



CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 280/18

In the matter between:

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS

Applicant

and

GESIENA MARIA BOTHA N.O.

First Respondent

ANGELIQUE BOTHA N.O.

Second Respondent

Neutral citation: *National Director of Public Prosecutions v Botha N.O. and Another* [2020] ZACC 6

Coram: Mogoeng CJ, Froneman J, Jafta J, Khampepe J, Madlanga J, Mhlantla J, Theron J and Victor AJ

Judgments: Victor AJ: (minority) [1] to [99]
Jafta J (majority): [100] to [131]

Heard on: 5 September 2019

Decided on: 26 March 2020

Summary: Section 50(1) of the Prevention of Organised Crime Act 121 of 1998 — forfeiture of unlawful proceeds — proportionality analysis

ORDER

On appeal from the Supreme Court of Appeal (hearing an appeal from the High Court of South Africa, Northern Cape Division, Kimberley):

1. Leave to appeal is granted.
2. The appeal is upheld.
3. Paragraphs 1(a) and 1(d) of the Supreme Court of Appeal order are set aside.
4. The first respondent must pay an amount of R1 169 068.49 to the state within a period of six months from the date of this order into the criminal assets recovery account number 8030 3056, held at the South African Reserve Bank.
5. Proof of payment must be furnished in writing to the appointed curator bonis.
6. Failing payment, the appointed curator bonis is authorised to sell the property, Erf 3432, Kimberley, also known as 12 Jawno Street, Kimberley, by public auction or private treaty, at a reasonable price to the highest bidder and, subject to the rights of secured creditors, to pay the sum of R1 169 068.49 into the account mentioned in paragraph 4 above and to disburse the net proceeds, after incidental expenses, to the estate of the late Yolanda Rachel Botha, number 394/2015.

JUDGMENT

VICTOR AJ (Froneman J and Khampepe J concurring):

Introduction

[1] Bribery and corruption in public procurement have become systemic in South African society. Corruption affects us all. It intersects at points of social, political, economic and ethical discourse with no end in sight and thus remains an elusive

malignancy slowly eroding our hard-won democracy. Whilst stories of the high-profile looters reach the media, the more low-key public officials who sit behind their desks committing acts of public procurement corruption with disturbing frequency may ultimately have an even greater catastrophic effect on our economy and society. In this case a bureaucrat who was a senior official in charge of public procurement was involved in bribery and corruption resulting in the loss of billions of rands for the Northern Cape Province and the Country.¹

[2] The enactment of various statutes including the Prevention of Organised Crime Act² (POCA) and the Prevention and Combating of Corrupt Activities Act³ (PCCA) casts a wide net to address many categories of this rampant crime and others in our country. The preamble to the PCCA addresses this by stating that—

“corruption and related corrupt activities undermine the rights [enshrined in the Bill of Rights], endanger the stability and security of societies, undermine the institutions and values of democracy and ethical values and morality, jeopardise sustainable development, the rule of law and the credibility of governments, and provide a breeding ground for organised crime.”

[3] Public resources are largely beneficial to poor people, it is they who suffer the harmful effects of corruption most grievously.⁴ Corruption has become “an albatross” around the neck of economic growth and a major hurdle to economic development.⁵

¹ *National Director of Public Prosecutions v Botha* [2016] ZANHC 89 (High Court judgment) at para 17.

² 121 of 1998.

³ 12 of 2004.

⁴ *Glenister v President of the Republic of South Africa* [2011] ZACC 6; 2011 (3) SA 347 (CC); 2011 (7) BCLR 651 (CC) (*Glenister II*) at para 167 referred to what Kofi Annan observed:

“This evil phenomenon is found in all countries big and small, rich and poor but it is in the developing world that its effects are most destructive. Corruption hurts the poor disproportionately by diverting funds intended for development, undermining a government's ability to provide basic services, feeding inequality and injustice, and discouraging foreign investment and aid. Corruption is a key element in economic under-performance, and a major obstacle to poverty alleviation and development.”

⁵ Angelo Dalli “Corruption is the Scourge of the Earth” Malta Unrepentant (26 May 2017) available at <https://www.maltaunrepentant.com/2017/05/corruption-is-the-scurge-of-the-earth.html>.

[4] The narrow factual issue in this case – which it is helpful to set out now – concerns the following fact pattern. Ms Yolanda Rachel Botha, (Ms Botha) now deceased,⁶ received a corrupt benefit of R1 169 068.49 in renovations to her residential property. She then “paid back” R411 054.66 to the company that carried out those renovations. She not contest that she must forfeit *something*; but how much? Should she forfeit the full R1 169 068.49, or should account be taken of the amount “paid back”, so she forfeits R758 013.83?

[5] There are, broadly speaking, two legal issues to be decided in this case. The first is whether a court is required to apply a form of proportionality assessment to a forfeiture order under section 50(1)(b) of POCA in respect of proceeds of crime. This requires us to consider the scope of section 25(1) of the Constitution and the correct interpretation of POCA. The second, is how any proportionality assessment is to be carried out.

Background

[6] Ms Botha, was the Head of Department (HOD) of the Northern Cape Department of Social Services and Population Development from January 2001 until April 2009. As the HOD, she held the rank of Deputy Director General and was the most senior functionary of the Department.

[7] In the course of her position as HOD, she embarked on an unprecedented scale of corruption by awarding tenders to a company known as Trifecta Investment Holdings (Pty) Ltd (Trifecta) for the lease of government premises. Trifecta would acquire well-constructed but rundown buildings within the Northern Cape Province. Trifecta would then renovate these buildings to lease to government departments at lucrative and exorbitant rates. For example, one property was rented at R74.40 per square metre when its fair market value was R40 per square metre thereby resulting in the state paying almost double the value of the leased property. Ultimately the loss to the state was in

⁶ On 28 December 2014, Ms Botha passed away during the course of her criminal proceedings.

the order of R26 billion and if the leases were carried to term would mean a loss of R57 billion.

[8] Trifecta received billions of rands as a result of these corrupt business opportunities. In exchange, in September 2009, Trifecta started renovation works on Ms Botha's family home.⁷ These renovations cost R1 169 068.49.⁸ On 28 February 2010, Ms Botha issued a certificate of indebtedness to Trifecta in the amount of R500 000. On 10 March 2010, a "loan agreement" was concluded between Trifecta and Ms Botha for the value of R500 000.⁹ It will be appreciated that both the certificate of indebtedness and the "loan agreement" were for far less than the cost of the renovations.

[9] In 2010, Ms Botha left her employment as HOD and was elected to Parliament. Unsurprisingly, she did not declare the gratifications she had received from Trifecta as she was required to under the relevant Code of Ethical Conduct for Members of Parliament.¹⁰ On 11 February 2011, after a press report in the Mail & Guardian newspaper, a parliamentary inquiry was launched into these alleged breaches (the parliamentary inquiry). Ms Botha's defence in her affidavit to the parliamentary inquiry was, in essence, that she had received no benefit from Trifecta because she was required to repay the sums that Trifecta had spent on renovating her home:

"as is evidence (sic) from the acknowledgement of debt agreement, I have to repay the amount that I had borrowed from Trifecta and as a result of this there can be no benefit for me."

⁷ High Court judgment above n 1 at para 23. Ms Botha received other benefits, but these are not in issue in the present case.

⁸ Id at para 49.

⁹ Id at para 24.

¹⁰ The Report of the Joint Committee on Ethics and Members' Interests on the Complaint Against Ms Botha, dated 16 November 2011, in para 3 stated that, "Members of Parliament are required to declare all '*registrable interest*' and '*benefits in case or in kind*'. This includes in terms of paragraph 7(g) the nature and source of any other benefit of a material nature; and the value of that benefit".

[10] The parliamentary committee (the committee), in a report published in November 2011, concluded that Ms Botha had breached the Code of Ethics on two broad fronts. First, she was guilty of receiving a benefit from an improper or generally corrupt relationship with Trifecta. In so doing, it rejected as untrue her defence in which she claimed “that the cost of the renovations were covered by a loan for R500 000”. Second, and importantly, she was found guilty of having misled the parliamentary committee. I quote the relevant portion of the report:

- “(i) The invoices submitted [by Trifecta] reflected that the last costs relating to the renovations were in October 2010 and the amount at that time exceeded R1.2 million. Despite this Ms Botha submitted the loan agreement with a value of R500 000 to try to prove that the cost of the renovations were in fact a loan.
- (ii) When it became evident that Ms Botha could not refute the total costs of the renovations she made a further submission under oath that the error was due to the fact that she had no legal background. The Panel rejects her assertion on the basis that a former [HOD] responsible for managing a department with a large budget cannot claim to be unable to understand a letter requesting the full costs of renovations to her home.”

[11] In other words, Ms Botha was found to have received an improper benefit, and to have attempted to cover this up by reference to what was, in effect, a sham loan agreement.

[12] I interpose to add that Ms Botha, while the inquiry was ongoing, paid certain sums to Trifecta. Namely, on 9 April 2011, she purported to repay the loan in an amount of R371 054.66 from her Government Employees Pension Fund and a further R40 000 on 28 April 2011, amounting to a total of R411 054.66.¹¹

[13] Thereafter, she together with others, was charged by the National Director of Public Prosecutions (NDPP) with offences of tender corruption and other offences of

¹¹ High Court judgment above n 1 at para 25.

corruption. The factual bases of these offences largely overlap with the ethical breaches considered by the committee.¹² All that need be noted is that Ms Botha – while not technically found guilty as she passed away before the High Court handed down – was judgment, was the subject of adverse findings by the High Court.¹³

[14] The NDPP then sought a civil forfeiture order, in respect of the proceeds of Ms Botha’s offences under Chapter 6 of POCA.¹⁴ It is this forfeiture order which is civil in nature that is now before this Court.

Litigation history

High Court

[15] The High Court had to determine an application brought in terms of section 48(1)¹⁵ and section 50¹⁶ of POCA for the forfeiture of *inter alia* (amongst other

¹² *Botha N.O. v National Director of Public Prosecutions* [2018] ZASCA 146; 2018 JDR 2093 (SCA) (Supreme Court of Appeal judgment) at para 7.

¹³ *Id* at para 8.

¹⁴ *Id* at para 2.

¹⁵ Section 48(1) of POCA is titled “application for forfeiture order” and provides as follows:

“If a preservation of property order is in force the National Director may apply to a High Court for an order forfeiting to the state all or any of the property that is subject to the preservation of property order.”

¹⁶ Section 50 of POCA reads as follows:

“(1) The High Court shall, subject to section 52, make an order applied for under section 48(1) if the Court finds on a balance of probabilities that the property concerned—

- (a) is an instrumentality of an offence referred to in schedule 1;
- (b) is the proceeds of unlawful activities; or
- (c) is property associated with terrorist and related activities

(2) The High Court may, when it makes a forfeiture order or at any time thereafter, make any ancillary orders that it considers appropriate, including orders for and with respect to facilitating the transfer to the state of property forfeited to the state under such an order.

(3) The absence of a person whose interest in property may be affected by a forfeiture order does not prevent the High Court from making the order.

(4) The validity of an order under subsection (1) is not affected by the outcome of criminal proceedings, or of an investigation with a view to institute such proceedings, in respect of an offence with which the property concerned is in some way associated.

things) the renovations to the property.¹⁷ The High Court concluded that the renovations were indeed, on the balance of probabilities, “the proceeds of unlawful activities” under section 50(1)(b) of POCA, and ordered forfeiture of the entire property.¹⁸

Supreme Court of Appeal

[16] The Supreme Court of Appeal agreed with the High Court that the renovations were indeed, on the balance of probabilities, proceeds of corruption and money laundering and hence fell within the scope of section 50(1)(b) of POCA.¹⁹ It then turned to a proportionality analysis whose purpose, the Court reasoned, was “to determine whether the grant of a forfeiture order would amount to an arbitrary deprivation of property in contravention of section 25(1) of the Constitution”.²⁰

[17] The Supreme Court of Appeal held that it was wrong to have forfeited the entire property which, first, was acquired by means of a legitimate bank loan in 2004 long before the events giving rise to the POCA application, and second, the NDPP had applied only for the forfeiture of the *value of the renovations* and not for the forfeiture of the *entire property*.²¹

[18] Instead, the Supreme Court of Appeal ordered R758 014.83 to be forfeited.²² Although its reasoning was terse, it effectively reasoned along the lines that Ms Botha

(5) The Registrar of the Court making a forfeiture order must publish a notice thereof in the Gazette as soon as practicable after the order is made.

(6) A forfeiture order shall not take effect –

(a) before the period allowed for an application under section 54 or an appeal under section 55 has expired; or

(b) before such an application or appeal has been disposed of.”

¹⁷ High Court judgment above n 1 at para 1.

¹⁸ Id at para 59.

¹⁹ Supreme Court of Appeal judgment above n 12 at para 39.

²⁰ Id at para 40.

²¹ Id at paras 42-5.

²² Id at para 46.

had repaid funds to Trifecta and that those funds had to be taken into account in the amount to be forfeited:

“[I]t is not disputed that the deceased paid an amount of R411 054.66 to Trifecta as part of the costs expended on the renovations. Mr Malan calculated the renovation costs at R1 169 068.49. Therefore the amount paid by the deceased has to be deducted from the renovation costs.”²³

In this Court

[19] The NDPP approaches this Court seeking to set aside the part of the Supreme Court of Appeal order that ordered the first respondent to pay R758 014.83 instead of R1 169 068.49.

[20] The Chief Justice issued directions on 27 February 2019 calling for written submissions on, *inter alia*, whether unlawful proceeds constitute property and whether a proportionality enquiry would apply to the forfeiture of proceeds of unlawful activities under section 50 of POCA.²⁴

Issues

[21] The issues for determination are:

1. Does section 25(1) of the Constitution protect the unlawful proceeds of crime from arbitrary deprivation?
2. Does the doctrine of proportionality apply to both instrumentality and proceeds of unlawful activity in terms of section 50 of POCA?
3. If so, how does the doctrine of proportionality apply here?

²³ Id at para 44.

²⁴ The directions requested written submissions on the following questions:

- “(a) whether a proportionality enquiry applies to forfeiture of proceeds of unlawful activities under section 50 of the Prevention of Organised Crime Act 121 of 2008 (POCA);
- (b) the proper approach to whether property subject to a preservation order should be forfeited under section 50(1)(b) of POCA; and
- (c) whether any payments made by the late Ms Botha under the ostensible loan agreement should be considered in determining the proceeds of unlawful activities to be forfeited under section 50 of POCA, and if so, on what basis.”

Jurisdiction and leave to appeal

[22] The issue before this Court raises a novel constitutional question on whether unlawful proceeds amount to property and whether the forfeiture of unlawful proceeds amounts to an arbitrary deprivation of property in terms of section 25(1) of the Constitution.²⁵ A further question which must be determined in tandem is whether the principle of proportionality applies to both instrumentality and proceeds from unlawful activities.

[23] In this Court, it was common cause that the renovation was the result of unlawful proceeds of crime. Clarity on the extension of the proportionality doctrine to forfeiture of unlawful proceeds is necessary and raises the question whether our law should accommodate this extension. Much of the current case law on forfeiture of property and proportionality relates to the forfeiture of the instrumentality of a crime and not to unlawful proceeds.²⁶

[24] This matter relates to the interpretation of section 25(1) of the Constitution. This matter involves a constitutional issue and therefore engages this Court's jurisdiction.

[25] The decisions of the courts below are divergent and therefore it requires this Court to make a definitive pronouncement on the issue. It is against this background that I grant leave to appeal.

²⁵ Section 25(1) of the Constitution, provides that—

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

²⁶ *Mohunram v National Director of Public Prosecutions (Law Review Project as Amicus Curiae)* [2007] ZACC 4; 2007 (4) SA 222 (CC); 2007 (6) BCLR 575 (CC); *Prophet v National Director of Public Prosecutions* [2006] ZACC 17; 2006 (2) SACR 525 (CC); 2007 (2) BCLR 140 (CC); and *National Director of Public Prosecutions v R O Cook Properties (Pty) Ltd; National Director of Public Prosecutions v 37 Gillespie Street Durban (Pty) Ltd; National Director of Public Prosecutions v Seevnaravan* [2004] ZASCA 36; 2004 (2) SACR 208 (SCA).

Merits

[26] I propose a four-fold approach to the analysis:

1. An overview of the legislative framework;
2. An examination of why a proportionality analysis is required by section 25(1) of the Constitution when a court orders forfeiture of proceeds under section 50(1)(b) of POCA;
3. How a proportionality analysis is to be carried out in respect of such orders; and
4. Why, on the facts of this case, it is not disproportionate for the full R1 169 068.49 to be forfeited.

Overview of the legislative framework

[27] POCA seeks to establish a civil mechanism to forfeit wrongfully gained property.²⁷ The rationale is, in essence, that no one should profit from their own wrong.²⁸

[28] The civil mechanism is two-fold. The first step, with which we are not concerned with in this case, is for the NDPP to make an application to the High Court for a preservation order under section 48 of POCA. The effect of that order is that persons are prohibited from dealing in any manner with the property. Second, the NDPP may apply for a forfeiture order in respect of the property which is subject to the preservation

²⁷ The preamble to POCA states that “[i]t is necessary to provide for a civil remedy for the preservation and seizure, and forfeiture of property which is derived from unlawful activities or is concerned in the commission or suspected commission of an offence.”

²⁸ The preamble to POCA further states that “[n]o person should benefit from the fruits of unlawful activities, nor is any person entitled to use property for the commission of an offence.”

There are other aims, noted by Van Heerden J in *Mohunram* above n 26 at para 57—

“the broader societal purposes served by civil forfeiture under Chapter 6 of POCA have been held to include: removing incentives for crime; deterring persons from using or allowing their properties to be used in crime; eliminating or incapacitating some of the means by which crime may be committed; and advancing the ends of justice by depriving those involved in crime of the property concerned”

order and this is the step we are concerned with. If a forfeiture order is granted, the property is forfeited to the state.²⁹

[29] The grant of a forfeiture order is civil in nature and is not dependent on there being a prior conviction for a criminal offence. So much is borne out by a contrast between Chapter 5 of POCA, which provides for confiscation orders that bite only upon conviction of a criminal offence³⁰ and Chapter 6 of POCA, which provides for forfeiture orders.

[30] The test for granting a forfeiture order is laid down in section 50 of POCA:

- “(1) The High Court shall, subject to section 52, make an order applied for under section 48(1) if the Court finds on the balance of probabilities that the property concerned—
- (a) is an instrumentality of an offence referred to in Schedule 1;
 - (b) is the proceeds of unlawful activities.”

[31] The purposes of section 50 in the context of Chapter 6 of POCA were helpfully explained by this Court in *Mohamed* as follows:

“Chapter 6 [POCA] provides for forfeiture in circumstances where it is established, on a balance of probabilities, that property has been used to commit an offence, or constitutes the proceeds of unlawful activities, even where no criminal proceedings in respect of the relevant crimes have been instituted. In this respect, Chapter 6 needs to be understood in contradistinction to Chapter 5 of [POCA]. Chapter 6 is therefore focused, not on wrongdoers, but on property that has been used to commit an offence

²⁹ Section 56(2) of POCA.

³⁰ Section 18(1) of POCA reads:

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

or which constitutes the proceeds of crime. The guilt or wrongdoing of the owners or possessors of property is, therefore, not primarily relevant to the proceedings.”³¹

[32] A forfeiture order can therefore be granted in respect of two different types of property. The first, is property which is used to commit an offence that is the “instrumentality forfeiture orders”.³² The second, is property which is the proceeds of unlawful activities or “proceeds forfeiture orders”.³³

[33] The language of section 50 of POCA leaves no discretion to a court. If property has been shown, on the balance of probabilities, to fall within either section 50(1)(a) or section 50(1)(b), then the court must order its forfeiture unless section 52 can be relied upon. This, as has been noted, is an invasive order. Moseneke DCJ, noting that such orders are “draconian”, put the point as follows:

“Civil asset forfeiture constitutes a serious incursion into well-entrenched civil protections particularly those against arbitrary and excessive punishment and against arbitrary confiscation of property. Courts in this country and elsewhere have generally been astute to the fact that forfeiture of the instrumentalities of crime can produce arbitrary and unjust consequences.”³⁴

[34] There is an established line of authority, in respect of section 50(1)(a) of POCA that once the “threshold of establishing that the property is an instrumentality of an offence has been met”,³⁵ this requires a court to carry out a proportionality analysis to determine whether the forfeiture would be disproportionate and is mandated by section 25(1) of the Constitution, which precludes arbitrary deprivation of property. The two leading authorities are *Prophet* and *Mohunram*, which are worth considering now.

³¹ *National Director of Public Prosecutions v Mohamed N.O.* [2002] ZACC 9; 2002 (4) SA 843 (CC); 2002 (9) BCLR 970 (CC) (*Mohamed*) at para 17.

³² Section 50(1)(a) of POCA.

³³ Section 50(1)(b) of POCA.

³⁴ *Mohunram* above n 26 at para 120.

³⁵ *Prophet* above n 26 at para 58.

[35] At issue in *Prophet*, was an order for the forfeiture of the applicant's house.³⁶ He used this house to manufacture methamphetamine, and there was evidence to the effect that "all the five rooms of the house and the garage on the property were used for illegal drug manufacturing activities."³⁷ The Court concluded that it was, on the balance of probabilities, a house used as the instrumentality of a drug offence.³⁸

[36] The judgment then went on to consider the question whether it would be proportionate to forfeit the house. Nkabinde J, writing in the unanimous judgment of the Court, reasoned:

"Civil forfeiture provides a unique remedy used as a measure to combat organised crime. It rests on the legal fiction that the property and not the owner has contravened the law. It does not require a conviction or even a criminal charge against the owner. This kind of forfeiture is in theory seen as remedial and not punitive. The general approach to forfeiture once the threshold of establishing that the property is an instrumentality of an offence has been met is to embark upon a proportionality enquiry – weighing the severity of the interference with individual rights to property against the extent to which the property was used for the purposes of the commission of the offence, bearing in mind the nature of the offence.

...

While the purpose and object of Chapter 6 must be considered when a forfeiture order is sought, one should be mindful of the fact that unrestrained application of Chapter 6 may violate constitutional rights, in particular the protection against arbitrary deprivation of property particularly within the meaning of section 25(1) of the Constitution, which requires that "no law may permit arbitrary deprivation of property".³⁹

³⁶ Id at para 14.

³⁷ Id at para 57.

³⁸ Id at paras 57-8 and 61.

³⁹ Id at paras 58 and 61.

[37] In *Mohunram* at issue was an order for the forfeiture of property belonging to the applicant on which an unlicensed casino was operated.⁴⁰ It was held, unanimously, that the property was indeed an instrumentality of the offence; that, in the words of Van Heerden AJ in a minority judgment that “it was not possible to commit the offence without using the property”.⁴¹ The Court was unanimous that there should be a proportionality enquiry.

[38] To that end, Van Heerden AJ explained the nature of the proportionality analysis required in terms of section 25(1) of the Constitution as follows:

“Turning now to the question of proportionality, the purpose of the proportionality enquiry is to determine whether the grant of a forfeiture order would amount to an arbitrary deprivation of property in contravention of section 25(1) of the Constitution.

The proper application of a proportionality analysis weighs the forfeiture and, in particular, its effect on the owner concerned, on the one hand, against the purposes the forfeiture serves, on the other.”⁴²

[39] Moseneke DCJ explained the approach that courts should take in pursuance of section 50(1) of POCA in this way. I emphasise in italics the relevant segments of this passage:

“[S]ection 50(1) of [POCA] is couched in peremptory terms. It provides that a court “shall” make a forfeiture order if it finds on the civil standard of balance of probabilities that the property sought to be forfeited is an instrumentality of an offence. *Textually, once the instrumentality threshold has been met, courts must authorise forfeiture. However, courts have consistently interpreted ‘shall’ to mean ‘may’.* They have correctly held all requests by state prosecutors for civil forfeiture to the standard of proportionality which amounts to no more than that the forfeiture should not constitute

⁴⁰ *Mohunram* above n 26 at para 49. More precisely, the property belonged to Shelgate Investments CC, over which the applicant held a 100% member’s interest.

⁴¹ *Id.*

⁴² *Id.* at paras 56-7.

arbitrary deprivation of property or the kind of punishment not permitted by section 12(1)(e) of the Constitution.

...

I have intimated earlier that proportionality is not a statutory requirement but an equitable requirement that has been developed by the courts to curb excesses of civil forfeiture. Put otherwise, *the requirement of proportionality is a constitutional imperative. It is imposed not by the relevant statute but by constitutional disdain for arbitrary dispossession of property and unwarranted or excessive punishment.*⁴³

[40] Finally, Sachs J wrote that:

“Although the concept of proportionality is not expressly mentioned in POCA, this Court and the Supreme Court of Appeal have accepted that proportionality is a governing principle imposing limits on how the powers granted under POCA may be exercised. . . . In approaching the question of proportionality in relation to the forfeiture of an instrumentality of an offence, it is necessary to weigh the purpose of the legislation against the effect of the forfeiture on the affected person.”⁴⁴

[41] The net effect of *Prophet* and *Mohunram*, therefore, is that the draconian effect of a forfeiture order is mitigated by the application of a proportionality analysis. Where section 50(1) says “shall”, the court reads “may, if proportionate.” So much is required by section 25(1) of the Constitution.

[42] However, both *Prophet* and *Mohunram* deal with the forfeiture of property used as the instrumentality of an offence under section 50(1)(a) of POCA. The question that one must ask in this case is whether the reasoning extends to the forfeiture of proceeds under section 50(1)(b) of POCA.

⁴³ Id at paras 121 and 130.

⁴⁴ Id at paras 142-3.

Does forfeiture of proceeds under section 50(1)(b) require a proportionality analysis?

[43] The NDPP argued that the word “property” in section 25(1) of the Constitution, does not include unlawful proceeds. It submitted that once a court finds on a balance of probabilities, that there are proceeds of unlawful activities, these proceeds remain such until forfeited or confiscated.

[44] The respondents, on the other hand, submit that property obtained from unlawful activities should enjoy protection under section 25(1) of the Constitution. As their argument goes, this Court, in *Prophet*⁴⁵ and *Mohunram*⁴⁶, held that property used as the instrumentality of an offence, and which falls within the scope of section 50(1)(a) of POCA is indeed covered by section 25(1) of the Constitution. That same reasoning should apply, they claim, to the forfeiture of unlawful proceeds under section 50(1)(b).

[45] As adverted to earlier, the parties agree that the conditions for a forfeiture order have been met; the question is the quantum. The parties agree that forfeiture of property used as the instrumentality of an offence under section 50(1)(a) of POCA does attract the protection of section 25(1) of the Constitution and does indeed require the court to conduct a proportionality analysis.

[46] This means that the issue before this Court, is a narrow one. The question is, should the proportionality analysis as applicable to forfeiture of instruments of crime under section 50(1)(a) of POCA, apply to the forfeiture of proceeds of crime under section 50(1)(b) of POCA?

[47] Section 25(1) of the Constitution provides that “no one may be deprived of property except in terms of a law of general application and no law may permit arbitrary deprivation of property.” I must immediately express keen appreciation for concerns that may be raised in relation to protecting something unlawful as in this case, the

⁴⁵ *Prophet* above n 26 at para 46.

⁴⁶ *Mohunram* above n 26 at para 9.

unlawful proceeds of crime. Bluntly, why would the Constitution protect the fruits of unlawfulness? I remain unconvinced, however, that the Constitution does not protect unlawfully acquired property against arbitrary deprivation.

[48] First, to protect only lawfully acquired property goes against the textual grain of section 25. That section refers to the fact that “no one may be deprived of property”. There is no *a priori* (from the former) requirement of lawfulness for determining whether the property in question is protected. The section does not state that “no one may be deprived of *their lawful* property” or of “property *rights*”. Thus, the provenance of the enjoyment of the property is not a prerequisite for the enjoyment of the legal protection of non-arbitrariness which section 25(1) confers. A textual analysis of section 25(1) of the Constitution does not suggest a requirement of lawfulness, as being fundamental to considering whether property requires protection.

[49] The fact that the money or car or thing may be stolen or otherwise unlawfully acquired cannot change the fact that it is property. If it was not lawfully acquired, the deprivation of the property from the holder will not, after assessment, be arbitrary under section 25(1) of the Constitution. Lawfulness need not be a requirement for a thing to classify as “property” because lawfulness may be a requirement for ownership.⁴⁷ In a case such as this where the property is acquired as proceeds of a crime, the deprivation is obviously not arbitrary. This is because although such proceeds are “property”, the negative right in section 25(1) only extends protection against the arbitrary deprivation of such property. On this basis, one can therefore recognise unlawful proceeds as property for purposes of section 25(1) but still hold that section 25(1) is not infringed through the forfeiture of unlawful proceeds.

[50] This Court has accepted that where the requisite threshold for instrumentality has been reached and that property is put to unlawful use, it is property that falls within

⁴⁷ Given our history of landownership and dispossession, there are good reasons why lawful ownership is not a requirement for classifying something as “property”.

the category of section 50(1)(a) of POCA.⁴⁸ It is indeed protected by section 25(1) of the Constitution. Thus, to claim that the Constitution does not protect unlawful proceeds against arbitrary deprivation, one would have to accept that there is a difference between, on the one hand, unlawfully *acquired* property (which does not benefit from the protection of section 25(1) of the Constitution) and, on the other, property which was lawfully acquired but put to an unlawful *use*.

[51] On the one hand, neither *Prophet* nor *Mohunram* distinguish between forfeiture orders under section 50(1)(a) and section 50(1)(b) of POCA. *Prophet* requires a proportionality analysis to temper the “unrestrained application of Chapter 6 [which] may [otherwise] violate constitutional rights”, without differentiating between section 50(1)(a) and section 50(1)(b).⁴⁹ Indeed, *Mohunram* in the minority judgment tells us to “always be sensitive to and on . . . guard against” disproportionate forfeiture orders regardless of whether such orders forfeit proceeds or the instruments of crime.⁵⁰ These are not isolated quotations. None of the judgments distinguish between the different subjects of forfeiture orders.

[52] On the other hand, such a technical approach is inconsistent with a broad and fact-sensitive approach the Court has taken to property rights under section 25(1) of the Constitution.⁵¹ This Court has repeatedly affirmed that in light of our history, property in section 25(1) of the Constitution should be given a wide meaning which may incorporate various forms of interests in various categories of property.⁵²

⁴⁸ *Prophet* above n 26 at para 58.

⁴⁹ *Id* at para 61.

⁵⁰ *Mohunram* above n 26 at para 56.

⁵¹ *National Credit Regulator v Opperman* [2012] ZACC 29; 2013 (2) SA 1 (CC); 2013 (2) BCLR 170 (CC) at paras 61 and 63-4. See also *Law Society of South Africa v Minister of Transport* [2010] ZACC 25; 2011 (1) SA 400 (CC); 2011 (2) BCLR 150 (CC) (*Law Society*) at para 83.

⁵² *Law Society* *id*.

[53] In *FNB*⁵³ Ackerman J writing for this Court stated:

“At this stage of our constitutional jurisprudence it is, for the reasons given above, practically impossible to furnish – and judicially unwise to attempt – a comprehensive definition of property for purposes of section 25. Such difficulties do not, however, arise in the present case. Here it is sufficient to hold that ownership of a corporeal movable must – as must ownership of land – lie at the heart of our constitutional concept of property, both as regards the nature of the right involved as well as the object of the right and must therefore, in principle, enjoy the protection of section 25.”⁵⁴

[54] Further, Froneman J in *Shoprite Checkers*⁵⁵ held that the interpretation of property must be read in line with the constitutional values pursuant to section 39(2) of the Constitution and stated:

“[T]o determine what kind of property deserves protection under the property clause cannot be restricted to private law notions of property. To do so would exclude other potential constitutional entitlements that may deserve protection from the ambit of protection under the property clause. It could also inadvertently lead to a failure to subject private law notions of property to constitutional scrutiny in order to ensure that they accord with constitutional norms.”⁵⁶

[55] It is difficult to accept that section 25(1) of the Constitution does not extend to unlawful property. I cannot find that the “constitutional imperative”⁵⁷ of proportionality is limited to forfeiture orders under section 50(1)(a) of POCA alone.

⁵³ *First National Bank of SA Limited t/a Wesbank v Commissioner for the South African Revenue Services; First National Bank of SA Limited t/a Wesbank v Minister of Finance* [2002] ZACC 5; 2002 (4) SA 768 (CC); 2002 (7) BCLR 702 (CC) (*FNB*).

⁵⁴ *Id* at para 51.

⁵⁵ *Shoprite Checkers (Pty) Limited v Member of the Executive Council for Economic Development, Environmental Affairs and Tourism, Eastern Cape* [2015] ZACC 23; 2015 (6) SA 125 (CC); 2015 (9) BCLR 1052 (CC) (*Shoprite Checkers*).

⁵⁶ *Id* at para 46.

⁵⁷ I reference the term used by Moseneke DCJ in *Mohunram* above n 26 at para 130.

[56] In this regard, I think it beneficial to address head on the contention that the Constitution does not protect unlawfulness, and that to do so would be contrary to the rule of law. This is simply incorrect. This is because although such proceeds are “property”, the negative right in section 25(1) of the Constitution only extends protection against the arbitrary deprivation of such property.

[57] This is why one can recognise unlawful proceeds as “property” for purposes of section 25(1) but still hold that section 25(1) is not infringed through the forfeiture of unlawful proceeds. Could a policeman, for example, consistently with section 25(1), vexatiously remove his neighbour’s car (which is in fact stolen) where the policeman had failed to follow procedures?

[58] There very well may be scenarios where section 25(1) would not find application to proceeds of crime. The upshot of this is that it should be case specific depending on the particular and peculiar facts before a court and that, generally, the unlawfulness of the interest goes to the arbitrariness of the deprivation as opposed to whether there is constitutional protection at all.

[59] Moving beyond the case of section 25(1), it is also clear that the Constitution does not turn its back on situations that arise out of unlawful activity. The family life of those who sojourn here illegally is protected, in certain circumstances, by the Constitution.⁵⁸

[60] The notion that section 25(1) extends to unlawful property is consistent with the nature of the right in section 25(1). Critically, section 25(1) does not *confer* the right to property in and of itself as a positive right. It does not say, for example, that X person is entitled to property Y. It does not grant an allegedly corrupt official the right to their proceeds. Rather it is a negative right that protects from arbitrary state interference. It says that X person is protected from interference in property Y. It grants – even an

⁵⁸ *Dawood v Minister of Home Affairs; Shalabi v Minister of Home Affairs; Thomas v Minister of Home Affairs* [2000] ZACC 8; 2000 (3) SA 936 (CC); 2000 (8) BCLR 837 (CC) at paras 38-9 and 58.

allegedly corrupt official – a right against arbitrary state interference in those proceeds after an enquiry.

[61] Hence, when Ms Botha avails herself of her rights under section 25(1) of the Constitution she does not do so to found a right to unlawful proceeds; rather, she seeks to assert a right against the state, and to ensure that the actions of the state, the NDPP and the courts in granting the forfeiture order, are not arbitrary. Putting the point differently, the issue here is not how Ms Botha acquired the property; the question is whether the forfeiture order is arbitrary in requiring Ms Botha to forfeit the entire value of the renovations when – at least ostensibly – she has repaid some of that value.

[62] In short, the focus is on the state's action, not on Ms Botha's. In order to be constitutionally compliant, section 25(1) tells us that a forfeiture order must not be arbitrary. It requires the same regardless of whether the underlying property was lawfully acquired or not.

[63] However, this should not be understood to mean that unlawfully acquired property will enjoy the same degree of protection under the prism of section 25(1) as lawfully acquired property. Indeed, as will be demonstrated subsequently, such property, by virtue of its provenance, enjoys a limited degree of protection in respect of arbitrary deprivation.

[64] I therefore conclude that unlawful proceeds, within the meaning of section 50(1)(a) of POCA, do indeed fall within the scope of section 25(1) of the Constitution.

[65] I turn, now, to POCA. This legislation, in my analysis, also supports the respondent's contention, namely that unlawful proceeds cannot arbitrarily be forfeited under section 50(1)(b) of POCA.⁵⁹

⁵⁹ As a preliminary point, there can be no doubt that the value of the renovations, as a textual matter, falls within the purview of POCA, and, hence, can, in principle, lawfully be forfeited under section 50(1)(a) of POCA which