

A CRITICAL ASSESSMENT OF THE INTRODUCTION OF PROPORTIONAL ANALYSIS BY THE SOUTH AFRICAN COURTS IN CIVIL-FORFEITURE JURISPRUDENCE

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SUMMARY

This article deals with civil forfeiture in terms of the Prevention of Organised Crime Act¹ (POCA) and considers the jurisprudential development of the instrumentality and exclusion analyses, considering in particular the newly introduced and limiting third stage, namely proportionality analysis. South African courts, appreciating the objectives of civil forfeiture, have utilized the Constitution to cushion its effects on property and liberty rights by implementing the proportionality analysis as a third criterion. The article also considers the call made by certain authorities that existing legislation ought to be amended in order to codify extant judicial precedent in this regard. In conclusion, it is recommended that civil forfeiture in South Africa should continue along the lines of the three-staged approach that has crystallized in practice by applying an approach incorporating instrumentality, exclusion and proportionality analyses.

“Of course we are interpreting our own Constitution ...”²

* The views expressed in this paper are those of the authors alone, and do not represent the views of the SA National Prosecution Authority or Nelson Mandela Metropolitan University. I am grateful for the assistance of my colleagues in the AFU as well as my wife, Lolla, in this research.

¹ 121 of 1998 (as amended).

² *Printz v US* 521 US 898, 977 1977 per Breyer J dissenting.

1 INTRODUCTION

This article attempts to trace South African jurisprudential development of both the instrumentality and exclusion analyses and critically assesses the newly introduced and limiting third stage or nuance³ which originates from the application of constitutional provisions to civil forfeiture. The phenomenon discussed will be called the constitutional imperative⁴ (also known as proportional analysis) and its origins, the manner of its introduction into civil forfeiture and the effect it has brought about in the Asset Forfeiture Unit's (AFU) implementation of the Prevention of Organized Crime Act⁵ (POCA) will be sketched.

It will briefly deal with forfeiture in a constitutional democracy, the instrumentality analysis, exclusion analysis, and broadly dwell on the purpose of proportionality analysis, proportionality analysis in South African non-civil forfeiture cases and proportionality analysis in South African civil forfeiture cases. This is not a comparative study. Only the appropriate United States law will be included in footnotes.

2 BACKGROUND

International Treaties and Conventions⁶ recommend that governments put in place effective measures to combat organized crime. In South Africa an advanced⁷ asset forfeiture regime is provided for in POCA, which provides for criminal⁸ and civil forfeiture.⁹ Legal practitioners employed by the AFU

³ In *NDPP v Constable* unreported judgment of CPD Case no 5147/2004 delivered on 28/2/2006. Davis J noted that Mphati DP in *Prophet* added a "nuance" to the second stage of enquiry.

⁴ These concepts will be used interchangeably.

⁵ 121 of 1998 (as amended).

⁶ Mention here may be made of, amongst others, the 1988 Basel Statement on the Prevention of Criminal Use of the Banking System for the Purpose of Money Laundering; the 1988 UN Convention against Illicit Traffic in Narcotic Drug and Psychotropic Substances; the 1990 Council of Europe Convention on Laundering, Search, Seizure and Confiscation of Proceeds from Crime; the 1990 Financial Action Task Force's recommendations; the 1991 Council of the European Communities Directive on Prevention of the Use of the Financial System for the Purpose of Money Laundering; the 1999 UN International Convention for the Suppression of Financing of Terrorism; the 2000 UN Convention Against Trans – National Organized Crime; the 2001 UN Security Council Resolution 1368; the 2003 UN Convention against Corruption; and the 2003 African Union Convention on Preventing and Combating Corruption.

⁷ As opposed to pockets of SA statutory forfeiture provisions and the Proceeds of Crime Act 76 of 1996; and see also Simser "Civil Forfeiture in Common Law Jurisdictions" a paper delivered on 2005-01-29, Continuing Legal Education Seminar, Osgoode Hall Law School 2, where he describes it as comprehensive.

⁸ Chapter 5 which targets only the recovery of proceeds of unlawful activities and is invoked when a suspect is to be charged or has been charged or prosecuted, there are reasonable grounds to believe that a conviction may follow and that a confiscation order may be made. It is thus conviction and *in personam*-based forfeiture. It is not really different from the UK asset forfeiture law as set out in the Proceeds of Crime Act 2002.

⁹ Chapter 6 which targets both the recovery of proceeds of unlawful activities and removal from public circulation of facilitating property or instruments or assets used in the commission of crime where the guilt of the wrongdoer is not relevant. This follows the so-

use Motion Court proceedings when invoking civil forfeiture.¹⁰ Notwithstanding its title, it is now settled law¹¹ that POCA applies both to organized-crime offences (that is, racketeering, money laundering, criminal gang activities) and individual wrongdoing. The Financial Action Task Force¹² has favourably assessed South Africa's forfeiture regime and described it as comprehensive; however, POCA does not apply to instrumentalities¹³ intended or likely to be used to commit an offence.¹⁴ It would require a legislative amendment to cure this perceived defect.

Since criminal forfeiture¹⁵ is conviction-based, it attracts less attention from critics¹⁶ of asset forfeiture and nothing more will be said about it in this article. The forfeiture of proceeds of unlawful activities under civil forfeiture too will receive no further attention. This article will focus on civil forfeiture based on the legal fiction of a guilty property,¹⁷ a legal phenomenon that has met with considerable criticism.¹⁸ In dealing with forfeiture of the instrumentalities of offences, civil forfeiture in POCA follows a two-stage enquiry¹⁹ that –

- (i) requires the State to prove on a balance of probabilities that a property is an instrumentality²⁰ (because it facilitated in a meaningful and substantial way the commission of an offence); and

called *in rem* proceedings wherein the asset is preserved and thereafter forfeited to the State and is similar to the United States forfeiture.

¹⁰ See fn 8 above.

¹¹ POCA has a list of 33 pre-existing common-law and statutory offences referred to in Schedule 1 which may be committed by individuals; *Mohunram v NDPP* (Law Review Project as *Amicus Curiae*) 2007 6 BCLR 575 (CC); 2007 4 SA 222 (CC) par 25-27; this view found support in *NDPP v (1) RO Cook Properties (Pty) Ltd (2) 37 Gillespie Street Durban (Pty) Ltd (3) Seevnarayan* 2004 8 BCLR 844 (SCA); 2004 2 SACR 208 (SCA); 2004 2 All SA 491 (SCA) par 19; *NDPP v Van Staden* 2007 1 SACR 338 (SCA); 2007 2 All SA 1 par 1 and 10, where it was reiterated that the provisions of POCA are designed to reach far beyond organized crime and apply also to cases of individual wrongdoing; and *Prophet v NDPP* 2006 1 SA 38 (SCA); 2005 2 SACR 670 (SCA); and see also *NDPP v Vermaak* 2008 1 SACR 157 SCA.

¹² 4 August 2003 FATF report.

¹³ For the purpose of this paper, the word "instrumentality" will be used which is defined in s 1(1) of POCA as any property which is concerned in the commission or suspected commission of an offence at any time before or after the commencement of this Act, whether committed within the Republic or elsewhere.

¹⁴ See *NDPP v Zhong*, unreported judgment of the WLD, Case no 26736/2003 delivered on 24/6/2004 par 12.

¹⁵ See fn 7 above.

¹⁶ Meeker-Lowry "Asset Forfeiture" <http://www.zmag.org> (accessed 2007-03-15) 2; Barnet "SA's Constitutional Safeguards are in Shreds" 2; Vivian "Breaking Every Safeguard in the Book" <http://www.businessday.co.za> (accessed 2007-03-14); Barnet "Legal Fiction and Forfeitures: An Historical Analysis of The Civil Asset Forfeiture Reform Act" 2001 *Duquesne University Lay Review Fall*; and Van Der Walt "Civil Forfeiture of Instrumentalities and Proceeds of Crime and the Constitutional Property Clause" 2000 16 *SAJHR* 4-7.

¹⁷ *In rem* proceedings Barnet 2001 *Duquesne University Lay Review Fall*.

¹⁸ It is regarded as controversial in constitutional democracies where it has a potential to violate constitutional property rights, the presumption of innocence, the rights of innocent children, the right to remain silent and due process. The double-jeopardy rule does not apply.

¹⁹ *RO Cook Properties supra* par 21; *Parker* par 11; and *NDPP v Nogaga*, unreported judgment of CPD Case no 3528/2004 delivered on 2006-01-25 par 31-32.

²⁰ The State must discharge this burden.

- (ii) expects an innocent/ignorant/responsible property owner to apply to court for the exclusion²¹ of an interest (if any) in the property before forfeiture to the State is granted.

Once forfeited to the State, the property is donated or sold and the proceeds are deposited in the Criminal Assets Recovery Account. Such proceeds are then used to bolster law enforcement, benefit charitable organizations which cater for victims of crime in general or reimburse victims of asset forfeiture underlying crimes. In this format, asset forfeiture is a powerful State weapon for combating crime and removing guilty property from public circulation. Using these two internationally-recognized jurisdictional requirements South African courts since 1999 appear to have operated under the notion that notwithstanding their draconian effect, civil-forfeiture provisions along with the *ex parte* procedure are constitutional.²²

Since 2004 South African courts developed the aforesaid two-staged approach. They introduced a third leg of enquiry in determining forfeiture of instrumentalities: a proportional analysis. Simser²³ has reviewed, comparatively, a number of international jurisdictions²⁴ that apply this technique of civil forfeiture on instrumentalities. He is of the view that South African courts have not really added a third leg but commingled proportionality analysis with instrumentality analysis. It will be demonstrated below that this is, with respect, not the case and that South African case law indicates that there is now indeed a three-stage enquiry. The next section deals with the constitutional dispensation in South Africa.

3 FORFEITURE IN A CONSTITUTIONAL DEMOCRACY

Non-conviction-based forfeiture of instrumentalities is about the State's permanent removal or deprivation²⁵ of privately-owned (movable and immovable) property from public circulation, its sale and payment of the proceeds thereof into State coffers in the absence of a victim. The issue has more to do with the finding of a balance between crime combating and property rights than anything else. It reasserts on one hand a sense of responsibility and pro-activity on the side of property owners in relation to their assets and the combating of crime on the other. It provides no compensation to property owners. While this is a laudable effort on the government's side (because it targets one of the core issues of organized

²¹ An innocent party may in terms of s 52 of POCA, apply to a court to exclude an interest in a preserved property in that he/she either did not know nor had reasonable grounds to suspect that the property in which the interest is held is an instrumentality of an offence referred to in Schedule 1.

²² *NDPP v Mohamed* 2003 4 SA 1 (CC) 7; see also Simser 5; and Gupta "Note: Republic of South Africa's Prevention of Organized Crime Act: A Comparative Bill of Rights Analysis" 2002 37 *Harvard Civil Rights – Civil Liberties LR* 159.

²³ In a paper entitled "Civil Asset Forfeiture of Instruments: Canada, the United States, South Africa, and Australia (Toronto: 5th Annual Symposium on Money Laundering, March 7, 2009, Osgoode Hall Law School)".

²⁴ Canada, Australia, South Africa, the United States and Australia.

²⁵ That is legally dispossessing of all rights, use, enjoyment or exploitation.

crime), it fashions a bitter pill for property owners in general and criminals in particular.

The Supreme Court of Appeal (SCA) has confirmed²⁶ that the interrelated purposes of civil forfeiture include removing the incentives for crime; deterring persons from using or allowing their property to be used in crime; eliminating or incapacitating some of the means by which crime may be committed and advancing the ends of justice by depriving those involved in crime of the property concerned. Civil forfeiture has indeed an important role to play in the South African justice system, particularly when it comes to drug trafficking and other types of organized crime²⁷ that beset the country.

In 1996 South Africa adopted its current Constitution²⁸ which has earned worldwide recognition for its comprehensiveness.²⁹ It provides that the Bill of Rights in Chapter 2 is a cornerstone of democracy.³⁰ South Africa has joined other constitutional democracies in promoting human rights and the property rights of both natural and juristic persons;³¹ in the case of property rights, particularly, against unconstitutional governmental action. The Constitution enshrines the rights of all people in the country and affirms the democratic values of human dignity,³² equality and freedom. Constitutions call for a generous interpretation in order to give full effect to the fundamental rights and freedoms that they create.³³

Van Der Walt,³⁴ when examining civil-forfeiture cases and legislation, opines that in an effort to serve the public interest in effective policing of serious crime, forfeiture legislation creates dramatic state powers to interfere with the sanctity of private property, and hence generates conflict with the protection of private property in terms of the Constitution. Gupta³⁵ adds that law enforcement measures threatening individual rights must withstand vigilant constitutional scrutiny lest they become oppressive. This is more so in reference to civil forfeiture of instrumentalities, as will become more apparent below and is in fact one of the reasons why the constitutional imperative discussed below was introduced by our courts.

Of significance to this paper is the fact that the Bill of Rights³⁶ provides that no law (POCA included) may permit arbitrary deprivation of property.³⁷

²⁶ *RO Cook Properties supra* par 18.

²⁷ *NDPP v Parker* 2005 JOL 16202 SCA par 1; and Gupta 2002 37 *Harvard Civil Rights – Civil Liberties LR* 160.

²⁸ The Constitution of the Republic of South Africa, 1996.

²⁹ The Soul of the Nation: Constitution-making in South Africa – [www.sahistory.org.za/pages/library ... constitution/chapter14.htm](http://www.sahistory.org.za/pages/library...constitution/chapter14.htm) (accessed 2010-02-23) 3.

³⁰ S 7(1).

³¹ This includes, according to Roux, anyone whether or not a SA citizen and whether or not they are resident in the country.

³² S 10.

³³ *S v Zuma* 1995 2 SA 642 CC par 14 per Kentridge J; and *NDPP v King unreported* judgment of the SCA, Case no 86/2009 delivered on 2010-03-08.

³⁴ 2000 16 *SAJHR* 1-2.

³⁵ 2002 37 *Harvard Civil Rights – Civil Liberties LR* 160.

³⁶ S 25(1) 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.

What constitutes arbitrary deprivation of property was authoritatively and exhaustively determined by the Constitutional Court in the *First National Bank* case.³⁸ Roux notes³⁹ that this case resolved much initial uncertainty surrounding the interpretation of section 25 of the Constitution and added greater clarity. When such a depriving law does not provide sufficient reason for the particular deprivation in question or is procedurally unfair, it amounts to arbitrary deprivation of property and can be declared unconstitutional;⁴⁰ the converse is also true. The Constitutional Court states that sufficient reason for deprivation has to be established by:

- (a) Evaluating the relationship between means employed (that is, the deprivation in question) and ends sought to be achieved (that is, the purpose of the law in question);
- (b) considering the complexity of the said relationship;
- (c) considering the relationship between the purpose of the deprivation and the interest of the person whose property is affected;
- (d) having regard to the relationship between the purpose of the deprivation and the nature of the property, as well as the extent of the deprivation;
- (e) establishing, where the property in question is ownership of land or a corporeal movable, a more compelling purpose in order for the depriving law to constitute sufficient reason for the deprivation than in the case when the property is something different and the property right something less extensive;
- (f) requiring a more compelling purpose for the deprivation when the deprivation in question embraces all the incidents of ownership, than when the deprivation embraces only some incidents of ownership and those incidents only partially; and
- (g) considering the interplay between variable means and ends, the nature of the property in question and the extent of deprivation (there may be circumstances when sufficient reason is established by, in effect, no more than a mere rational relationship between means and ends, while in others this might only be established by a proportional evaluation closer to that required by section 36 of the Constitution).

Whether there is sufficient reason to warrant the deprivation is a matter to be decided on all the relevant facts of each particular case, always bearing in mind that the enquiry is concerned with the meaning of the term “arbitrary” in relation to the deprivation of property under section 25.

³⁷ Gupta 2002 37 *Harvard Civil Rights – Civil Liberties LR* 166 and 181 concludes that POCA is likely pass constitutional muster with relative ease.

³⁸ *First National Bank of SA Ltd t/a Wesbank v Commissioner, SA Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 4 SA 768 (CC); 2002 7 BCLR 702 (CC) par 100 which was quoted with approval in *Armbruister v The Minister of Finance*, reportable judgment of the CC, Case no CCT 59/2006 delivered on 2007-09-25; see also discussion by Roux *Constitutional Law of South Africa* 2ed (loose-leaf since 2000) 46-1 to 46-37.

³⁹ 46-2.

⁴⁰ *First National Bank supra* 100; and *NDPP v Brennan*, unreported judgment of the GSJ Case no 27382/2006 delivered on 2007-11-22 13.

Roux⁴¹ offers some constructive criticism of this test. On one hand, he describes it as a useful practitioner's step-by-step guide and, on the other, a deliberate retention by the court of an almost absolute discretion to decide future cases in the manner it deems fit; that it will be the focus of almost any property clause inquiry and that it leaves much scope for judicial discretion. *Prima facie* a test like this indeed has a limiting effect on legal practitioners. They are likely to tread extremely cautiously and carefully in choosing cases on which to litigate.

Although phrased in the negative, section 25(1)⁴² does not expressly guarantee the right to acquire or hold, use and dispose of property. Property ownership protection is neither unlimited nor generally insulated from State interference,⁴³ or absolute. It is thus inevitable that there will be instances where the State will be allowed, after complying with certain requirements, to forfeit guilty property. Relevant factors include the high crime rate, the threat of organized crime and the deterrent effect of asset forfeiture on the crime rate.

South African courts are further enjoined by section 39(2)⁴⁴ to interpret any legislation (like POCA) in a manner that promotes the spirit, purport and objects of the Bill of Rights and to ensure that its provisions are constitutionally justifiable. The interpretation and development of civil forfeiture by our judiciary since inception⁴⁵ and particularly after 2004 ought, it is submitted, to be viewed within this constitutional context. In *Carmichele*⁴⁶ the court held that the obligation of the courts to develop the common law is not purely discretionary but that courts are under a general obligation to develop the common law *appropriately* where it is deficient in promoting the section 39(2) objectives. Ackermann J⁴⁷ added that there is a like obligation on the courts, when interpreting any legislation – including fiscal legislation – to promote those objectives. The emphasis here is on appropriate interpretation and development and not deliberate imposition of limitations which have the resultant effect of truncating the very objective and purpose of a particular statute.

⁴¹ 46-22 to 46-23.

⁴² Of the Constitution.

⁴³ Van der Walt *The Constitutional Property Clauses: A Comparative Analysis* (1999) 332; and *First National Bank supra* par 48-49.

⁴⁴ See fn 41 above.

⁴⁵ In 1999.

⁴⁶ *Carmichele v Minister of Safety and Security (Center for Applied Legal Studies Intervening)* 2001 4 SA 938 (CC); 2001 10 BCLR 995.

⁴⁷ *First National Bank supra* par 31.

4 INSTRUMENTALITY ANALYSIS⁴⁸

This analysis is the first jurisdictional requirement that the State must discharge in determining whether preserved property ought to be forfeited. POCA defines an instrumentality⁴⁹ of an offence. The words “concerned in” in the definition must be interpreted in order that the link between the crime that has been committed and the property used renders the latter functional to the commission of an offence. The property must be instrumental, have a clearer or close enough relationship or reasonably direct link⁵⁰ to or play a reasonably direct role or facilitate or make possible in a substantial way the commission of crime.⁵¹ In the final analysis each case must be decided on its own facts after having regard to the entire picture. If this restrictive interpretation⁵² or strict approach is followed by the AFU in applications, forfeiture ought not to violate sections 25(1) or 39 of the Constitution.

The following queries as suggested in *Chandler*⁵³ (although not necessarily exhaustive) are of much assistance and are instructional in this enquiry. Was:

- (a) the use of the property in the offence deliberate and planned or merely incidental and fortuitous;
- (b) the property important to the success of the illegal activity in question;
- (c) the property illegally used over a period of time and what was the spatial extent of its use;
- (d) its illegal use an isolated event or had it been repeated; and
- (e) the purpose of acquiring, maintaining or using the property to carry out an offence?

The chronicle of South African courts’ pronouncements in this regard has crystallized the instrumentality analysis into three useful indicators or instances⁵⁴ of (i) closer connection or means by which,⁵⁵ (ii) adaptation,⁵⁶

⁴⁸ The United States’ Civil Asset Forfeiture Reform Act of 2000 deals with this as follows in s 2(c) – In a suit or action brought under any civil-forfeiture statute for the civil forfeiture of any property – (1) the burden of proof is on the Government to establish, by a preponderance of the evidence, that the property is subject to forfeiture; (2) the Government may use evidence gathered after the filing of a complaint for forfeiture to establish, by a preponderance of the evidence, that property is subject to forfeiture; and (3) if the Government’s theory of forfeiture is that the property was used to commit or facilitate the commission of a criminal offence, or was involved in the commission of a criminal offence, the Government shall establish that there was a substantial connection between the property and the offence.

⁴⁹ As any property, which is concerned in the commission or suspected commission of an offence.

⁵⁰ *In re: Mercedes Benz CA 57768* unreported judgment of the Tki Case no 1215/2007 delivered on 2007-10-18.

⁵¹ *RO Cook Properties supra* par 6-32.

⁵² *RO Cook Properties supra* par 12-15; and *In re R4 750*, reportable judgment of the NPD, Case no AR/874/2004 delivered on 2005-08-25.

⁵³ 36 F 3d 358 1994 (these questions should be asked to assist in determining if a preserved property is an instrumentality of an offence or not); *Prophet* par 26.

⁵⁴ *Parker; R O Cook properties; NDPP v Cole* 2004 1 All SA 745 (W); and *Prophet; Van Staden; Singh v NDPP* 2007 3 All SA 510 (SCA).

⁵⁵ *Swart* 2005 2 SACR 186 (SE) par 1; and the *sine qua non*.

and (iii) repetition. The closer connection instance connotes that the property should be indispensable⁵⁷ or the use thereof should be a *sine qua non* for the commission of an offence. It must not be incidental to, or just a venue⁵⁸ where, the crime is committed; if it is, it would be unfair to forfeit it.

The adaptation instance refers to the functional nature of the property in question. In its nature (that is, of being equipped,⁵⁹ organized or furnished) or through the manner of its deliberate utilization, the property must have been employed in some way to make the commission of an offence possible and/or easier.⁶⁰ In the United States this is called facilitating property. In *Stoltz*⁶¹ the State applied for forfeiture of an immovable property in which counterfeit money was found hidden in one cupboard, a motor vehicle wherein a counterfeit R200 note was seized and another motor vehicle which was used to transport counterfeit notes. The court was not satisfied that these assets were instrumentalities without some modification or adaptation; it required more compelling reasons to forfeit the immovable property.

The instance of repetition is about regular utilization of the property over a period of time.⁶² In *Engels*⁶³ Griesel J put this crisply: the more such incidents of criminal conduct the state can establish, the more easily the instrumentality inference may be drawn. What is still not clear is the number of such incidents the State should prove and how long or short the time frame in between them should be. Simser⁶⁴ notes that the South African instrumentality analysis as explained above is consistent with United States jurisprudence. Our courts should be applauded for providing rational and helpful guidelines for interpreting these somewhat vague statutory provisions.

⁵⁶ *Constable* 12-13.

⁵⁷ *Van Staden* par 14; *Mohunram v NDPP* 2007 4 SA 222 (CC) par 49 with which view the majority agreed; *NDPP v Geyser* a reportable judgment of the SCA, Case no 160/2007 dated 2008-03-25 par 16; and *NDPP v Van der Merwe*, unreported judgment of the WCC, Case no 3356/2006 delivered on 2007-12-31 par 14.

⁵⁸ *NDPP v Patterson* 2001 2 SACR 665 (C) and *NDPP v 37 Gillespie Street, Durban (Pty) Ltd*, unreported judgment of the D+CLD, Case no. 509/2002 delivered on 2003-09-10; *NDPP v RO Cook Properties (Pty) Ltd* 2002 4 All SA 692 (W); and *NDPP v Seevnarayan* 2003 2 SA 178 (C).

⁵⁹ *Prophet, Cole and Davies* 2004 3 All SA 745 (W); *Parker* par 21; *Mohunram* par 50; and *NDPP v Bombshell* unreported judgment of GSJ, Case no 19883/2004 delivered on 2005-08-18 par 44.

⁶⁰ *Prophet* par 26-27.

⁶¹ Unreported judgment of the GNP, Case no 25650/2003 delivered on 2004-06-03.

⁶² *Singh* par 43; *NDPP v Myburg* 2006 JOL 18052 (SE) 6-7; and *Van der Merwe* 14

⁶³ 2005 3 SA 109 (C) par 13; and *Mohunram* par 51.

⁶⁴ 14.

5 EXCLUSION ANALYSIS⁶⁵

An innocent or ignorant owner's interest in a preserved property may be excluded from the operation of forfeiture if the owner neither knew (nor had reasonable grounds to suspect) that such property was an instrumentality (or proceeds of unlawful activities); or where the crime occurred before 1998, where the owner took reasonable steps to prevent the property from being

⁶⁵ In the United States the Civil Asset Forfeiture Reform Act of 2000 (CAFRA) in s 2(d) deals extensively with this aspect as follows: (1) An innocent owner's interest in property shall not be forfeited under any civil forfeiture statute. The claimant shall have the burden of proving that the claimant is an innocent owner by a preponderance of the evidence. (2)(A) With respect to a property interest in existence at the time the illegal conduct giving rise to forfeiture took place, the term "innocent owner" means an owner who – (i) did not know of the conduct giving rise to forfeiture; or (ii) upon learning of the conduct giving rise to the forfeiture, did all that reasonably could be expected under the circumstances to terminate such use of the property. (B)(i) For the purposes of this paragraph, ways in which a person may show that such person did all that reasonably could be expected may include demonstrating that such person, to the extent permitted by law – (I) gave timely notice to an appropriate law enforcement agency of information that led the person to know the conduct giving rise to a forfeiture would occur or has occurred; and (II) in a timely fashion revoked or made a good faith attempt to revoke permission for those engaging in such conduct to use the property or took reasonable actions in consultation with a law enforcement agency to discourage or prevent the illegal use of the property. (ii) A person is not required by this subparagraph to take steps that the person reasonably believes would be likely to subject any person (other than the person whose conduct gave rise to the forfeiture) to physical danger. (3)(A) With respect to a property interest acquired after the conduct giving rise to the forfeiture has taken place, the term "innocent owner" means a person who, at the time that person acquired the interest in the property – (i) was a *bona fide* purchaser or seller for value (including a purchaser or seller of goods or services for value); and (ii) did not know and was reasonably without cause to believe that the property was subject to forfeiture. (B) An otherwise valid claim under subparagraph (A) shall not be denied on the ground that the claimant gave nothing of value in exchange for the property if – (i) the property is the primary residence of the claimant; (ii) depriving the claimant of the property would deprive the claimant of the means to maintain reasonable shelter in the community for the claimant and all dependents residing with the claimant; (iii) the property is not, and is not traceable to, the proceeds of any criminal offence; and (iv) the claimant acquired his or her interest in the property through marriage, divorce, or legal separation, or the claimant was the spouse or legal dependent of a person whose death resulted in the transfer of the property to the claimant through inheritance or probate, except that the court shall limit the value of any real property interest for which innocent ownership is recognized under this subparagraph to the value necessary to maintain reasonable shelter in the community for such claimant and all dependents residing with the claimant. (4) Notwithstanding any provision of this subsection, no person may assert an ownership interest under this subsection in contraband or other property that it is illegal to possess. (5) If the court determines, in accordance with this section, that an innocent owner has a partial interest in property otherwise subject to forfeiture, or a joint tenancy or tenancy by the entirety in such property, the court may enter an appropriate order – (A) severing the property; (B) transferring the property to the Government with a provision that the Government compensate the innocent owner to the extent of his or her ownership interest once a final order of forfeiture has been entered and the property has been reduced to liquid assets; or (C) permitting the innocent owner to retain the property subject to a lien in favour of the Government to the extent of the forfeitable interest in the property. (6) In this subsection, the term "owner" – (A) means a person with an ownership interest in the specific property sought to be forfeited, including a leasehold, lien, mortgage, recorded security interest, or valid assignment of an ownership interest; and (B) does not include – (i) a person with only a general unsecured interest in, or claim against, the property or estate of another; (ii) a bailee unless the bailor is identified and the bailee shows a colorable legitimate interest in the property seized; or (iii) a nominee who exercises no dominion or control over the property.

used as an instrumentality.⁶⁶ *Bennis v Michigan*⁶⁷ is a decision by the United States Supreme Court which held that the innocent-owner defence is not constitutionally mandated by the Fourteenth Amendment Due Process in cases of civil forfeiture. In this case, Tina Bennis was a joint owner, with her husband, of the motor vehicle in which her husband had engaged in sexual activity with a prostitute. In declaring the vehicle forfeit as a public nuisance under Michigan's Statutory Abatement Scheme, the trial court permitted no offset for the wife's interest, notwithstanding her lack of knowledge of her husband's activities.

The Michigan Court of Appeals overturned the decision; it was, however, again reversed by the State Supreme Court,⁶⁸ which concluded, *inter alia*, that the Michigan legislation's failure to provide an innocent-owner defence was constitutional; Tina Bennis's defence was therefore not valid against the forfeiture of the vehicle. Justice Stevens, dissenting, said that the prior decisions supported the government's ability to seize contraband or the proceeds of criminal activity, even if they ended up in the hands of an innocent owner. He said that no prior decision had approved seizure of property that was truly incidental to the crime – as the car was to the sexual activity that occurred – and that it was unfair under such circumstances to take property from a person who was innocent of any wrongdoing.⁶⁹

This case is about the second stage of the enquiry⁷⁰ which is brought about by way of a counter application and the court has to enquire whether such an application is before it before declaring the property forfeit. The *onus* is on the owner who must prove, *inter alia*, that such an interest was legally acquired. Mpati DP *et* Cameron JA explain this *onus*⁷¹ and process as follows:

“This section burdens the owner with an *onus* to prove certain facts on a balance of probabilities before court can make an exclusionary order. Although the Constitutional Court referred to this loosely as creating an ‘innocent owner’ defence,⁷² a literal reading of s 52(2A)(a) would suggest that innocence is not enough. In the case of post-statute offences, if the owner fails to prove absence of knowledge or absence of reasonable suspicion, on such a reading the

⁶⁶ S 52 of POCA; The exclusion also applies to proceeds of unlawful activities where the owner acquired such interest legally and for consideration the value of which is not significantly less than the value of such interest; See *NDPP v Levy Marc Spencer* unreported judgment of the WLD Case no 23381/2001 delivered on 2004-06-08 par 20-24, where a liberal and wide meaning of the word “interest” is preferred.

⁶⁷ 516 US 442 (1996) – this is one of the first United State cases which dealt with the concept of innocent-owner defence and is illustrative in the South African context.

⁶⁸ 517 US 1163 (1996).

⁶⁹ <http://www.answers.com/topic/bennis-v-michigan> (accessed 2010-05-12); and see also Kessler “Injustice for All: Bennis vs. Michigan” <http://www.kessleronforfeiture.com/injustice.html> (accessed 2010-05-12).

⁷⁰ *Mohamed NO* par 18.

⁷¹ *RO Cook Properties* par 24; and *NDPP v Yanling*, unreported judgment of the GSJ Case no 21556/2003 delivered on 2006-08-15 par 14-16.

⁷² *Mohammed* 2002 2 SACR 196 (CC); 2002 4 SA 843; 2002 9 BCLR 970 par 17.

property stands to be forfeited even if he or she was unable⁷³ to do anything about the scheduled offence or its continuation.”

The owner’s guilt, wrongdoing, ignorance or innocence becomes relevant at this stage of the inquiry.⁷⁴ In *Parker*⁷⁵ the owner had allowed her son to manage her immovable property where drugs were sold. She did not qualify as an innocent owner because it was clear that she was aware and did not take issue seriously with the allegations regarding the entrapment operations, various arrests on the property, that the property was known as a drug outlet, or that it had facilities in its driveway described by the police as having served the convenience of buyers and thus facilitating drug deals. The SCA in *Mazibuko*⁷⁶ dealt with whether the interest of an innocent spouse married in community of property was capable of exclusion in the operation of a forfeiture order. Whilst the court acknowledged the indivisible nature of the spouse’s property rights, it held that to deprive such a spouse of her interest would be tantamount to arbitrary deprivation of property and would accordingly be unconstitutional. The innocent spouse’s interest was thus excluded from the forfeiture. Following this reasoning Balton J⁷⁷ ordered the appointed curator to pay the interest of the spouse to her.

In *Kolowole*⁷⁸ Preller J was not persuaded to exclude two motor vehicles belonging to a panel-beater in which suspects had been arrested for drug trafficking, despite the fact that the panel-beater claimed to have orally leased the vehicles to the suspects. In *Swarts*⁷⁹ the respondent conceded that a truck with a hidden compartment in which abalone units, worth more than R1m, were transported was an instrumentality, but applied for its exclusion on the basis that he had leased it to the driver. Upon closer examination of the compartment it was apparent that it had been fitted to the truck for some time (probably before the alleged lease) because it was rusted. The driver of the truck denied the existence of such a lease. When the truck was seized the respondent reacted thereto only after a period of a year. The court dismissed the exclusion counterclaim.

The next section deals with the constitutional imperative.

⁷³ It is submitted that, with proportionality analysis in place, this would amount to arbitrary deprivation; and see *NDPP v Gerber* 2007 1 SA 384 (WLD), where the domineering first respondent’s wife could not stop his illegal activities but the house was not declared forfeit.

⁷⁴ *RO Cook Properties supra* par 21.

⁷⁵ Par 12.

⁷⁶ 2009 2 SACR 368 (SCA); and see also *US v 92 Buena Vista Ave.* 937 F.2d 98 (3rd Circuit 1991).

⁷⁷ *NDPP v Mncube*, unreported judgment of KZD, Case no 15399/2007 delivered on 2010-01-19 17.

⁷⁸ Unreported judgment of GNP, Case no 5289/2009 delivered on 20/8/2009; and *NDPP v Florence*, unreported judgment of the CPD, Case no 9309/2005 delivered on 2007-03-14; *NDPP v April* 2007 JOL 19695 (C).

⁷⁹ Unreported judgment of NCK, Case no 118/2009 delivered on 2009-12-11.

6 PROPORTIONALITY ANALYSIS

6.1 Purpose of proportionality analysis

Gupta⁸⁰ pointed out in 2002 that the message from the United States arbitrariness jurisprudence, arising under the doctrines of excessive fines and due process, is to create some civil rights checks grounded in an idea of proportionality. Proportional analysis has avoidance of causing an imbalance between the adverse and beneficial effects of an administrative action as its primary purpose. It encourages consideration of the need for the action and the possibility of using less drastic or oppressive means to accomplish the desired end.⁸¹ Simply put, it is a mechanism used as a balancing act in reconciling conflicting or divergent interests. For the purpose of this paper these interests are crime combating on one hand and property rights on the other; it is thus a rights analysis.

6.2 Proportionality analysis in South African non-civil forfeiture cases

In the *First National Bank* case proportionality was applied in relation to the provisions of the Customs and Excise Act⁸² and arbitrary deprivation of property. FNB, a financial institution and juristic person, sells and leases movables. Three of its motor vehicles had been detained by the Commissioner. It was argued by FNB that the proposed detention and sale by the Commissioner⁸³ of FNB-owned and -registered motor vehicles, under the circumstances where FNB was not a customs' debtor, amounted to an expropriation for the purpose of section 25 of the Constitution.⁸⁴ The court agreed.

Ackerman J emphasized⁸⁵ that even fiscal statutory provisions – no matter how indispensable they may be for the economic well-being of a country – are not immune to the discipline of the Constitution and must conform to its normative standards. The judge, relying on scholarly work, traced the meaning of the concept of arbitrary deprivation of property when reviewing an executive action in the United States, Australia, Europe, Germany and the United Kingdom. He concluded that there is broad support in other jurisdictions for an approach based on some concept of proportionality when dealing with deprivation of property, although the context and analytical methodology are not the same as under the South African Constitution.⁸⁶

⁸⁰ 181.

⁸¹ *NDPP v Kleinbooi* – a reportable judgment of the CPD, case number 9651/2004 delivered on 2007-12-03 13 where, Hoexter *Administration Law in South Africa* (2007) 309 was quoted.

⁸² 91 of 1964.

⁸³ Under s 114 of the Customs and Excise Act which allows the Commissioner to collect debts due to the State and sell goods without the need for a prior judgment or authorization by a court even where the goods do not belong to the customs' debtor but to some third party.

⁸⁴ Par 26. This was a constitutional property attack.

⁸⁵ Par 31.

⁸⁶ Par 71.

Following this approach the court found no sufficient reason existed for section 114 to be used to deprive third persons other than customs' debtors of their goods and that such deprivation was arbitrary and unconstitutional.

In *S v Kwalase*⁸⁷ proportionality was applied in the context of sentencing of juvenile offenders, deprivation of liberty and finding a sentence fair both to the youth and society – a balancing act. The juvenile had been 15 years and 11 months old at the time the offence was committed and was unrepresented at trial. He pleaded guilty and the stolen item had been recovered. He was convicted of robbery and sentenced to three years' imprisonment, 18 months of which were suspended for three years on condition he was not convicted of housebreaking, attempted robbery or robbery committed during the period of suspension. The magistrate failed to obtain a pre-sentence report, elicit employment details of the juvenile, ascertain with whom he was living and erred in finding that the juvenile was living an adult life. The court found the sentence to be severe and imposed correctional supervision. It noted that the post-1994 constitutional and international legal dispensation in South Africa had also to be borne in mind by courts when determining appropriate sentences for youthful offenders whose age, well-being and special needs had to be taken into account. It reiterated that courts ought to follow the treatment approach as set out in section 28(1)(g) of the Constitution, the UN Convention of the Rights of the Child (1989) as well as the Beijing Rules.⁸⁸

In *PE Municipality v Various Occupiers*⁸⁹ proportionality was applied in such a way that the common law right to property had to be interpreted to also recognize that the normal ownership rights of possession, use and occupation had to be aligned with the right of squatters not to be arbitrarily deprived of a home.

In these cases the use of proportionality brought significant changes to South African courts' usual approach to customs' provisions, juvenile justice and eviction. Its source appears to be international jurisprudence and the Constitution. These cases thus set a new pace for the use of proportionality analysis in South Africa in an attempt to avoid causing an imbalance between the adverse and beneficial effects of administrative actions. When they were adjudicated, courts had already been grappling with cases of forfeiture of instrumentalities but were yet, at the time, to conflate⁹⁰ the instrumentality analysis with proportionality analysis or introduce the latter as an added third leg of the enquiry.

⁸⁷ 2000 2 SACR 135 (C).

⁸⁸ One may also add the Child Justice Act 75 of 2008 which came into operation on 2010-04-01 as another limiting guide in this regard.

⁸⁹ 2004 12 BCLR 1268 (CC).

⁹⁰ Simser 14.

6 3 Proportionality analysis in South African civil-forfeiture cases⁹¹

Section 50(1) of POCA provides that, if a court finds that the preserved property is an instrumentality of an offence, it “shall” declare it forfeit to the State. The courts, however, held in *Cook Properties*⁹² and *Van Staden*⁹³ and the Constitutional Court concurred in *Prophet*,⁹⁴ *Mohunram*⁹⁵ and *Geyser*,⁹⁶ that courts retain the discretion to decline forfeiture if its impact would be out of proportion to its purpose. The word “shall” has since been read as “may”. Further, despite an instrumentality finding, forfeiture will not ensue if a respondent’s exclusion counter-application is successful.

It is settled law⁹⁷ that civil forfeiture is a serious matter because it makes significant inroads into well-entrenched civil protection against arbitrary deprivation of property and may amount to excessive punishment and arbitrary confiscation of property. It has the potential of producing arbitrary and unjust consequences. In *Prophet*,⁹⁸ Nkabinde J, writing for a unanimous court, reiterated this:

“Asset forfeiture orders as envisaged under Chapter 6 of the POCA are inherently intrusive in that they may carry dire consequences for the owners or possessors of properties particularly residential properties. Courts are therefore enjoined by section 39(2) of the Constitution to interpret legislation such as the POCA in a manner that ‘promote[s] the spirit, purport and objects of the Bill of Rights’, to ensure that its provisions are constitutionally justifiable, particularly in the light of the property clause enshrined in terms of section 25 of the Constitution.”

It was only in 2004⁹⁹ that the Constitutional Court introduced the concept of proportional analysis into civil-forfeiture jurisprudence of instrumentalities. Why this did not take place in 1999 when POCA came into effect, or soon subsequent to the *First National Bank* case, is not clear. In *Mohunram 1*¹⁰⁰ Patel J (although there was no constitutional attack to be resolved) sounded the warning when he quoted Van der Walt:¹⁰¹

“In view of the characteristics of the Bill of Rights in the 1996 South African Constitution (and particularly the property clause in s 25 and the general limitation provisions in s 36), the courts should consider the possibility that an excessively unfair or disproportionate forfeiture might have to be treated as a

⁹¹ For the Canadian perspective in this regard see <http://www.canlii.ca/en/on/onsc/doc/2008/2008canlii67887/2008canlii67887.pdf>; <http://www.canlii.ca/en/on/onsc/doc/2008/2008canlii4256/2008canlii4256.pdf> and <http://www.canlii.ca/en/bc/bcsc/doc/2009/2009bcsc322/2009bcsc322.pdf>.

⁹² *RO Cook Properties supra* par 74; and *Prophet* par 30.

⁹³ *Van Staden* par 5 and 8.

⁹⁴ *Prophet* par 58-61.

⁹⁵ *Mohunram* par 56-63, 122-123 and 142-143.

⁹⁶ Par 16.

⁹⁷ *RO Cook (SCA)* par 17; *Mohunram* par 118; *Cole* par 15; and *Van Staden* par 4.

⁹⁸ Par 46; see also *Mohunram* par 9; *RO Cook Properties* par 23; and *Brennan* 14.

⁹⁹ After 42 written civil-forfeiture judgments were obtained from the courts.

¹⁰⁰ Unreported judgment of the NPD Case no 3576/2001 delivered on 2004-02-02.

¹⁰¹ See Van Der Walt 2000 16 *SAJHR* 1 and 45.

material expropriation of private property rather than a legitimate deprivation, if a reasonable and justifiable balance is to be struck between the public interest in effective crime fighting and the interests of private property owners affected by forfeiture laws.”

This gave an advance indication of a new approach to be adopted by courts in civil forfeiture of instrumentality matters.

Running a brothel falls into a category of organized crime. In *RO Cook* the State urged the court to forfeit as instrumentalities: (i) an immovable property in Johannesburg alleged to have been used as a brothel and where victims of kidnapping had been assaulted and held hostage;¹⁰² (ii) a run-down hotel in Durban where walls were used to secrete drugs and rooms were used for prostitution;¹⁰³ and (iii) investments in Cape Town used to evade payment of taxes.¹⁰⁴ The court only had to resolve the instrumentality enquiry; the application for forfeiture was refused in all the three cases.

Whilst commenting on the instrumentality analysis, the court reiterated that POCA requires property owners to exercise responsibility for their property and to account for their stewardship of it in relation to its possible criminal utilization. While this confirmation by the court is crucial for law enforcement, the pursuit of those very statutory objectives cannot exceed what is constitutionally permissible.¹⁰⁵ The court then, quoting the *First National Bank* case, accepted submissions made by the State¹⁰⁶ that the relationship between the purpose of the forfeiture and the property must be compelling and that a proportional analysis – in which the nature and value of the property is assessed in relation to the crime involved and the role it played in the commission thereof – may be appropriate at the final stage of forfeiting property to the State. It also referred to the *Austin*¹⁰⁷ and *Bajakajian*¹⁰⁸ cases to the effect that in post-conviction forfeitures, the touchstone of the constitutional enquiry is the principle of proportionality: the amount forfeited must be compared to the gravity of the offence; if the amount is disproportional to the gravity of the offence, it is unconstitutional.

The court held that the exclusion analysis falls within the final stage of forfeiting property. It is submitted that what the court meant by this is that a proportional analysis may be an appropriate added enquiry after deciding on the instrumentality and exclusion analysis. It is, however, not clear on the reading of the *RO Cook* judgment why the State made such a submission. In refusing leave to appeal in *Mohunram 2*¹⁰⁹ Patel J relied, *inter alia*, on this very submission. Simser¹¹⁰ makes the observation that in this way the court in *RO Cook* introduced proportionality analysis into the instrumentality

¹⁰² *RO Cook Properties*.

¹⁰³ *37 Gillespie Street*.

¹⁰⁴ *Seevnarayan*.

¹⁰⁵ Par 29.

¹⁰⁶ In *Seevnarayan*.

¹⁰⁷ *Austin v United States* 509 US 602 (1993). This is one of the United State cases on proportionality.

¹⁰⁸ *United States v Bajakajian* 524 US 321 (1998); another United State case on proportionality.

¹⁰⁹ 2005 JOL 13223 N 3.

¹¹⁰ 15.

enquiry and that the structure of POCA drove the court to this result; that POCA allows for the exclusion of partial interest, but does not allow for the exclusion of a whole property interest even if forfeiture would be disproportionate.

A closer reading of the two judgments reveals that the proportionality analysis issue was not before the courts to be resolved and that reference to it was an *obiter dictum*. It is submitted that proportionality analysis was introduced (where appropriate) for use at a *final stage* as an additional or a totally separate enquiry¹¹¹ (which the courts did not have to use to decide these cases). It was introduced not because of the structure of POCA, but because of the constitutional dispensation POCA formed part of.

In *Gouws*¹¹² a respondent was convicted, after pleading guilty, of being in unlawful possession of 62 units of abalone worth in the region of R5 400. He was sentenced to pay a fine of R1 500 or serve 90 days imprisonment. At the conclusion of the criminal trial the court ordered that a motor vehicle, valued at about R17 000, be returned to the respondent who had received R300 as payment to transport the abalone illegally. This was not done. The vehicle was held by the State, subsequent to its seizure, for two and a half years and was also preserved. The court hearing the forfeiture application declared the vehicle an instrumentality of an offence of transporting abalone without the requisite permit. It, however, dismissed the application for its forfeiture relying on the proportionality analysis. Ludorf J reasoned as follows:¹¹³

“In my judgment the particular facts of this case demonstrate that the respondent had been suitably punished, that his deprivation of his motor car for two and a half years has augmented his punishment and that his use of the Opel in the commission of the crime concerned as an instrument in furtherance of the crime, has, in the circumstances, been sufficiently vindicated to satisfy the public demand for neutralization of the Opel as such instrument when measured and considered by way of a proportional analysis of the objectives of POCA, the personal circumstances of the respondent and the public interest also in preserving the protection which the law ordinarily affords an owner in his undisturbed ownership and possession of property.”

It is significant to note that the court found that the State had discharged the burden of proving that the Opel was an instrumentality of an offence. The respondent did not qualify to use the exclusion analysis as an innocent owner. The constitutional imperative, it would appear, was considered as an additional enquiry and used to dismiss the forfeiture application against movable property. Further, the fact that punishment had already been meted out prior to the forfeiture hearing appears to have played an important role in the dismissal of the forfeiture.

In *Gerber*¹¹⁴ an application for forfeiture of an immovable property used to cultivate a dagga plantation was dismissed, using the proportionality analysis on the basis that the second respondent who was innocent and

¹¹¹ Par 30.

¹¹² 2005 2 SACR 193 (SECLD).

¹¹³ 197E-G; and *Mohunram* par 60.

¹¹⁴ 2007 1 SA 384 (WLD).

afraid of the domineering first respondent would, together with her foster-care child and elderly mother, be left homeless. One would have expected the court here to forfeit the immovable property but exclude her interest in the operation of the forfeiture; instead and in its balancing act, it went further and took into account rights of other occupants who were not owners and who did not even join the forfeiture proceedings.

In *Nogaga* the respondent argued that the forfeiture was disproportional when the State applied for forfeiture of a sum of R593 880 as proceeds of drug dealing. Drugs worth between R20 000 to R28 000 had been seized. Erasmus J accepted¹¹⁵ that the seized amount was proceeds and that its forfeiture in its entirety would achieve the objective of removing the means to purchase further drugs. In *Mooi*¹¹⁶ a garage in an immovable property was proved to have been used to manufacture drugs and the premises (which had been adapted with high walls) were shown to have been repeatedly used to store stolen property. The respondent argued that it would be disproportional to forfeit his property. The court, aware of the *RO Cook*, *Parker* and *Prophet* judgments, held¹¹⁷ that the offences committed on the property were serious, that no market value was submitted on the property and thus that the forfeiture was not disproportional, even on the criteria by Ponnann JA in the *Prophet* case.

In *Constable*¹¹⁸ two immovable properties were forfeited to the State because they were found to be instrumentalities of drug dealing. Disproportional forfeiture was raised and Davis J¹¹⁹ reasoned as follows:

“In my view, when properties are used this consistently for nothing more than drug houses, there is no disproportionality when these particular properties are forfeited, particularly if regard is had to the socio-economic costs of drug-related offences in this country, particularly in this part¹²⁰ of South Africa and especially given the pernicious influence which organized drug-dealing have had on the social fabric of the society, particularly in disadvantaged communities.”

This ruling and that of *Gerber* may be contrasted with *NDPP v Van der Merwe*,¹²¹ where Louw J found that forfeiture of an immovable property consistently used for drug trafficking would prevent further drug dealing and would not deprive its owner (who was aware that it was used for drug peddling) of a home; however, since it was her only asset and source of income, its forfeiture would not be proportional. The court arrived at this conclusion even though it expressed its awareness of the negative and drastic consequences of drug dealing on the community¹²² and the fact that

¹¹⁵ Par 43 and fully aware of *R O Cook* and *Prophet* cases.

¹¹⁶ Unreported judgment of the SGJ, Case no 5058/2004 delivered on 2006-02-17; and *Yanling* par 18.

¹¹⁷ 10.

¹¹⁸ *NDPP v Constable* unreported judgment of CPD Case no 5147/2004 delivered on 2006-02-28.

¹¹⁹ 16.

¹²⁰ Western Cape Province.

¹²¹ Unreported judgment of WCC, Case no 3356/2006 delivered on 2009-08-21 par 46 and 47.

¹²² Par 48.

drug dealing was probably¹²³ continuing in the immovable property in question. Drug dealing also falls in the category of organized crime and it could have been expected that the courts would, after what Davis J said in *Gerber*, adopt a firmer view in all such cases and not use the constitutional imperative.

In *Mohunram* proportional analysis was used to dismiss an application for forfeiture of an immovable property which the majority judgment found to be an instrumentality. Mohunram had, prior to the application for forfeiture (as was the case in *Gouws*), been convicted and paid a fine of R88 500 for the same offence. Seized cash and equipment worth R287 000 had already been forfeited. The immovable property was mortgaged for R600 000, the outstanding balance being R470 000. It was partly used for a legitimate glass business which had some employees. These mitigating factors weighed heavily in Mohunram's favour when the constitutional imperative was applied.

Following the decision in *Van Staden* in which it was held that a motor vehicle may be an instrumentality of drunken driving, the AFU joined the Arrive Alive Zero Tolerance Campaign to reduce traffic fatalities. In *Vermaak* the State sought to have a motor vehicle driven by a respondent whilst she was under the influence of liquor forfeited to the State. The court that convicted the respondent considered the respondent's problem not to be reckless conduct in deliberate defiance of the law, but rather an illness of alcohol abuse.

Nugent JA found¹²⁴ that it was well-established, and was repeated in *Van Staden*, that an order for forfeiture may be made only if the deprivation in a particular case is proportionate to the ends at which the legislation is aimed. Drug trafficking is clearly one of those targets. The judge, embarking on a balancing act, warned¹²⁵ against the use of POCA as a means of "topping up"¹²⁶ penalties imposed by a court when the ordinary criminal remedies are quite capable of serving the purpose of deterring the commission of further offences, whether by the particular offender or by other offenders. If the sentences that are available to serve that purpose are inadequate it is open to the legislature to remedy that defect and not for the AFU to use civil forfeiture. He concluded that forfeiture of the vehicle *in casu* would function as no more than an additional penalty for the commission of the offences.

In *Kleinboo*¹²⁷ the court also dealt with a vehicle used in drunken driving. The respondent argued that its forfeiture would be disproportionate. The court confirmed that the vehicle was indeed an instrumentality but stated that for the State to succeed there was a *further* obstacle: proportional analysis. After analyzing *Mohunram*, Davis J pointed out¹²⁸ that when considering a forfeiture application a court must take into account the extent to which the

¹²³ Par 49.

¹²⁴ Par 9.

¹²⁵ Par 12.

¹²⁶ Or convenient substitute.

¹²⁷ Unreported judgment of CPD, Case no 9651/2004 delivered on 2007-12-03.

¹²⁸ 12.

common law and statutory criminal provisions are inadequate to deal therewith. It is on this very notion that the forfeiture, as in *Vermaak*, was dismissed.

In *Lewis*,¹²⁹ also a drunken-driving case, the respondent argued that in the light of the criminal sanction already imposed upon him, forfeiture of his vehicle would not be proportional to the crime committed. The court agreed. It should be noted, however, that these cases dealt with the so-called non-POCA offences (or individual wrongdoing).

In contrast, in *Geyser* the SCA dealt with the illegal running of a brothel, the State applying for the forfeiture of an immovable property in which it was run. The respondent argued¹³⁰ that it would be disproportionate if the State acquired the property through forfeiture and stripped Geysers of an asset worth about R2 million as such a result would constitute excessive punishment for an offence where the prescribed penalties were a sufficient deterrent. Here is seen a combination argument dealing with the proportionality and "topping up" issues. Distinguishing *Mohunram* and relying on *Vermaak* the court concluded¹³¹ that the proportionality argument was misplaced and that the required remedial effect was one which would convey the unmistakable message to Geysers, to other brothel-keepers and to the public at large that the law does not turn a blind eye to the persistent and obdurate pursuit of a criminal business and will act to demonstrate that brothel-keeping does not pay. The appropriate means by which to convey that message in this case was forfeiture to the State of the property in question.

In *Van der Burg*¹³² the State applied for forfeiture of an immovable property (valued at R350 000) situated close to two schools, on the grounds that it had been used extensively as an illegal tavern for a period of two years. Fifty two police operations were conducted on the property and fifteen criminal cases emanating from the property were registered. Over the years the respondent and employees were arrested and/or convicted for illegal trading in liquor. Several written warnings to refrain from illegal trading were issued in relation to the property. Subsequent to the granting of the preservation order against the property, illegal trading continued unabated. It was clear that the property was a community nuisance. The respondent argued that some space in the property was rented to fruit-and-vegetable hawkers¹³³ and that the four minor children living in the property ought to be protected in terms section 28(2)(c) of the Constitution (an argument used in *Gerber*); thus, the submission continued, its forfeiture would be disproportionate to the offence of unlawful sale of liquor.

The court found that the property was materially integral to the commission of the offence. It held¹³⁴ that the fact that the offence

¹²⁹ Unreported judgment of the CPD, Case no 2459/2005 delivered on 2007-12-03.

¹³⁰ 21.

¹³¹ 35.

¹³² Unreported judgment of the CPD, Case no 5597/2006 delivered on 2008-12-22.

¹³³ An argument of attempting to legitimize a section of the property as was successfully made in *Mohunram*.

¹³⁴ Par 28.

complained of cannot be categorized as part of organized crime is a relevant factor when considering a proportional analysis. It held¹³⁵ further that the evidence established that conventional criminal penalties and police operations had failed in inhibiting continued illegal trading. It agreed with the sentiment expressed in *Vermaak*¹³⁶ that the effect of forfeiture of the property was to be remedial and to confirm a firm message that the law does not turn a blind eye to the persistent and obstinate pursuit of criminal business and will act to demonstrate that this does not pay.¹³⁷ The court thus rejected the argument that the forfeiture was disproportionate. As for the children, the court held¹³⁸ that they would not be rendered destitute or homeless if forfeiture were granted. Perhaps to avoid what happened in *Gerber* in regard to the children and other occupants, the State was directed to lead evidence about alternative accommodation for them, a strategy the State should perhaps use in other sufficiently related cases.

In *Bosch*¹³⁹ the State contended that an immovable property was used since 1991 to facilitate the illegal running of a brothel. The first police trap resulted in the seizure of brothel paraphernalia as well as cash, the respondent paying an admission-of-guilt fine. The second trap in 2006 yielded the same results except that women, instead of the respondent, were arrested for prostitution and they deposed to affidavits confirming that the property facilitated prostitution. The respondent's income over a period of seven years was estimated at more than R1.8 million and the property valued at about R400 000. The respondent denied running a brothel and argued that it was a massage parlour. The court rejected this and relying on *Geyser* held that the forfeiture of the property would also be remedial and would send a clear message to other criminals regarding the courts' attitude. This shows a clear trend of courts' tough stance (missing in *Van der Merwe*) against organized criminal business.

In *Nissa Medunsa-Boroto*¹⁴⁰ both the respondent and his son were HIV positive; the former was charged with theft of manhole covers (individual wrong-doing) which he transported in his motor vehicle worth R51 000. He pleaded guilty and was sentenced to six months' imprisonment or a fine of R3 000 wholly suspended for three years. The state preserved the vehicle. The evidence revealed that the complainant, a university, had to install expensive surveillance cameras in order to identify and apprehend the thieves of the covers and that stolen manhole covers pose a danger to motorists. The respondent argued that he sold the covers to buy immune boosters for his son and himself and that he used the vehicle to earn an income. The court held¹⁴¹ that the sentence imposed would not deter others from committing similar crimes; however, the sentence, together with the respondent's need to use the vehicle to earn an income and the HIV status

¹³⁵ Par 35.

¹³⁶ Par 11-13.

¹³⁷ Quoting *Geyser* par 35.

¹³⁸ Par 31.

¹³⁹ Unreported judgment of the KZD, Case no 10087/006 delivered on 2009-04-23.

¹⁴⁰ Unreported judgment of the GNP, Case no 56751/2008 delivered on 2009-05-07.

¹⁴¹ Par 34.

of his son and himself, resulted in the court dismissing the forfeiture application on the basis of proportionality.

In *George Smith*¹⁴² and *Gigaba*,¹⁴³ which cases are still on appeal, the courts again applied the disproportionate forfeiture criterion to dismiss the state's application. A Nissan LDV belonging to George Smith, who gave a lift to a hitchhiker, was stopped by the police after they observed the hitchhiker throwing away what later turned out to be cannabis weighing 3 kilograms. Criminal charges were withdrawn against George Smith. The Nissan was preserved as an instrumentality. Revelas J was not convinced that there was enough evidence to satisfy the instrumentality analysis and dismissed the application. In doing so, the court relied¹⁴⁴ on *Gouws* and *Mohunram* and, in particular, the proportionality analysis. It is not clear whether the latter was pleaded but the court held¹⁴⁵ that the public interest would not be served if the vehicle were declared forfeit. It is submitted that, after holding that the vehicle was not in the instrumentality category, there was, with respect, no need for the court to embark on the proportionality analysis.

In *Gigaba* the respondent's Mitsubishi Colt LDV was held to be an instrumentality used to facilitate stock theft¹⁴⁶ which the court held was prevalent in the Northern Cape Province with major financial implications to farmers. The respondent was accompanied by two other persons. Williams J, however, dismissed the forfeiture on the basis¹⁴⁷ that the respondent was an unemployed first offender and had to use the Colt, which had not been used criminally in the past, to earn a living for his family. There was no evidence that the Colt would be used in the future to facilitate the commission of crime. Furthermore, the Colt had been in police custody for almost a year, resulting in hardship to the family, the sheep had been returned to the complainant and, notwithstanding the fact that the criminal law was due to take its course, the deterrent effect of civil forfeiture had already been served.

6 4 Conclusion and the legal effect on implementation

There is no doubt that the courts' introduction of the proportionality analysis into civil forfeiture was induced by the constitutional dispensation. On the one hand, it left what used to be a powerful State weapon to deter the commission of crime less effective and powerful than it had been. The courts' rejection of the so-called "topping up" tendency might be viewed as being constitutionally correct, but also sympathetic to criminals. This "sympathy" is apparent in cases of addiction, HIV-positive status, old age and those involving females and children (family). Some instances of criminality are therefore bound to fall between the proverbial cracks and criminals might ultimately view themselves as untouchable. On the other

¹⁴² Unreported judgment of the ECD-G, Case no 3438/2009 delivered on 2010-07-29.

¹⁴³ Unreported judgment of the NCD, Case no 2143/2009 delivered on 2010-10-01.

¹⁴⁴ Par 9-10.

¹⁴⁵ Par 11.

¹⁴⁶ Sheep worth R4000.

¹⁴⁷ Par 14-16.

hand, the notion that the closer the offence is to organized crime offences and the easier it has become to forfeit facilitating property appear to be the area where this powerful State weapon must still continue to be useful.

The decision in *Mohunram* came close to being viewed as pronouncing the end of civil forfeiture. When interviewed,¹⁴⁸ the Head of the AFU said that the case would create some difficulties and that the AFU would have to apply additional resources and time. Keightley¹⁴⁹ opined that the instrumentality jurisprudence developed to the extent that there now seemed to be far more uncertainty regarding the proper reach of the law than before and that this was likely to be more prejudicial to law enforcement agencies than to property owners. Simpser¹⁵⁰ is of the view that the courts created jurisprudence that is confusing and misapplied the reasoning in United States conviction-based cases. Indeed when the case law is analyzed it is not crystal clear in which cases exactly the courts will invoke the constitutional imperative and in which they will not. There is, however, some apparent leaning towards using it in criminal businesses and cases linked to organized-crime offences. Roux's criticism of the court in the *First National Case* is perhaps apposite here as well. With respect, the courts have again shown a deliberate retention of an almost absolute discretion to decide future cases in the manner they deem fit.

It is the property owner who is expected to allege that the granting of a forfeiture order would be disproportionate to the crime committed. In *Prophet*¹⁵¹ Ponnann J had difficulty with the test for significantly disproportional forfeiture and the saddling of a respondent with such onus in addition to placing the necessary material for a proportionality analysis put before the court. In *Mohunram* Moseneke DCJ shifted the question of onus slightly and reasoned as follows:¹⁵²

"The office of the NDPP, as applicant for forfeiture, bears the initial duty to disclose all relevant facts within its knowledge to the court hearing the asset forfeiture application if arbitrary forfeitures are to be avoided, I may even add that, in terms of section 48(1), read together with section 50(1) of POCA, the NDPP bears the onus to establish on a balance of probabilities that the forfeiture sought is justified. Naturally, the respondent in forfeiture proceedings will have to adduce evidence if she or he hopes to disturb or rebut the facts that the NDPP relies upon in the founding depositions ... The NDPP must always anticipate that the court will enquire into proportionality and must always place facts before the court to enable it to make the requisite proportionality assessment."¹⁵³

This, however, should not be understood to have removed the burden from the respondent property owner completely and is an easy exercise for the State to anticipate. Does this then truncate the use of civil forfeiture? Considering the jurisprudence post *Lewis* the answer ought to be in the

¹⁴⁸ "So many Questions with Willie Hofmeyr" 15 April 2007 *Sunday Times*.

¹⁴⁹ In her unpublished (on the AFU server which can only be accessed by staff members) article entitled "The Drug dealer, the Gambler and the Long Arm of Asset Forfeiture Law".

¹⁵⁰ 21.

¹⁵¹ Unreported judgment of the SCA, Case no 502/2004 delivered on 2005-09-29 33-37.

¹⁵² Par 131; and see also *Van Staden* par 9.

¹⁵³ Par 132; and see a contrary view by Mpati, DP in *Prophet* par 37.

negative. It is certainly not the end of the road. It is difficult to quantify the effect of the impact but with the entrenchment of proportionality and the outlined jurisprudence, clearly the AFU's use of civil forfeiture has been significantly limited.

7 THE WAY FORWARD

Simser¹⁵⁴ suggests a reworking of the purpose section of POCA particularly in respect of the objectives of civil forfeiture. Further, he moots for an amendment which codifies proportionality as a concept and the factors that need to be taken into account, similar to the position in the United States where the Civil Asset Forfeiture Reform Act of 2000 (CAFRA) provides a statutory basis for proportionality analysis in civil cases.¹⁵⁵ In other words, instead of relying on the guidelines as pronounced by the courts, South Africa should, argues Simser, enshrine the provisions in a statute¹⁵⁶ because this would be a logical step to bring clarity to the confusion. In a similar vein, Lundberg¹⁵⁷ points out the benefits of such a provision as laying out the timing and the procedure a court should follow in determining the proportionality of forfeiture. Furthermore, she advocates a stipulation that the claimant cannot raise proportionality until after¹⁵⁸ there has been a judgment of forfeiture.

It is apparent that South African courts appreciate the objectives of civil forfeiture and have, like the United States courts, used the Constitution to cushion its effects on property and liberty rights. It is submitted that the jurisprudence is now reasonably clear on the proportionality analysis but does need further adjudication on specific aspects which might hopefully be found in the judgments from the Full Bench or the SCA in *George Smith* and

¹⁵⁴ 22.

¹⁵⁵ Title 18, s 983(g) provides that (1) The claimant may petition the court to determine whether the forfeiture was constitutionally excessive. (2) In making this determination, the court shall compare the forfeiture to the gravity of the offence giving rise to the forfeiture. (3) The claimant shall have the burden of establishing that the forfeiture is grossly disproportional by a preponderance of the evidence at a hearing conducted by the court without a jury. (4) If the court finds that the forfeiture is grossly disproportional to the offence it shall reduce or eliminate the forfeiture as necessary to avoid a violation of the Excessive Fines Clause of the Eighth Amendment of the Constitution.

¹⁵⁶ It is suggested that the South Africans version of such a proposed amendment would probably read as follows and be inserted in POCA as s 52A: Proportionality. – (1) The High Court may, on application – (a) under section 48(3); or (b) by a person referred to in s 49(1), and when it makes a forfeiture order determine whether the forfeiture is constitutionally disproportional. (2) In making this determination, the court shall compare the forfeiture to the gravity of the offence giving rise to the forfeiture and balance the public interest in effective crime fighting and the interests of private-property owners affected by forfeiture laws. (3) The applicant shall have the burden on the balance of probabilities of establishing that the forfeiture is disproportional at a hearing conducted by the court. (4) If the court finds that the forfeiture is disproportional to the offence it shall reduce or eliminate the forfeiture as necessary to avoid a violation of the Constitution.

¹⁵⁷ In an unpublished (on the AFU server which can only be accessed by staff members) article entitled "Forfeiture and Proportionality – A United States Perspective" 4.

¹⁵⁸ In South Africa a property owner does not have to wait for a forfeiture declaration before raising proportionality or not of the forfeiture. Bearing in mind the draconian nature of POCA, it is submitted that this is the correct and preferable approach.

Gigaba. Perhaps the courts are now in fact required to engage themselves in a precise mathematical formulation of means and ends.¹⁵⁹

In any event, the constitutional imperative transcends civil-litigation cases and is not unique to civil forfeiture. What additional effects will its codification thus have on civil forfeiture? Other than spelling out the matter of onus and the factors to consider when determining proportionality (which are already known), the proposed amendment will not assist civil-forfeiture litigation and law enforcement in any other novel way; it will certainly not remove the perceived limiting effect of the proportionality analysis.

What then is the way forward? It is submitted that the AFU should accept that, like the Constitution, the proportionality analysis is here to stay. The solution lies in the AFU's careful selection of cases (that is, avoiding cases with possible "topping up" issues or individual wrongdoing and forfeiture of immovable property particularly where the courts might be sympathetic to property owners and targeting cases with POCA/ organized crime offences). It should draft court papers and articulate its cases in a constitutionally permissible manner and in such a way that the "confused" jurisprudence is realigned to reflect the international instrumentality approach that Simser is advocating. That is, civil forfeiture should follow a three-staged approach (instrumentality, exclusion and proportionality analysis) in terms of which the burden for the constitutional imperative would be on the property owner. Although the courts agree that asset forfeiture applies both to organized crime and individual wrongdoing, the case law indicates that the proportionality analysis is more likely to be invoked in the latter cases to dismiss forfeiture applications. It is submitted that adherence to these guidelines will lead to the creation of a flexible and workable body of jurisprudence that will assist in the fight against crime while remaining sensitive to hard-won constitutional imperatives.

¹⁵⁹ *Prophet* par 36, where the court was of the view that it was not required to do so.