[66] The key argument is a textual one. Section 50(1) of POCA provides that 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 it may order a forfeiture of the property as envisaged in section 48(1) of POCA."

[67] In analysing the structure and scheme of Chapter 6 of POCA, it is clear that sections 50(1)(a) and (b) define in precise terms the manner in which forfeiture must apply both to the instrumentality of an offence and to unlawful proceeds. The construction of sections 50(1)(a) and 50(1)(b) of POCA does not suggest that the two must be treated differently when it comes to forfeiture. It follows that on a purely textual analysis, the linguistic interpretation to the subsections means the principle pertaining to forfeiture must apply equally to instrumentality and unlawful proceeds. The core purpose of this section demonstrates that the legal effect of the entire statute is to cast the net wide for corrupt activities. That, in my view, is a proper construction as to why the principles pertaining to forfeiture should be applied equally to unlawful proceeds and instrumentality.

[68] Second, this approach coheres with principle. It is not always easy to practically separate and distinguish the "unlawful proceeds" from the "instruments" of an offence. This is particularly so in cases where property is retained by proceeds – where, for example, the rent in a lease is paid using proceeds of crime.[60] *Salie,* for example, dealt with prostitution offences.[61] One of the properties over which the NDPP sought a

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defines proceeds as "*any property* or any service, advantage, benefit or reward". In turn, the definition of "property" contained in section 1 of POCA is defined as "money or other movable, immovable, corporeal or incorporeal thing and includes any rights, privileges, claims and securities and any interest therein and all proceeds thereof." This is, clearly, a broad definition of property which extends to "*any interest therein*" such as the value of the renovations to the property.

[60] One ought to recall that proceeds of unlawful activities is defined in POCA broadly, and includes "any property or any service advantage, benefit or reward which was derived, received or *retained*." Hence, property for which rent is paid from proceeds of crime is, itself, a proceed because it is "retained" through such proceeds.

[61] *National Director of Public Prosecutions v Salie* 2015 (1) SACR 121 (WCC).

forfeiture order, Broad Road property, was alleged to have been used for the purposes of prostitution. The rent for the property was paid from proceeds from prostitution.[62] Thus, on the one hand, Broad Road property could be seen as an instrument of the offence (in allowing the offences of prostitution to be committed), yet, on the other, it could be considered a proceed of the offence (because it was retained as a result of the offences of prostitution). Indeed, the NDPP's case was pleaded on the basis that Broad Road property was an instrument of the offence and, in the alternative, a proceed thereof.[63]

[69] It is, however, difficult to accept that a court would have to conduct a proportionality analysis in respect of one, but not the other, depending on how the NDPP characterised the property in question. It would be artificial and technical to have a separate approach to the forfeiture of property characterised as proceeds and property characterised as the instrument of an offence. This proportionality analysis will naturally yield different results when considering unlawful proceeds as opposed to instrumentality.

[70] As a final point, it is worth considering the position if, contrary to my view, a court is not required to conduct a proportionality analysis in respect of the forfeiture of proceeds of unlawful activities. The answer is that a court would be duty-bound to order the forfeiture of the property unless the narrow exception in section 52 of POCA could be relied upon.[64] In other words, where the state had simply shown that the property in question was more likely than not the proceeds of crime, a court would be required to order its forfeiture. The defence in section 52 is of limited assistance. First,

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[62] Id at para 106.

[63] Id at para 6, the Court held that "[t]he NDPP contends that, on the probabilities, all of the property is the *proceeds* of contraventions of the Sexual Offences Act 23 of 1957" and at para 7 the Court further held that "[t]he NDPP further contends that, on the probabilities, the Broad Road property is an *instrumentality* of those offences."

[64] So much was recognised by Moseneke DCJ in *Mohunram* above n 26 at para 121 where he said:

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

one has to apply for relief from forfeiture. It is not a defence which the court is required to consider *mero motu* (of its own accord). Many may not have the privilege of funds, time and knowledge at their disposal to launch such applications. Second, it is a condition of the defence (when applied for in the context of a forfeiture order dealing with proceeds) that the applicant has "acquired the interest concerned legally and for a consideration".[65] It would not, therefore, extend to the entirely realistic situation where a house had been purchased by A, using proceeds of crime, but their spouse, B, had not contributed to the purchase price or rent of that house. Nor would a court be able to consider a variety of factors that may be relevant in determining whether a forfeiture order was proportionate on the facts of a case.

[71] I recall, in this regard, that this Court has already stressed that a forfeiture order is draconian, as this Court explains because it "constitutes *a serious incursion into well-entrenched civil protections particularly those against arbitrary and excessive punishment and against arbitrary confiscation of property*".[66] Elaborating on the point this Court stated:

> "Statutory civil forfeiture of assets is meant to pursue worthy and noble objectives aimed at curbing serious crime. And there is no gainsaying that, in effect, it is draconian. . . . [T]he prosecution or the state has to show only on a balance of probabilities that the property may be seized and forfeited to the state. The criminal standard of proof does not come into it. When the state seeks civil forfeiture of assets that were used in the commission of a crime, it is not required to show that the owner has been convicted of the offence or that the owner performed an unlawful act with a criminal intent. The initial and central enquiry in asset forfeiture is whether the property is an instrumentality of an offence. If it is, the property is liable to be declared forfeit to the state."[67]

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[65] Section 52(2)(a) of POCA.

[66] *Mohunram* above n 26 at para 120.

[67] Id at para 118. See also, *Mohamed* above n 31 at para 17 where it was explained that—

> "Chapter 6 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. Chapter 6 is therefore focussed, not on wrongdoers, but on property that has been

[72] In short, in failing to adopt a form of proportionality assessment in relation to forfeiture orders that deal with proceeds, a court would fall prey to the very thing that we were warned against in *Prophet*. A court would fail to "be mindful of the fact that unrestrained application of Chapter 6 may violate constitutional rights", or, as I would put it, the court would fail to guard against overreaching and arbitrary orders that do not rationally further the aims of POCA.[68]

[73] It is for these reasons that I find it difficult to accept the NDPP's argument which enjoins the courts to apply different approaches to, on the one hand, forfeiture orders under section 50(1)(a) of POCA which do not require a proportionality analysis, and, on the other hand, forfeiture orders under section 50(1)(b) of POCA which do require a proportionality analysis.

[74] I therefore conclude that the use of the words "*shall order forfeiture*" in section 50(1) of POCA requires a court to conduct a proportionality analysis regardless of whether forfeiture is sought of proceeds of an offence, or the instrumentality of an offence.

Proportionality

[75] Having established that some form of proportionality assessment is required when a court orders forfeiture in respect of proceeds, the question then turns to what form of proportionality is appropriate.

[76] The principle of proportionality has been firmly established in our law. Chaskalson P in *Makwanyane*[69] held:

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used to commit an offence 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."

[68] *Prophet* above n 26 at para 61.

[69] *S v Makwanyane* [1995] ZACC 3; 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC).

> "The limitation of constitutional rights for a purpose that is reasonable and necessary in a democratic society involves the weighing up of competing values, and ultimately an assessment based on proportionality. . . . Principles can be established, but the application of those principles to particular circumstances can only be done on a case-by-case basis. This is inherent in the requirement of proportionality, which calls for the balancing of different interests."[70]

[77] Two points must be made at this juncture.

[78] The first is to note that section 25(1) of the Constitution prohibits an arbitrary deprivation of property. Yet the preceding discussion was couched in terms of proportionality. Does this mean that there are two differing standards at play here? A constitutional standard of arbitrariness, and a POCA one of proportionality? Must a forfeiture order jump both hurdles of arbitrariness and proportionality?

[79] The answer is no. A proportionality analysis ensures that the ordering of forfeiture does not amount to an arbitrary deprivation of property. Clearly, arbitrariness is broader than just disproportionality.[71] This Court stated in *FNB*, and affirmed in *Shoprite Checkers*, that a deprivation of property is arbitrary when the law does not provide sufficient reason for the deprivation or when it is procedurally unfair.[72] A forfeiture order that is *disproportionate* will, in short, be arbitrary. The point was well put, in this context, by the Supreme Court of Appeal in the following terms:

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[70] Id at para 104.

[71] Basedeo "The Law and Practice of Criminal Asset Forfeiture in South African Criminal Procedure: A Constitutional Dilemma" (2014) 17 *PELJ* 1048 at 1059, notes, referring to this Courts decisions in *Prophet* and *Mohunram* the importance of proportionality in the assessment of the constitutional validity of asset forfeiture in terms of POCA. A proportionality analysis requires a weighing of the severity of the interference with an individual's property rights against the extent to which the property was used for purposes of the commission of the offence, taking cognisance of the nature of the offence committed. This Court has further confirmed that proportionality is not a statutory requirement under POCA but is rather an equitable requirement that has been formulated by our courts to curb the excesses of forfeiture.

[72] *FNB* above n 53 at para 100 and *Shoprite Checkers* above n 55 at paras 77 and 80.

> "It is indeed the purpose of the proportionality enquiry to avoid arbitrary deprivation of property and to ameliorate the potentially unjust consequences that could follow if the forfeiture is grossly disproportional to the offence."[73]

[80] That the proportionality enquiry ensures that deprivation of property is not arbitrary is confirmed by the more general case-law on section 25(1). In *FNB*, for example, which dealt, in essence, with the power to sell property to levy taxes without a court order, this Court held that—

> "for the validity of such deprivation [i.e. for such deprivation to not fall foul of section 25], there must be an appropriate relationship between means and ends, between the sacrifice the individual is asked to make and the public purpose this is intended to serve."[74]

[81] Hence, determining what is arbitrary within the meaning of section 25(1) inexorably leads to a balancing act which compares ends – the statutory goal of preventing an individual from benefitting from corruption and means – the forfeiture of property. In other words, a proportionality assessment.

[82] This leads on to the second point, which deals with the standard of the proportionality assessment. It is, in the context of forfeiture orders in respect of proceeds under section 50(1)(b) of POCA, a strict proportionality assessment. It requires, overall, the court to consider whether the aims of POCA would rationally be furthered by the forfeiture of the proceeds in question. The aims of POCA, which, as explained above, seek to ensure that individuals do not benefit from corruption, will usually be furthered by forfeiting the profits. Taking away profits derived from corrupt activities removes the incentive for corruption. This Court in *FNB* listed a number of

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[73] *Van der Burg v NDPP* [2012] ZACC 12; 2012 (2) SACR 331 (CC); 2012 (8) BCLR 881 (CC) at para 48. This echoes the minority judgment of Van Heerden AJ in *Mohunram* above n 26, which stated the following at para 56:

> "[t]urning 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."

[74] *FNB* above n 53 at para 98.

factors that must be considered when assessing arbitrariness and proportionality, these range from evaluating the relationship between the means employed and the ends sought to be achieved. Other factors include the relationship between the purpose for deprivation and the purpose of the person's property in question.[75]

[83] Hence, the default position will be that unlawful proceeds are to be forfeited and that the discretion be a narrow one which focuses on whether the purpose of POCA (that no one should receive the fruits of their offence) is legitimately advanced by the forfeiture of proceeds.

[84] *Salie* explained the correct approach to forfeiture orders in lucid terms:

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[75] Id at para 100. This Court held as follows:

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

> "It also follows from the primary purpose and the secondary purposes of confiscating proceeds of crime that full confiscation or forfeiture [Chapter 6] will be the norm and an order refusing confiscation or forfeiture or an order granting only partial confiscation or forfeiture will be exceptions to the norm. The discretionary [proportionality] enquiry under sections 18(1) and 50(1)(b), is not an open-ended one. Rather it is aimed at determining whether, having regard to all the relevant considerations, the case at hand is an exceptional one in which there should be no or only partial confiscation or forfeiture."[76]

[85] This approach is well founded in authority. In *Shaik*, a case on Chapter 5 confiscation orders which reasoning can logically be extended to Chapter 6, O'Regan J held that—

> "*[i]n most circumstances it will be entirely appropriate that all direct profits of crimes of which the defendant has been convicted be confiscated.* . . . In these circumstances, the primary purpose of the Act – to ensure that a criminal does not enjoy the fruits of his or her crime – will be directly served."[77]

[86] In *Cook Properties*, it was stated that "the risk of unconstitutional application [of the definition of 'proceeds of unlawful activities'] is smaller than it is with the definition of 'instrumentality of an offence' ".[78] By extension, the proportionality hurdle will be more difficult for a person to overcome in relation to forfeiture orders that deal with proceeds.

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[76] *Salie* above n 61 at para 138.

[77] *S v Shaik* [2008] ZACC 7; 2008 (5) SA 354 (CC); 2008 (8) BCLR 834 (CC) at para 69. See also *Cook Properties* above n 26 at para 67, where it was stated—

> "the forfeiture of a good deal of property that could literally be said to be 'concerned in' [i.e. property used as an instrumentality of an offence] an offence would run unconstitutionally counter to the Act's objectives of removing incentives, deterring the use of property in crime, eliminating or incapacitating the means by which crime may be committed and at the same time advancing the ends of justice. In our view it is less likely that forfeiture of benefits [i.e. the property which is the proceeds of an offence] derived, received or retained 'in connection with or as a result of any unlawful activity' would fail rationally to advance those objectives."

[78] *Cook Properties* id at para 66.

[87] I am careful to stress that there is no legal presumption in favour of forfeiture. Rather, it is the nature of what is being forfeited that means it will usually be difficult for an individual to show that forfeiture would be disproportionate.

[88] It is necessary, therefore, to apply a proportionality analysis in respect of forfeiture, in light of all relevant factors, to ensure that the aims of POCA are achieved. The question is whether the forfeiture at hand is proportionate to the goal of ensuring that criminals do not benefit from the fruits of their unlawful activities. This approach is consistent with the purpose of POCA which provides that "no person convicted of an offence should benefit from the fruits of that or any related offence".

Application to the facts

[89] The NDPP seeks forfeiture of the entire value of the renovations to the property, even though Ms Botha purportedly repaid some of that value.[79] Is such a forfeiture disproportionate, applying the approach sketched out above? I am of the view that it is not.

[90] The central flaw in Ms Botha's argument is that it is a fallacy to consider Ms Botha as having "repaid" Trifecta. She was not repaying Trifecta. She was, rather, attempting to obfuscate the unlawful origin of the proceeds.

[91] Let us examine the loan agreement of March 2010. It is for R500 000 which is far less than the ultimate value of the renovations. Ms Botha argues that this was because the cost of renovations was not known at the time. I find it unconvincing that Trifecta, a company which specialises in construction, would have commenced a construction project without making provision for increased costs down the line. The agreement is also vague. It makes no mention of any instalments, only that the debt is due within five years. And, finally, the agreement was concluded only after the

[79] I note that the NDPP does not, in this Court, argue for the forfeiture of the entire property as was ordered by the High Court. It is therefore not necessary to consider that point.

renovations commenced in September 2009. Again, it is unlikely that a company like Trifecta would have commenced renovation works without any legally binding guarantee that it would be repaid for them. These considerations clearly demonstrate, to my mind, that there was no intention for Ms Botha to pay back the so-called loan.[80]

[92] The context of the so-called "loan" also supports the conclusion that it was a sham designed to disguise the real relationship between Ms Botha and Trifecta. Initially, there was no loan between Ms Botha and Trifecta. Rather, Trifecta disguised the renovations costs as *expenses* (not a loan to an individual) for another, unrelated project. It is clear that there was no intention for such expenses to have been repaid by Ms Botha.[81] When the parliamentary committee requested a copy of the loan agreement between Trifecta and Ms Botha, Ms Pretorius, an employee of Trifecta in the accounts department indicated that she had no knowledge of any such agreement and that there was no record of the same on Trifecta's books. The first time she saw such an agreement was in April 2011 (after the commencement of the parliamentary inquiry), nearly a year after it was signed in March 2010.

[93] Finally, the payments to Trifecta were made in April 2011 after the commencement of the parliamentary inquiry. In other words, it was only once suspicions arose, that Ms Botha attempted to effect repayment. Prior to that point, not a rand had been repaid. As the parliamentary inquiry concluded, I am of the view that the "loan" was in fact a sham designed to hide the unlawful origin of the proceeds.

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[80] This point is amply backed-up by the evidence of the forensic accountant led before the High Court in this case. The report of forensic accountant concluded, generally, that "Ms Botha's relationship with Trifecta extended beyond a normal client or supplier relationship". More specifically, at the time the agreement was concluded "there was no intention to treat this as a loan to Ms Botha", and "the loan agreement . . . was created after the fact". He therefore concluded that "the amount paid by Trifecta for the renovations to Ms Botha's residence was for her personal benefit", and, despite her undertaking to repay the sum once the final amount of the renovations had been determined, a further agreement would be entered into, "there is no evidence in the records provided by Trifecta or their auditors that such an agreement has been entered into".

[81] Again, the report concludes that "this [i.e. the entering of the sums as expenses for a separate project] would indicate that at the time these expenses were paid for the benefit of Ms Botha there was no intention to treat this as a loan to Ms Botha."

[94] The money was not repaid in a moment of repentance but as a carefully designed scheme which was awash with criminal motive. There was no real loan between Ms Botha and Trifecta, and there was no real debt between them. The repayments were designed to hide the improper relationship between Ms Botha and Trifecta. It is important to impose a deterrent on this type of conduct and ensure that no one benefits from camouflaging such nefarious activities, as this would defeat the very purpose of Chapter 6 of POCA.

[95] On the present facts, this is not an exceptional case in which full forfeiture would be disproportionate because the forfeiture of the full amount of R1 169 068.49 is proportionate to the aim of ensuring that crime does not pay.

[96] I am fortified in this conclusion by the following argument. If Ms Botha were only to forfeit R758 085, the courts would, in effect, give her "credit" for the fact that she tried to cover up the original wrongdoing. It will have the perverse effect of rewarding attempts to obfuscate corruption, directly contrary to the avowed aims of POCA.

[97] On an analysis of the entire conspectus of facts, I find that the forfeiture of the entire R1 169 068.49 is proportionate. The appeal must therefore succeed.

Costs

[98] The applicant has succeeded in its appeal against the Supreme Court of Appeal decision and costs must follow the result.

Order

[99] The following order is made:

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 R 1 169 068.49 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.

JAFTA J (Madlanga, Mhlantla J, Mogoeng CJ and Theron J concurring):

[100] I have had the pleasure of reading the judgment prepared by my colleague Victor AJ (first judgment). I am indebted to her for the meticulous narration of the facts which I wholeheartedly embrace. I also agree with the order proposed and much of the reasoning.

[101] However, I differ with the first judgment on two major conclusions. These are whether the proceeds of unlawful activities we are concerned with here constitute property envisaged in section 25(1) of the Constitution,[82] and whether the proportionality analysis that applies to determine the lawfulness of forfeiture of property used as an instrumentality of an offence, applies to the forfeiture of the present proceeds of unlawful activities.

[102] Otherwise I agree with the first judgment that this matter in the main concerns the question whether the forfeiture order should cover the entire value of the renovations

[82]See section 25(1) of the Constitution above n 25.

effected on Ms Botha's house and paid for by Trifecta. The reason for this being that the payment of the sum of R1 169 068 by Trifecta constituted proceeds of unlawful activities. I also agree that the amount of R411 000 that was paid to Trifecta by Ms Botha has no bearing in determining the extent of the proceeds which must be forfeited to the state. The Supreme Court of Appeal erred in deducting that amount from the R1 169 068.

[103] But the Supreme Court of Appeal rightly reversed the forfeiture order granted by the High Court. The latter Court had ordered that the entire house of Ms Botha be forfeited to the state. This was not warranted because not the whole house was proceeds of unlawful activities. The order should have been limited to the value of those proceeds. Otherwise the forfeiture of the entire house constituted an arbitrary deprivation of property to the extent that the order went beyond the value of the proceeds of unlawful activities.

Is it necessary to determine whether proceeds of crime constitute property?

[104] The first judgment holds that the proceeds of crime paid by Trifecta for the renovations of Ms Botha's house constitute property protected by section 25(1) of the Constitution. This conclusion is reached despite accepting the fact that Ms Botha held no legal right or interest in those proceeds.[83] But it is said that notwithstanding the absence of rights in the proceeds, section 25(1) of the Constitution confers upon her a right which she may assert against the state to ensure that the forfeiture order is not arbitrary.

[105] Strictly on this approach it is unnecessary to determine whether the proceeds of crime we are concerned with here amount to property envisaged in section 25(1). All that needs to be done is to enquire into the forfeiture order granted so as to determine whether it was arbitrary. For this determination recourse must be had to the relevant provisions of POCA.

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[83] First judgment at [61].

[106] The forfeiture was made in terms of section 50(1) of POCA, which mandates the High Court to order forfeiture of property to the state. In its terms POCA defines what is meant by "property" for purposes of that Act. The money that was paid by Trifecta for renovations, which constitutes proceeds of a crime, is property as defined by POCA.

[107] POCA prescribes an elaborate procedure which must be followed before an order of forfeiture is made. In order to safeguard the rights in the property concerned, section 48 obliges the NDPP to give notice of the application for forfeiture to every person who has recorded in terms of section 39 that they have interest in the property in question. Once served with the papers, such person may appear at the hearing of the application and oppose the order of forfeiture or request that the operation of the order should exclude her interest in the property. She is entitled to adduce evidence at the hearing of the application.[84]

[108] If the person opposing forfeiture persuades the High Court that forfeiture should not be granted, it should not grant the order. Where that person establishes that she has legally acquired interest for consideration in the proceeds of unlawful activities, the Court may exclude such interest in the operation of the forfeiture order.[85]

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[84] Section 48 of POCA provides:

> "(1) 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.
>
> (2) The National Director shall give 14 days notice of an application under subsection (1) to every person who entered an appearance in terms of section 39(3).
>
> (3) A notice under subsection (2) shall be served in the manner in which a summons whereby civil proceedings in the High Court are commenced, is served.
>
> (4) Any person who entered an appearance in terms of section 39(3) may appear at the application under subsection (1)-
>
> (a) to oppose the making of the order; or
>
> (b) to apply for an order-
>
> excluding his or her interest in that property from the operation of the order; or varying the operation of the order in respect of that property, and may adduce evidence at the hearing of the application."

[85] Section 52 of POCA provides:

> "(1) The High Court may, on application—

[109] It is evident from the scheme emerging from sections 48-52 of POCA that proceeds of unlawful activities may be forfeited to the state unless a party opposing forfeiture has legally acquired them for consideration. If the acquisition occurred after January 1999, she must also show that she did not know or had no reasonable grounds to suspect that the property in which she acquired interest was the proceeds of unlawful activities.

[110] The purpose of forfeiture, namely combating serious crimes and removing an incentive to commit such crimes, coupled with the fair procedure prescribed by POCA refute the assertion that forfeiture made in compliance with POCA is arbitrary. In this matter Ms Botha knew that the money paid by Trifecta for renovations constituted proceeds of unlawful activities and she did not acquire those proceeds legally. In other words, she had no right or legally recognised interest in them hence the attempt to disguise them as a loan.

(a) under section 48(3); or

(b) by a person referred to in section 49(1),

and when it makes a forfeiture order, make an order excluding certain interests in property which is subject to the order, from the operation thereof.

(2) The High Court may make an order under subsection (1), in relation to the forfeiture of the proceeds of unlawful activities, if it finds on a balance of probabilities that the applicant for the order-

(a) had acquired the interest concerned legally and for a consideration, the value of which is not significantly less than the value of that interest; and

(b) where the applicant had acquired the interest concerned after the commencement of this Act, that he or she neither knew nor had reasonable grounds to suspect that the property in which the interest is held is the proceeds of unlawful activities.

(4) A High Court making an order for the exclusion of an interest in property under subsection (1) may, in the interest of the administration of justice or in the public interest, make that order upon the conditions that the Court deems appropriate including a condition requiring the person who applied for the exclusion to take all reasonable steps, within a period that the Court may determine, to prevent the future use of the property as an instrumentality of an offence referred to in Schedule 1 or property associated with terrorist and related activities."

[111] In fact the acquisition by her and her possession of the proceeds in question constituted a criminal offence under POCA.[86] The absence of any legal right in those proceeds and the fact that she committed an offence in acquiring and keeping them removes the legal foundation of any claim to the effect that she had a right to hold onto them, until a forfeiture order was made.

[112] The scheme outlined above illustrates that here it is not necessary to first determine whether the proceeds of crime constitute property as envisaged in section 25 of the Constitution. The arbitrariness of the forfeiture order may be established with reference to POCA as the law of general application and the relevant standard for determining arbitrary deprivation. In *FNB* this Court declared:

> "[I]t is concluded that a deprivation of property is 'arbitrary' as meant by section 25 when the 'law' referred to in section 25(1) does not provide sufficient reason for the particular deprivation in question or is procedurally unfair."[87]

[113] POCA prescribes a fair procedure which must be followed before a forfeiture order is made and it also provides sufficient reasons for deprivation. However, if the issue whether the proceeds amount to property contemplated in section 25 were to be decided, what is said above provides proper context in which the issue must be addressed.

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[86]Section 6 of POCA provides:

> "Any person who—
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> (a) acquires;
>
> (b) uses; or
>
> (c) has possession of,
>
> property and who knows or ought reasonably to have known that it is or forms part of the proceeds of unlawful activities of another person, shall be guilty of an offence."

[87] *FNB* above n 53 at para 100.

Whether proceeds of crime are property in terms of section 25(1) of the Constitution

[114] Without addressing the contradiction flowing from section 6 of POCA, the first judgment suggests that the proceeds we are dealing with here amount to property protected by section 25 of the Constitution and that—

> "[W]hen Ms Botha avails herself of her rights under section 25 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."[88]

[115] The first difficulty with this proposition is that it suggests that Ms Botha's criminal conduct in acquiring and keeping the proceeds of unlawful activities triggered the protection of property rights in section 25(1) of the Constitution. She had a right against the state "to ensure that the actions of the state are not arbitrary." There is a logical difficulty in this proposition. Once it is accepted, as the first judgment does, that Ms Botha had no right in the proceeds in issue and that section 25 did not give her any rights in those proceeds, it is illogical to conclude that she had property that was protected against arbitrary deprivation. The protection against deprivation relates to an individual's right to property. Here on all accounts Ms Botha had no claim in and to the proceeds to be forfeited.

[116] Section 25 does not itself regulate process in terms of which deprivation of property may occur. What the section requires is that deprivation of property must be effected only in terms of law of general application.[89] But it does not end there, it goes further to declare that the law in question must not authorise arbitrary deprivation. The section states that no law may permit arbitrary deprivation of property. This means that a law that allows arbitrary deprivation would be inconsistent with the section. Here Ms Botha did not contend that POCA, in terms of which the proceeds concerned are to be forfeited to the state, permits arbitrary deprivation.

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[88] First judgment at [61].

[89] See section 25(1) of the Constitution above n 25.

[117] Therefore, there is no legal basis for concluding that she had a right against the state "to ensure that the actions of the state are not arbitrary." Forfeiture of the proceeds of crime in the present circumstances cannot constitute arbitrary deprivation of property. This is because Ms Botha had no right in the proceeds, let alone a right that is protected against arbitrary deprivation. In addition, the law in terms of which forfeiture was granted does not authorise arbitrary deprivation.

[118] It is apparent from the text of section 25(1) that deprivation of property rights, regardless of whether it is arbitrary or not, is not permitted under the Constitution unless it is authorised by a law of general application. Even so, the empowering law may not mandate arbitrary deprivation. This is so because the law in question would be invalid for violating the prohibition in section 25(1) and any deprivation that took place under that law would also be invalid.

[119] It is now settled that section 25(1) does not create property rights but protects existing ones. Indeed in *FNB* this Court stated:

> "The purpose of section 25 has to be seen both as protecting existing private property rights as well as serving the public interest, mainly in the sphere of land reform but not limited thereto, and also as striking a proportionate balance between these two functions."[90]

[120] In its jurisprudence, this Court has recognised one or the other right in property, before reaching the conclusion that it was dealing with property as contemplated in section 25 of the Constitution.[91] On the contrary, here Ms Botha had no such existing right in the proceeds of unlawful activities. Consequently, there was no right in property that could be protected by section 25(1) against arbitrary deprivation.

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[90] *FNB* above n 53 at para 50.

[91] *Shoprite Checkers* above n 55 at paras 68 and 87 and *Opperman* above n 51 at paras 61-3.

[121] Therefore, in present circumstances I hold that proceeds of unlawful activities did not and could not constitute property as envisaged in section 25(1) of the Constitution.

Proportionality

[122] The first judgment concludes that a proportionality exercise applicable to forfeiture of property that was used as an instrumentality of an offence equally applies to forfeiture of proceeds of an unlawful activity. I see the issue differently.

[123] The premise from which the first judgment proceeds is mistaken. It overlooks the genesis of the proportionality analysis, which is the need to interpret and apply the provisions of POCA in a manner that avoids a breach of the right not to be arbitrarily deprived of property. In *Prophet* this Court observed:

> "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".[92]

[124] This approach in the interpretation and implementation of POCA was affirmed in *Van der Burg* where this Court stated:

> "The proportionality requirement is aimed, on the one hand, at balancing the constitutional imperative of law enforcement and combating crime and the seriousness of the offence against, on the other, the right not to be deprived arbitrarily of property."[93]

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[92] *Prophet* above n 26 at para 61.

[93] *Van der Burg* above n 74 at para 58.

[125] This demonstrates that the proportionality analysis is required in cases where property rights would be affected by the forfeiture order. In *Mohunram* this Court emphasised –

> "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."[94]

[126] For a number of reasons here the grant of forfeiture will not lead to arbitrary deprivation of property. In the first place, Ms Botha had no right in the money paid by Trifecta for the renovations effected on her house. That money constituted proceeds of an unlawful activity. Therefore, in her case there can be no talk of deprivation of a right in property.

[127] Moreover, while it is true that deprivation as contemplated in section 25(1) does not require a total loss of a right in property, there must be substantial interference with the right in question. In *Mkontwana* this Court held —

> "[w]hether there has been a deprivation depends on the extent of the interference with or limitation of use, enjoyment or exploitation. It is not necessary in this case to determine precisely what constitutes deprivation. No more need be said than that at the very least, substantial interference or limitation that goes beyond the normal restrictions on property use or enjoyment found in an open and democratic society would amount to deprivation."[95]

[128] The interference or limitation in question must relate to a legal use or enjoyment of property. If the acquisition of a property is illegal and the person who holds it does not have any legal right in the property concerned, it is inconceivable that in those

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[94] *Mohunram* above n 26 at para 56.

[95] *Mkontwana v Nelson Mandela Metropolitan Municipality* [2004] ZACC 9; 2005 (1) SA 530 (CC); 2005 (2) BCLR 150 (CC) at para 32.

circumstances it may be said that deprivation as envisaged in section 25(1) of the Constitution has occurred.

[129] But the presence of deprivation alone is not enough for section 25(1) to be contravened. The deprivation must also be arbitrary. In *FNB* this Court concluded that in the context of section 25, a deprivation of property is arbitrary if the law authorising it fails to provide sufficient reasons for the deprivation or it is procedurally unfair. POCA satisfies these requirements. It furnishes good reasons for deprivation of proceeds of crime while affording those who forfeit such proceeds procedural fairness.

[130] All of the aforegoing reasons illustrate the inappropriateness of applying the proportionality analysis in the case of a forfeiture of proceeds of a crime in circumstances where the person from whom the proceeds are taken does not have any interest which is lawfully recognised.

[131] As mentioned, I concur in the other reasons contained in the first judgment and those reasons sufficiently support the proposed order.

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