution prohibits.

---

93 *Deutschmann v Commissioner for the Revenue Service* 2000 2 SA 106 (E).
94 S 38(1) of *POCA*.

(c) POCA does not make provision for the recovery of interest that has accumulated on a "benefit" from the date of the offence to the date of the confiscation order and this allows the defendant to enjoy that part of the benefit from the crime. It is recommended that the following provision be inserted in POCA in order to prevent such practice:

(d) Any interest derived from a benefit of the proceeds of crime, from the date of the offence to the date of issuance of a confiscation order, is deemed to be part of the proceeds of crime.

(e) In terms of section 30 of POCA it is settled law that criminal asset forfeiture makes provision for the consideration of loss suffered by victims of crime. It is recommended, however, that section 30 of POCA should distinguish between victims who participated willingly in the commission of a crime and those who did not. This is of critical importance when it comes to the issue of the reimbursement of the victim and is also essential for the wider objective of POCA, which is to ensure that crime does not pay.

(f) The presumption of innocence poses the most serious constitutional challenge, as regards forfeiture in terms of POCA. In *S v Zuma*[95] the Constitutional Court explicitly set out the parameters of the presumption of innocence protection:

> ... the presumption of innocence is derived from the centuries old principle of English law. It is always for the prosecution to prove the guilt of the accused person, and the proof must be proof beyond a reasonable doubt.

In *S v Zuma* the court adopted a two pronged approach:

(i) The presumption of innocence is infringed whenever the accused is liable to be convicted despite the existence of a reasonable doubt.

(ii) If by the provisions of a statutory presumption an accused is required to establish, that is to say to prove or disprove, on a balance of probabilities either an element of an offence or an excuse, then it contravenes section 11(d) (*Interim Constitution*, precursor to section 35(3) of the South African

95 *S v Zuma* 1995 2 SA 642 (CC) 656.

Constitution). Such a provision would permit a conviction in spite of reasonable doubt.[96]

In terms of POCA the state need only prove its case on a balance of probabilities. This appears to violate approach (i) above because a reasonable doubt can exist regardless of the balance of probabilities standard having being met. The innocent owner defence is not an adequate prophylactic because the innocent owner defence violates approach (ii) above. It requires the defendant to establish an excuse on a balance of probabilities. This is too low a standard. It may permit conviction despite a reasonable doubt. Although the presumption of innocence as formulated in *Zuma* does not disqualify the burden shift entailed in POCA *per se*, it does however discredit the balance of probabilities standard advanced by POCA.

(a) Section 35(3)(m) of the *Constitution* provides what amounts to a double jeopardy provision. With regard to civil asset forfeiture the literal interpretation of this provision is that a second trial may not follow, since the first trial if only nominally civil would be preclusive. The state would have to combine the POCA proceedings with the underlying criminal proceedings and engage in a single unified litigation. If POCA was punitive, a body of constitutional rights for the accused would follow, effectively eviscerating POCA. Accommodating a meaningful right to counsel and requiring a prosecution in conjunction with the civil case would entail increased administrative and related costs, while presuming innocence would deprive the state of its most powerful law enforcement mechanism under POCA as it stands. In order to prevent precipitating the body of constitutional rights, the state would explicitly refute arguments that the owner in POCA civil proceedings is an accused facing criminal prosecution.

96 *S v Zuma* 1995 2 SA 642 (CC) 656.

BIBLIOGRAPHY

Literature

Casella 2003 *Acta Juridica*

Casella SD "The development of asset forfeiture law in the United States" 2003 *Acta Juridica* 314-360

De Koker "Organised Crime"

De Koker L "Organised Crime, Racketeering, Money Laundering and Criminal Gang Activities - Reflections on Terminology" Unpublished paper *SAPS Crime Information Analysis Centre* (1999)

De Koker 2002 *Journal of Money Laundering Control*

De Koker L "Money laundering trends in South Africa" 2002 *Journal of Money Laundering Control* 27-41

Gupta 2002 *Harv CR-CL Law Rev*

Gupta D "Republic of South Africa's Prevention of Organised Crime Act: a comparative Bill of Rights analysis" 2002 *Harv CR-CL Law Rev* 159-182

Keightley *Asset Forfeiture*

Keightley R *Asset Forfeiture in South Africa under the Prevention of Organised Crime Act 121 of 1998* (William Pratt House Landsdowne 2009)

Kruger *Organised Crime*

Kruger A *Organised Crime and Proceeds of Crime Law in South Africa* (LexisNexis Durban 2008)

Redpath 2000 *African Security Review*

Redpath J "Forfeiting rights? Assessing South Africa's asset forfeiture laws" 2000 *African Security Review* 5/6:15-23

Shereda 1997 *Geo Wash J Int'l L & Econ*

Shereda JP "The internationalisation of the war on drugs and its potential for successfully addressing drug trafficking and related crimes in South Africa" 1997 *Geo Wash J Int'l L & Econ* 297-322

Case law

ABSA Bank Ltd v Fraser (CC) unreported case number 66/05 of 15 December 2006

Deutschmann v Commissioner for the Revenue Service 2000 2 SA 106 (E)

Director of Public Prosecutions, Cape of Good Hope v Bathgate 2000 2 SA 535 (C)

Director of Public Prosecutions v Aereboe 2000 1 All SA 105 (N)

Mohunram v NDPP 2007 2 SACR 145 (CC)

NDPP v Basson 2002 1 SA 419 (SCA)

NDPP v Carolous 2000 1 SA 1127 (N)

NDPP v Geyser 2008 ZASCA 15

NDPP v Kyriacou 2003 2 SACR 524 (SCA)

NDPP v Mcasa 2000 1 SACR 263 (Tk)

NDPP v Meyer 1999 4 All SA 263 (D)

NDPP v Mtungwa 2006 1 SACR 122 (N)

NDPP v Niemoller (WLD) unreported case number A560/04 of 15 November 2004

NDPP v Phillips 2002 4 SA 60 (W)

NDPP v Rautenbach 2005 1 SACR 530 (SCA)

NDPP v Rebuzzi 2002 1 SACR 128 (SCA)

NDPP v Tam 2004 1 SACR 126 (W)

NDPP v Vermaak 2008 1 SACR 157 (SCA)

Phillips v NDPP 2003 2 SACR 410 (SCA)

Prophet v NDPP 2005 (2) SACR 670 (SCA)

R v Simpson 1998 2 CR App R (S) 111

R v Smith 2002 1 All ER 367 (HC)

Shaik v State 2007 2 All SA 150 (SCA)

S v Zuma 1995 2 SA 642 (CC)

Legislation

Administration of Estates Act 66 of 1965
Constitution of the Republic of South Africa, 1996
Drugs and Drug Trafficking Act 140 of 1992
National Prosecuting Authority Act 32 of 1998
Prevention of Organised Crime Act 121 of 1998
Proceeds of Crime Act 76 of 1996
United Kingdom Criminal Justice Act, 1998

Internet sources

Greek Date Unknown
http://www.fear.org/history/Greek_History_of_Forf_England_ColonialAmerica.html
Greek C Date Unknown *Drug Control and Asset Forfeiture: A Review of the History of Forfeiture in England and Colonial America* http://www.fear.org/history/Greek_History_of_Forf_England_ColonialAmerica.html accessed 12 January 2012

LIST OF ABBREVIATIONS

AFU	Asset Forfeiture Unit
NPA	National Prosecuting Authority
POCA	Prevention of Organised Crime Act 121 of 1998

THE LAW AND PRACTICE OF CRIMINAL ASSET FORFEITURE IN SOUTH AFRICAN CRIMINAL PROCEDURE: A CONSTITUTIONAL DILEMMA

V Basdeo*

SUMMARY

The deprivation of the proceeds of crime has been a feature of criminal law for many years. The original rationale for the confiscation of criminal assets at international level was the fight against organised crime, a feature of society described by the European Court of Human Rights as a "scourge" so that the draconian powers which are a feature of confiscation regimes around the world have been approved in circumstances which otherwise might have caused governments considerable difficulties before the international human rights tribunals.[1] The primary objective of this article is to determine if the asset forfeiture measures employed in the South African criminal justice system are in need of any reform and/or augmentation in accordance with the "spirit, purport and object" of the South African *Constitution*.[2] This article attempts to answer three questions. Firstly, why is criminal asset forfeiture important to law enforcement? Secondly, in which circumstances can property be forfeited and what types of property are subject to forfeiture? Thirdly, how is forfeiture accomplished, and what are its constitutional ramifications?

KEYWORDS: Criminal asset forfeiture; criminal procedure; confiscation; evidence; restraint stage; confiscation and realisation stage; constitutional; assets.

* Vinesh Basdeo. BA (Hons) LLB LLM LLD (Unisa). Associate Professor, College of Law, University of South Africa. E-mail: mbasdeo@unisa.ac.za. This article is based on a doctoral thesis submitted by the author for the completion of the degree Doctor of Laws at the University of South Africa, Pretoria.

1 Casella 2003 *Acta Juridica* 314.

2 *Constitution of the Republic of South Africa*, 1996.