



REPORTABLE

CASE NO. SA 107/2023

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

PROSECUTOR-GENERAL

First Appellant

MINISTER OF JUSTICE

Second Appellant

ATTORNEY-GENERAL

Third Appellant

**DIRECTOR-GENERAL: ANTI-CORRUPTION
COMMISSION**

Fourth Appellant

MINISTER OF FINANCE

Fifth Appellant

and

MARTIN NANDE SHILENGUDWA

First Respondent

HILMA DALONDOKA SHILENGUDWA

Second Respondent

Coram: SHIVUTE CJ, DAMASEB DCJ, MAINGA JA, HOFF JA *et* FRANK
AJA

Heard: 10 July 2024

Delivered: 28 March 2025

Summary: This appeal concerned the constitutional interpretation of the definition of 'proceeds of unlawful activities' in section 1 of the Prevention of

Organised Crime Act 29 of 2004 (POCA). In particular, the court was tasked to determine whether the phrase '*and includes property which is mingled with property that is proceeds of unlawful activity*' included in the definition was unconstitutional or not.

This precise question served before the High Court in an application brought by the respondents who contended that the expression was unconstitutional and sought a declaration to that effect.

The facts briefly are that the respondents, a couple married in community of property previously owned a property situated in Windhoek. During 2017, they sold the property to the Business and Intellectual Property Authority (BIPA). The market value of the property at the time was N\$4 300 000, however BIPA purchased the property for over N\$18 000 000, which allegedly was the asking price based on the running concern value of the property.

N\$16 982 583,01 of the N\$ 18 000 000 was paid over to the first respondent in the account he held at Bank Windhoek and N\$1 031 956,16 to the second respondent in her First National Bank account.

When the first respondent's share of the purchase price was paid into his Bank Windhoek account, there was a prior positive balance of N\$5 478 818,71 held in that account. That amount mingled with the proceeds of the transaction that were paid into the account. Before the preservation order was made, it would appear, the first respondent had paid N\$13 million into Capricorn Investment Fund (Capricorn Fund) as an investment and a total of N\$3 807 200 to various other parties or entities. Also included in the latter amount is N\$130 000 that was withdrawn in cash.

The Prosecutor-General alleged in her preservation application in the High Court that the officials involved in the transaction on BIPA's side lacked authority to request and/or approve the transfer of the funds paid to the respondents and that there were reasonable grounds for believing that the funds in question were

proceeds of unlawful activities. The High Court granted the preservation order. No application was made in respect of the amount paid into the second respondent's bank account.

The whole of the first respondent's interest in the Bank Windhoek account and the Capricorn Fund was restrained by the order of the High Court as being the proceeds of unlawful activities. As noted above, this interest included the pre-existing funds in the Bank Windhoek account which intermingled with the money received from the sale of the property.

Subsequently, the respondents approached the High Court to determine the constitutionality of the definition of 'proceeds of unlawful activities' in s 1 of POCA to the extent that the definition reads 'and includes property which is mingled with property that is proceeds of unlawful activity'.

A Full Bench of the High Court found in favour of the respondents. It accordingly declared the impugned portion of the definition to be unconstitutional and excised it, without more, from the definition of 'proceeds of unlawful activities'.

On appeal, the Supreme Court –

Held per SHIVUTE CJ (DAMASEB DCJ, HOFF JA *et* FRANK AJA concurring):

Held that; the definition of 'proceeds of unlawful activities' is overbroad to the extent that it permits the preservation and possible forfeiture of 'clean' property just because it mingled with property obtained from illegitimate sources and therefore amounts to irrational and arbitrary deprivation of property.

Held that; it is irrational to preserve and possibly forfeit money lawfully acquired just because it has mingled with tainted money more so when the extent to which the funds have mingled can be assessed.

Held that, to sever the impugned portion from the definition, without more, would not be the necessary and appropriate remedy as that would enable persons to insulate the proceeds of unlawful activities from preservation and forfeiture by intermingling them with property acquired legitimately. In the circumstances, the necessary and appropriate remedy to make would be to read-in words in the definition of 'proceeds of unlawful activities' so as to limit the order to the value of the impugned property prior to the mingling.

In the result, the appeal against the High Court order was unsuccessful.

Held per FRANK AJA (concurring):

Held that, whereas there may indeed be a basis to preserve suspected properties in a preservation order based on information which may give rise to a reasonable belief that the property is suspect pending a further inquiry to establish, on a balance of probabilities, whether those properties were indeed an instrumentality of a relevant offence or acquired through unlawful activities; there can be no basis to grant a preservation order in respect of a property where no case was made out whatsoever that such property fell within the ambit of s 51 of POCA.

Held that, to submit that the 'innocent owner' provisions give adequate protection in cases such as the present cannot be accepted. As pointed out by the Chief Justice, a preservation order was not without effect and in any event placed an onus on such owner which was not justified if there were no averments from the Prosecutor-General that needed to be addressed. On what basis must the 'innocent owner', be burdened with an onus where there was no evidence whatsoever, that the money already in his bank account prior to the deposit of the suspected money, was in any manner tainted? This would grant the Prosecutor-General a claim which was never made, for which no basis was established and which was not sought.

Held that, the definition as it stands cannot pass constitutional scrutiny and the words indicated by the Chief Justice must be read in.

Held per MAINGA JA (dissenting):

Held that, it is common sense that there are circumstances where things when mingled, to borrow the words of the main judgment, ‘. . . may raise intractable difficulties of separation . . . ’ It is for this reason alone that I would not have interfered with the impugned words in the definition – the definition serves a legitimate public purpose.

Held that, the POCA in Part 2, ss 51-58, provides for preservation of property and provides other opportunities to the affected parties, namely, notice of preservation of property order, the duration of the order, provision for expenses, variation and rescission of orders. The deponent seeking a preservation order must show that the property concerned is (a) an instrumentality or intended instrumentality of an offence referred to in schedule 1; (b) the proceeds of unlawful activities; or (c) an unexplained asset. The court grants the order when satisfied that prima facie the information there are reasonable grounds for that belief.

Held that, Part 3 ss 59 – 68 provide the procedure for the application for a forfeiture order. Forfeiture is provided in circumstances where it is established on a balance of probabilities that the said property was used or intended to be used in the commission of crime(s) or constitutes proceeds of unlawful activities or is an unexplained asset. Forfeiture provisions provide for evidence either on affidavits or oral evidence. It also provides for the ‘innocent owner defence’, the protection of interests of third parties and provides other opportunities to affected parties to have forfeiture orders varied or set aside.

Held that, given the preservation and forfeiture processes of POCA, it is safe to say the provisions provide enough cushion for the limitation that may take place especially at the preservation stage procedure.

Held that, to require of the appellant (Prosecutor-General) in applications for preservation orders that every amount or value of property sought to be preserved be capable of being ascertained as the majority proposes defeats the purpose of

POCA. The Constitution provides for limitation of rights provided the law providing the limitation is of a general application, not negating the essential content of the right and it shall specify the ascertainable extent of such limitation and identify on which authority to enact such limitation is claimed to rest.

Held that, nothing is wrong with the safeguards in ss 63 and 65. The intended application(s) in the provisions are no different to other civil processes, like default, summary, rescission judgments etc. Even if one were to accept that the provisions therein are stringent as the majority suggest, the measures in the Act are needed to deal effectively with organised crime and related gang activities. Recently in *Itula & others v President of the Republic of Namibia & others* (A2-2024) NASC (28 February 2025), this Court approved the principle that the Legislature's enacted text includes only words that matter or that the Legislature does not intend to enact invalid or purposeless provisions. Ours is an adversarial system, therefore incurred expenses in any application under ss 63 and 65 come with the territory and cannot be ground for declaring a statutory provision constitutionally invalid.

Held that, on the issue of costs, I would order appellant to pay half the costs of the respondents for reason that appellant's alternative relief, although I do not agree with the legislative endeavours the majority delved in, succeeded. In fact, the appeal salvaged the order of severance by the High Court, without more, which left the door open for criminals to protect their ill-gotten gains from preservation and forfeiture.

Consequently, the majority dismissed the appeal with costs, whilst the minority would have upheld the appeal, with an order for the payment of half the respondents' costs.

APPEAL JUDGMENT

SHIVUTE CJ (DAMASEB DCJ, HOFF JA and FRANK AJA concurring):

Introduction

[1] This appeal concerns a crisp but rather tricky question of constitutional interpretation of whether the phrase '*and includes property which is mingled with property that is proceeds of unlawful activity*' in the definition of 'proceeds of unlawful activities' in section 1 of the Prevention of Organised Crime Act 29 of 2004 (POCA) is unconstitutional or not. This precise question served before the High Court in an application brought by the respondents who contended that the expression was unconstitutional and sought a declarator to that effect. A Full Bench of the High Court found in favour of the respondents. It accordingly declared the impugned expression to be unconstitutional and excised it, without more, from the definition of 'proceeds of unlawful activities'. Aggrieved by the judgment and order of the High Court, the appellants have appealed to this Court, contending principally that the court below erred in so finding.

Background

[2] The respondents are husband and wife married in community of property. They owned a property then known as Club Vaganza, situated at Erf 2780, Wanaheda, Windhoek (the property) at which they carried on the business of a restaurant, bar, car wash and gambling house. During 2017, the respondents sold the property to the Business and Intellectual Property Authority (BIPA), a now State-owned enterprise but which was at the time of the transaction incorporated as a non-profit association in accordance with s 21 of the Companies Act 28 of 2004. BIPA functions, amongst others, as the central focal point for the

registration, administration and protection of industrial property rights in the country.

[3] The market value of the property was said to be approximately N\$4.3 million, but BIPA bought it from the respondents for over N\$18 million in 2017. The respondents averred that the amount the property was bought at was the asking price, based on the running concern value of the property and not necessarily its market value. The Prosecutor-General applied to the High Court for a preservation order pursuant to s 51(1) of POCA in respect of Mr Shilengudwa's Bank Windhoek account and his investment held in the Capricorn Asset Management Investment Fund.

[4] The Prosecutor-General alleged in the application that the officials involved in the transaction on BIPA's side lacked authority to request and/or approve the transfer of the funds paid to the respondents and that there were reasonable grounds for believing that the funds in question were proceeds of unlawful activities.

[5] When the property was sold, the proceeds of the transaction in the amounts of N\$16 982 583,01 and N\$1 031 956,16 were paid over to Mr Shilengudwa into the account he held at Bank Windhoek and to Mrs Shilengudwa in her First National Bank account, respectively. Mrs Shilengudwa paid N\$1 million of her share of the proceeds of the transaction to settle the study loan of the couple's youngest daughter who was studying in the United States of America at the time.

[6] When Mr Shilengudwa's share of the purchase price was paid into his Bank Windhoek account, there was a prior positive balance of N\$5 478 818,71 held in that account. That amount mingled with the proceeds of the transaction that were paid into his account. Before the preservation order was made, it would appear, Mr Shilengudwa had paid N\$13 million into the Capricorn Investment Fund (Capricorn Fund) as an investment and a total of N\$3 807 200 to various other parties or entities. Also included in the latter amount is N\$130 000 that was withdrawn in cash.

[7] Considering the definition of 'proceeds of unlawful activities' in s 1 of POCA, the whole of Mr Shilengudwa's interest in the Bank Windhoek account and the Capricorn Fund was restrained by the order of the High Court as being the proceeds of unlawful activities. As noted above, this interest included the pre-existing funds in the Bank Windhoek account which intermingled with the money received from the sale of the property. In both the High Court and in this Court, the respondents contended that the definition was unconstitutional while the Prosecutor-General argued against that proposition.

[8] The Prosecutor-General had applied for the forfeiture of the preserved funds in terms of s 59(1) of POCA. That application had been postponed several times for several reasons, including lately the institution of the application which is the subject matter of this appeal.

[9] The respondents had brought an application in the High Court challenging the constitutionality of a portion in the definition of the phrase 'proceeds of unlawful

activities', contending in the first place that the preservation and forfeiture of anything that is not the proceeds of unlawful activity is an arbitrary deprivation of property in breach of Article 16¹ of the Namibian Constitution, and negates the essential content of the right to property in breach of Article 22(a)² of the Constitution. Secondly, they asserted that the definition was in breach of Articles 8³ and 21(1)(j)⁴ of the Constitution, on the basis that Mr Shilengudwa's life savings did not constitute proceeds of unlawful activities as they were earned by him through the exercise of his right to carry on any occupation, trade or business in terms of Article 21(1)(j).

[10] The respondents also relied on a provision in the Palermo Convention to which Namibia is a signatory and which appears to have inspired the enactment of POCA that states that if proceeds of unlawful activities have mingled with property acquired from legitimate sources, such property is 'liable to confiscation *up to the assessed value* of the intermingled proceeds'.

[11] With reference to a series of what at first blush appear to be extravagant and surreal examples, the respondents argued that the last portion of the definition of the phrase in the section was so wide that it had the potential to 'criminalise the entire Namibian economy'. To illustrate the possible consequences of the alleged overbreadth of the definition, the respondents gave the example of the movement of the money paid for the sale of the property in this matter. They averred that the

¹ Which protects the right to property subject to lawful restrictions and expropriation in the public interest and subject to the payment of just compensation.

² Which provides that any authorised limitation of a fundamental right or freedom must be of general application and must not negate the essential content of the right.

³ Which provides for the respect for human dignity.

⁴ The right to practise any profession, or carry on any occupation, trade or business.

amount of N\$18 million paid on behalf of BIPA for the transaction was first transferred into the trust account of the conveyancers. The conveyancers in turn made the requisite payments in respect of the transaction to the City of Windhoek and the Receiver of Revenue through the Deeds Office, before effecting the transfer of the immovable property and thereafter paying the remainder of the purchase price to the respondents.

[12] In those circumstances, so the argument developed, in a preservation application the High Court, applying the impugned portion of the definition, would have no discretion but to grant preservation orders of the entire positive balance - including property that was innocently acquired for value - in the trust account of the conveyancers, the bank accounts of the City of Windhoek and of the Receiver of Revenue.

[13] The appellants, however, counter-argued that the assertion was far-fetched and in effect fanciful as such property could be excluded through a remedy of the 'innocent owner' defence embedded in s 63 of POCA, a remedy the appellants say was open to the respondents to seek but which, for reasons not articulated, they did not try to obtain. The arguments of the parties in this Court largely mirrored the contentions and submissions made in the High Court and it is convenient to briefly summarise them at the outset to get the gist of the protagonists' respective positions before presenting the summary of the court a quo's judgment and finally moving on to the determination of the appeal.

The parties' submissions and contentions on appeal

On behalf of the Prosecutor-General

[14] The Prosecutor-General contended that the effect of the High Court order declaring the key portion of the definition of the 'proceeds of unlawful activities' unconstitutional had opened the door to criminals to insulate any money that is the proceeds of unlawful activity from preservation or forfeiture under Chapter 6 of POCA by mixing it with some 'clean' money, no matter how small the amount of that money is. Significantly, the Prosecutor-General accepts that standing alone, the definition of the phrase 'proceeds of unlawful activities' can lead to the forfeiture of intermingled property that was lawfully acquired, a consequence that could potentially be disproportionate and unjustified.

[15] In this regard, the Prosecutor-General submitted that s 63 of POCA recognises that certain property may fall within the statutory definition of 'proceeds of unlawful activity' but has been acquired innocently by the owner. The section is a mechanism to avoid the disproportionate result which would follow if such property were forfeited because of the breadth of the definition of 'proceeds of unlawful activity'. According to the Prosecutor-General, this applied both where the entire property was innocently acquired and where part of it was innocently acquired, as for example, where 'dirty' money had become intermingled with 'clean' money and both have by definition become part of the property constituting 'proceeds'.

[16] The Prosecutor-General argued furthermore in this connection that s 61⁵ is expressly made 'subject to s 63', which demonstrates that the Legislature was

⁵ In terms of which a forfeiture order may be made.

aware of the need to provide a safeguard against what might otherwise result in a disproportionate or arbitrary deprivation of property. It was thus forcefully contended that s 63 'provides a complete answer' to the assertion that the definition of 'proceeds of unlawful activities' authorises or mandates the forfeiture of property which was innocently acquired for value as that property can be excluded by an order under s 63. It was averred that the 'innocent owner' defence could be brought both at the preservation and forfeiture stages and such application could 'hardly fail'.

[17] It was thus submitted that the High Court erred in 'effectively' disregarding the provisions of ss 63 and 65 as they provided protection to innocent owners and third parties alike. As the respondents in effect contended that they were innocent owners, so argued the Prosecutor-General, they were also protected by these provisions and were entitled to apply for the exclusion of their lawfully acquired funds from preservation or forfeiture. Given these safeguards and the important public purpose served by the definition of 'proceeds of unlawful activities', so the contention expanded, it was not necessary to declare the phrase unconstitutional as it passes the constitutional muster of proportionality.

[18] On the respondents' reliance on the Palermo Convention, the Prosecutor-General argued that while the Convention was generally an aid to interpretation, it could not be prayed in aid to determine the validity of the Namibian legislation. The Convention, according to the Prosecutor-General, does not speak to the question whether the Namibian legislation is constitutional or not. The legislation in question is clear in its scope and ambit and requires no interpretation.

On behalf of the respondents

[19] The respondents, on the other hand, forcefully supported the judgment of the court a quo. They contended that the preservation and ultimate forfeiture of lawful property just because it intermingled with proceeds of unlawful activities is irrational and therefore unconstitutional. The respondents undertook a comparative analysis of the definition of 'proceeds of unlawful activities' in the South African legislation also known as POCA which is almost identical to the definition in our POCA and contended that the South African legislation permitted the preservation and forfeiture of intermingled funds in a bank account, but only up to an amount not exceeding the value of the proceeds of the alleged unlawful activities.

[20] They contended that the absence of the 'mingling' provision in the South African legislation did not place intermingled funds beyond preservation and forfeiture in that country. They argued furthermore that if the judgment of the High Court in this matter is not upset on appeal, Namibia's POCA would similarly allow preservation and forfeiture of intermingled funds up to an amount not exceeding the value of the alleged proceeds of unlawful activities, and not more. They asserted that the wording would be in line with both the Namibian Constitution and the Palermo Convention to which Namibia is a signatory and on which our POCA is based.

[21] It is necessary to interpose momentarily to say that much will be said about the Palermo Convention later in the judgment. Having presented the summary of

some of the arguments of the parties, the remainder of such arguments are reserved for consideration in other parts of the judgment that would be preceded by a quick summary of the judgment of the court a quo to which the next part of this judgment is dedicated.

Judgment of the High Court

[22] In a closely reasoned judgment, the court a quo analysed the relevant provisions of the Constitution and of POCA as well as the applicable legal principles. It held that Art 16 of the Namibian Constitution should be interpreted in a purposive and liberal way to accord subjects the full measure of rights inherent in property, including the right to possess, use and enjoy one's property. Any legislative constraint to property must be reasonable, in the public interest and serve a legitimate objective.

[23] It was logical and reasonable for the definition of 'proceeds of unlawful activities' to focus on the proceeds of unlawful activities. Insofar as the impugned portion of the definition targets property not tainted by unlawful activity, it is not rationally and constitutionally explicable. The preservation and forfeiture of property that is not proceeds of unlawful activities violates Article 16 of the Constitution as it is tantamount to expropriation without just compensation.

[24] As the impugned portion of the definition limits the Article 16 right to property, it should comply with Article 22 of the Constitution. It however does not do so. Civil forfeiture was not meant to be punitive but remedial. However, the preservation and potential forfeiture of 'clean' money just because it intermingled

with tainted money is irrational and amounts to punishment contrary to the remedial purpose Chapter 6 of POCA was intended to serve.

[25] The impugned portion of the definition did not only fall short of Article 22 of the Namibian Constitution, but it was also in conflict with international law as embodied in article 12(4) of the Palermo Convention Namibia is a signatory to. As noted above, this provision permits the preservation of both lawful and unlawful funds, but only up to the assessed value of the proceeds of unlawful activity.

[26] As to the contention that POCA has in-built remedies to address the proportionality concerns, the court a quo held that the 'innocent owner' defence in s 63 of POCA did not provide satisfactory protection. It held, on that score, that to approach a competent court to exclude lawful funds from preservation and possible forfeiture would require expending funds as access to justice involved funds and specialised knowledge which not all individuals possessed. The court below accordingly found the impugned portion to be unconstitutional and struck it from the definition of 'proceeds of unlawful activities'.

Determination by this Court

[27] Any determination of the constitutionality of a provision must start with the consideration of the relevant provisions of the Constitution itself and the principles of constitutional interpretation. In respect of the alleged breach of a constitutional right, it is a trite principle of constitutional interpretation that the Constitution must be interpreted purposively. This is so that the subjects are accorded the full

measure of their constitutional rights, such as the right to possess, use and enjoy their property.

[28] The thrust of the respondents' constitutional challenge is that the impugned portion of the definition of 'proceeds of unlawful activities' breaches their rights, including the right to property enshrined in Article 16. The respondents contended that their right to property is breached by the State through the impugned portion of the definition that takes away - through preservation and possibly forfeiture - property that had been acquired legitimately just because it has intermingled with property alleged to be proceeds of unlawful activities.

[29] The right to property is one of the constitutionally protected rights enshrined in Chapter 3 of the Namibian Constitution. Article 16 of the Constitution provides as follows:

'(1) All persons shall have the right in any part of Namibia to acquire, own and dispose of all forms of immovable and movable property individually or in association with others and to bequeath their property to their heirs or legatees: provided that Parliament may by legislation prohibit or regulate as it deems expedient the right to acquire property by persons who are not Namibian citizens.

(2) The State or a competent body or organ authorised by law may expropriate property in the public interest subject to the payment of just compensation, in accordance with requirements and procedures to be determined by Act of Parliament.'

[30] It is axiomatic that while the right to property is not absolute, any legislative constraint placed on ownership of property must be reasonable, in the public

interest and must serve a legitimate purpose.⁶ Legislation that is disproportionate or arbitrary cannot pass constitutional muster.⁷ As the impugned portion of the definition of ‘unlawful activities’ targets property, Article 16 is evidently engaged.

[31] As a starting premise, there can be no question that POCA serves a legitimate public purpose of combating organised crime, money laundering and related criminal activities. POCA represents Namibia’s commitment, in line with similar trends world-wide, to address these scourges through the introduction of measures that ensure that crime does not pay. Chapter 5 of POCA deals with ‘criminal forfeiture’, which is the confiscation of benefits of crime consequent to conviction after a criminal trial while Chapter 6 addresses ‘civil forfeiture’. As explained by this Court in *New Africa Dimensions*,⁸ the addition of a civil forfeiture mechanism in POCA was informed by the global experience that criminal forfeiture alone was an inadequate law-enforcement tool as it was dependent on a successful criminal prosecution. Civil forfeiture on the other hand does not at all require any prosecution. Criminal forfeiture is supposed to be punitive whereas civil forfeiture was designed to be remedial.

[32] Prior to the striking out of the impugned portion by the High Court, the phrase ‘proceeds of unlawful activities’ as defined in s 1 of POCA, read as follows:

“proceeds of unlawful activities” means any property or any service, advantage, benefit or reward that was derived, received or retained, directly or indirectly in Namibia or elsewhere, at any time before or after the commencement of this Act,

⁶ *Namibia Grape Growers and Exporters Association & others v Ministry of Mines and Energy & others* 2004 NR 194 (SC) at 212E.

⁷ *Ibid* at 212F.

⁸ *New Africa Dimensions CC & others v Prosecutor-General* 2018 (2) NR 340 (SC).

in connection with or as a result of any unlawful activity carried on by any person, and includes any property representing property so derived and includes property which is mingled with property that is proceeds of unlawful activity.'

[33] 'Unlawful activity' in turn is defined as meaning 'any conduct which constitutes an offence or which contravenes any law whether that conduct occurred before or after the commencement of this Act and whether that conduct occurred in Namibia or elsewhere as long as that conduct constitutes an offence in Namibia or contravenes any law of Namibia'.

[34] This appeal concerns the preservation of money. As such, the focus of the analysis of the legislation in question will be primarily on money as opposed to other property which may also raise intractable difficulties of separation when intermingled. It was common cause amongst the parties that the contention advanced by the Prosecutor-General that the phrase 'proceeds of unlawful activities' included both the pre-existing funds in Mr Shilengudwa's Bank Windhoek account and the funds received through the sale of the property was the correct interpretation of the law prior to the present constitutional challenge.

[35] According to the definition of 'proceeds of unlawful activities', money from a legitimate source that is found, for example, in a bank account becomes proceeds of unlawful activities as soon as it has mingled with money alleged to have been acquired from an illegitimate source irrespective of the amount of the alleged tainted money loaded onto the account. In Mr Shilengudwa's case, the positive balance of N\$5 478 818,71 held in his Bank Windhoek account became the proceeds of unlawful activities as soon as it had mingled with any amount of the

funds realised from the sale of his property (which was alleged to have been proceeds of unlawful activities). As things stand, Mr Shilengudwa runs a real risk of not only losing the proceeds of the sale, but also the couple's property that was sold to BIPA, and as if to compound his predicament, his life savings as well. There can be no doubt that in those circumstances, the right to lawfully acquire property is breached to the extent that property such as life savings in a bank account may also be preserved and possibly forfeited just because it had intermingled with the proceeds of alleged unlawful activity. As noted above, this is the position irrespective of the amount of the lawfully acquired money that was found in the account prior to intermingling.

[36] Doubtless, the inclusion in the definition of property that is mingled with proceeds of unlawful activity serves a legitimate and important public purpose of ensuring that criminals do not benefit from the proceeds of crime by mingling such proceeds with property received from legitimate sources. However, the overbroad sweep of the definition to also include the preservation and possible forfeiture of 'clean' money just because it mingled with illegitimate funds, without more, amounts to irrational and arbitrary deprivation of property.

[37] It is evidently irrational to preserve and possibly forfeit money lawfully acquired just because it has mingled with tainted money even in the circumstances where the extent to which the funds have mingled can be assessed. However, the Prosecutor-General submitted that there is a complete answer to the irrationality and arbitrariness concerns, and it is to this aspect that the analysis turns next.

'Innocent owner' defence

[38] As already mentioned, the Prosecutor-General contended that the preservation (and possibly) forfeiture of lawfully acquired money because it mingled with tainted funds is constitutional as the proportionality argument had been addressed under POCA through the exclusion of certain interests from forfeiture under ss 63 and 65. It was argued that such a remedy was available to the respondents, but they failed to apply for it. Instead of explaining why they did not apply for the exclusion of the legitimate funds from preservation, so argued the Prosecutor-General, Mr Shilengudwa wrongly asserted that the s 63 application may be resorted to after it had been determined that the funds were in fact not proceeds of unlawful activities.

[39] The Prosecutor-General argued that legitimate funds on the facts of the respondents' case would almost without more, be released upon an 'innocent owner' application being made to court. It is argued furthermore that the 'innocent owner' defence could be brought both at the preservation and forfeiture stages and such application 'could hardly fail'.

[40] It appears to be the correct legal position that an application for exclusion of interests in property may be made at the preservation stage⁹ and forfeiture stage,¹⁰ but such application must meet the stringent requirements set in s 63 and it is not a defence that is there for the asking. These stringent requirements will be considered briefly below.

⁹ Section 52(3).

¹⁰ Section 59(4).

[41] In relation to the forfeiture of proceeds of unlawful activities, in an attempt to obtain an order excluding interest in property subject to a forfeiture order, s 63(2) provides that the applicant must prove, on a balance of probabilities, that he or she (a) acquired the interest concerned legally and for a consideration not significantly less than the value of the interest; and (b) where the interest had been acquired after the commencement of POCA, that he or she neither knew nor had reasonable grounds to suspect that the property in which the interest is held was the proceeds of unlawful activities.

[42] An application for the exclusion of interest may also be made after a forfeiture order has been made. Section 65(1) provides that a person affected by the forfeiture order and who was entitled to receive notice of the application for forfeiture but did not receive it, may within 30 days after the notice of the making of the order is published in the *Gazette*, apply for an order excluding his or her interest in the forfeited property from the operation of the order, or varying the operation of the order in respect of that property.

[43] Section 65(2) states that the application must be accompanied by an affidavit setting out (a) the nature and extent of the applicant's right, title or interest in the property; (b) the time and circumstances of the applicant's acquisition of the right, title or interest in the property; (c) any additional facts in support of the application; and (d) the relief sought. At the hearing of the application, the applicant and the Prosecutor-General may testify and call witnesses.

[44] It is as clear as day that to institute the application in question, an applicant is placed to greater expense in the form of lawyers' and other professional fees to mount a vigorous defence and preclude the preservation and/or forfeiture of his or her lawfully acquired interest when such interest could conceivably be excluded by the authorities through assessing the extent to which tainted money intermingled with 'clean' money and separating the wheat from the chaff, to use a common metaphor.

[45] Moreover, it is not simply a matter of lodging the application and the order excluding the interest would be granted as argued by the Prosecutor-General (if the argument in this regard is well understood). As explained above, an applicant for the exclusion of interest in preserved or forfeited property must meet the stringent requirements set out in the Act; with proceedings possibly turning into a full-blown hearing. At the end of the proceedings, the applicant may of course taste victory in having his or her interests in the property excluded from preservation and/or forfeiture. However, insofar as that outcome may be called a victory, it may well be a Pyrrhic victory, which may come as cold comfort to the applicant.

[46] The process certainly does not appear to be as easy as making an application. If it is so that the matter is as simple as launching the application and the order for exclusion would be granted, a legitimate and fundamental - if perhaps not rhetorical - question arises: Why take property that would be returned to the owner without further ado in any event (according to the Prosecutor-General)

when it is known that the property in question is not proceeds of unlawful activity? Herein lies the irrationality of the impugned portion of the definition.

[47] It seems plain that the preservation and possible forfeiture of money which is known to originate from a legitimate source just because it intermingled with tainted money, without more, amply demonstrates the irrationality of the portion of the definition in question. In its current form, that portion of the definition of 'proceeds of unlawful activities' constitutes an irrational and arbitrary deprivation of property and to that extent it is unconstitutional and invalid.

[48] The impugned portion of the definition negates the essential content of the right to property. It does so because it does not specify the ascertainable extent of such negation, nor does it identify the authority on which the limitation is claimed to rest. Moreover, it does so in circumstances where Chapter 6 in the legislation (dealing with forfeiture and related matters) is remedial, yet the process is turned into a punitive action because of the definition. POCA primarily revolves around the notion of 'unlawful activity', but because of the definition, lawful activity is rendered unlawful through preservation and forfeiture. The respondents are correct that this is a breach of Article 22 of the Constitution. The court a quo was justified in so finding in its erudite and well-researched judgment.

Proportionality and discretion

[49] On the proportionality argument, the Prosecutor-General submitted that as the respondents failed to explain why they considered the 'innocent owner' defence to be an inadequate remedy for ensuring that disproportionate or arbitrary

deprivation of property does not occur, it is not necessary for this Court to traverse the question of whether there is a proportionality requirement in POCA.

[50] To the extent that this Court is inclined to consider the question, the Prosecutor-General submitted that the Court should determine whether in deciding a preservation or forfeiture application, a court is obligated – because of the use of the word ‘must’ in the relevant section - to grant the application if all jurisdictional requirements have been met or whether in appropriate circumstances it has a discretion to temper its order by declining the making of the order if such order would result in a disproportionate or arbitrary deprivation of property, even if ss 63 and 65 are not of application.

[51] With reference to South African jurisprudence,¹¹ the Prosecutor-General submitted that despite the use of the word ‘shall’ in s 50(1) of that country’s POCA, courts in that country have a discretion to decline making forfeiture orders where the result would be a disproportionate or arbitrary deprivation of property.

[52] Our POCA employs the word ‘must’ in s 51(1). This phrase was discussed by this Court in *New Africa Dimensions*.¹² However, the context in which the word was discussed was different. In that case, there was no challenge to the constitutionality of any part of POCA and it was therefore not necessary to decide the issue. In this case, the constitutionality of a portion of a definition in POCA has

¹¹ As discussed in, for example, *Mohunram & another v National Director of Prosecutions & another (Law Review Project as Amicus Curiae)* 2007 (4) SA 222 (CC) paras 121 and 130.

¹² *New Africa Dimensions CC & others v Prosecutor-General* 2018 (2) NR 340 (SC) para 56.

been directly challenged. Should the question of whether there is a proportionality requirement in our POCA be decided in these proceedings?

[53] It is not necessary in the present proceedings to traverse that question. The High Court did not decide the issue. The constitutionality or otherwise of the impugned portion of the definition of ‘proceeds of unlawful activities’ can be decided on the basis articulated in this judgment. We should heed the timeless admonition in *Kauesa*¹³ not to decide more than what is necessary. Therefore, the question of whether there is a proportionality requirement in s 51 of our POCA is left open for decision when it is squarely raised and it is necessary to do so. Having disposed of this aspect, it has become necessary to consider the Palermo Convention, to which the respondents partly relied in contending for the unconstitutionality of the portion of the definition.

The Palermo Convention

[54] Our POCA is modelled on the Palermo Convention,¹⁴ the ground-breaking convention adopted by the United Nations in the Italian city of Palermo in December 2000. While the Convention per se cannot determine the validity of the Namibian legislation as argued by the Prosecutor-General, it is indisputably an aid to interpretation. The Convention represents the international community’s response to a global challenge of cross-border crime and the emergence of organised crime and its various manifestations. According to the preamble to the Convention, the parties were convinced that the Convention would constitute an

¹³ *Kauesa v Minister of Home Affairs & others* 1995 NR 175 (SC) at 183-184.

¹⁴ Officially cited as the United Nations Convention Against Transnational Organized Crime and the Protocols thereto.

effective tool and the necessary legal framework for international cooperation in combating transnational organised crime and terrorist crimes. Article 1 identifies the Convention's primary purpose as the promotion of cooperation in the effective prevention and combating of transnational organised crime.

[55] The approach advocated in the Convention may not be universally followed and each party to it is at liberty to chart its own legislative path within the tenor and spirit of the Convention. However, when the domestic legislation of a party to it is impugned, as is the position in the current proceedings, the Convention may be prayed for in aid in search of a constitutionally compliant interpretation. The Convention is part of international law, which our Constitution, and country honour. In fact, being binding on Namibia, the Convention has become part of our law by virtue of Article 144 of the Namibian Constitution.

[56] Article 12 of the Convention contains provisions relating to the confiscation and seizure of proceeds of crime as well as property, equipment or other instrumentalities used in the commission of the offences covered by the Convention. The article provides in full as follows:

‘1. State Parties shall adopt, to the greatest extent possible within their domestic

legal systems, such measures as may be necessary to enable confiscation of:

(a) Proceeds of crime derived from offences covered by this Convention or *property the value of which corresponds to that of such proceeds;*

(b) Property, equipment or other instrumentalities used in or destined for use in offences covered by this Convention.

2. State Parties shall adopt such measures as may be necessary to enable the identification, tracing, freezing or seizure of any item referred to in paragraph 1 of this article for the purpose of eventual confiscation.

3. If proceeds of crime have been transformed or converted, in part or in full, into other property, such property shall be liable to the measures referred to in this article instead of the proceeds.

4. If proceeds of crime have been intermingled with property acquired from legitimate sources, such property shall, without prejudice to any powers relating to freezing or seizure, be liable to confiscation *up to the assessed value of the intermingled proceeds*.

5. Income or other benefits derived from proceeds of crime, from property into which proceeds of crime have been transformed or converted or from property *with which proceeds of crime have been intermingled shall also be liable to the measures referred to in this article, in the same manner and to the same extent as proceeds of crime.*' (Emphasis is added).

[57] Article 12 of the Convention reflects an international consensus on the issue of the extent to which the proceeds of crime that have mingled with property acquired from legitimate sources may be liable to forfeiture. Through the Convention, the international community (including Namibia) has accepted that 'if proceeds of crime have been intermingled with property acquired from legitimate sources, such property shall, without prejudice to any powers relating to freezing or seizure, be liable to confiscation up to the assessed value of the intermingled proceeds'.

[58] The international community has also accepted that ‘income or other benefits derived from proceeds of crime, from property into which proceeds of crime have been transformed or converted or from property with which proceeds of crime have been intermingled shall also be liable to [freezing or seizure], in the same manner and to the same extent as proceeds of crime’.

[59] The thread that runs throughout this global consensus is that property obtained from proceeds of crime should be liable to confiscation, but up to the assessed value of the proceeds of the unlawful activity and not more or less. The measures contained in article 12 of the Convention seek to serve a dual purpose: that of preventing the mischief which the Convention and ultimately the national legislations enacted pursuant to the Convention seek to cure and limiting the risk of disproportionate or arbitrary deprivation of property.

[60] In Namibia, because of the overbreadth of the definition of ‘proceeds of unlawful activities’ in POCA, it is necessary to introduce the qualification contained in article 12 of the Convention in our definition to ensure that our legislation is constitutionally compliant. How is this to be achieved and on what basis can this conceivably be done? These twin questions necessitate the consideration of the issue of ‘appropriate remedy’ to which the next part of the judgment turns.

Devising appropriate remedy

[61] The court a quo simply struck the impugned portion from the definition of ‘proceeds of unlawful activities’. According to the Prosecutor-General, striking down the relevant portion of the definition, without more, is not an appropriate

remedy. Such an approach, according to the argument, would leave criminals at large to protect their ill-gotten gains from preservation and forfeiture by simply mingling the proceeds of unlawful activities with property acquired from legitimate sources. Towards fashioning an appropriate remedy, the Prosecutor-General submitted that this Court has two options to choose from.

[62] First, it may allow Parliament, pursuant to Article 25(1)(a) of the Namibian Constitution, 24 months to correct the defect in the definition of 'proceeds of unlawful activities'. Secondly, it may 'read-in' at the end of the definition, the words 'but not exceeding the value of the proceeds of the unlawful activity before mingling'. The latter approach is the option favoured by the Prosecutor-General if her principal arguments did not find favour with the Court. The respondents were not opposed to this approach. In fact, reading-in is the remedy the respondents sought in the High Court on an alternative basis, which relief the Prosecutor-General then opposed on the ground that seeking reading-in as an alternative relief would be constitutionally impermissible. In response to this assertion, the respondents retorted that reading-in and striking out a phrase from a statutory provision are in principle the same.

Limiting substantive impact of declaration of invalidity

[63] When a court declares a part of the provision of a law unconstitutional and invalid, to save the provision from the consequences of a declaration of invalidity, it may instead order one of the following three remedies, namely severance, notional severance and reading-in. These remedies have been explained by Michael Bishop (Bishop) as follows:

‘Limiting substantive impact – invalidating only part of the legal effect of a law – can take three different forms: severance, notional severance, and reading-in. Severance requires the excision of certain words from a statute. When a court leaves the words of a statute unaltered, but submits its application to a condition, it engages in notional severance. Finally, when a court adds words to a statute, we call it ‘reading-in’. These practices are not mutually exclusive. A court can simultaneously sever words and read-in . . . For although the tests for each remedy may be similar, certain features are unique to each one.’¹⁵

[64] Bishop furthermore explains why it is desirable for a court to use one of the above interpretive techniques rather than simply making a declaration of invalidity in the following terms:

‘Generally, a court should use one of these devices rather than a bald declaration of invalidity because it is “less intrusive of the legislative function” to invalidate only a portion of the legislation that violates the Constitution, rather than the whole. These devices permit the law to continue in operation rather than creating a lacuna in the law that may disrupt social relations and require immediate action by the legislature.’¹⁶

Reading-in

[65] Having declared a provision unconstitutional, a court may find that the ‘necessary and appropriate’ remedy in terms of Article 25(3) is to read words into the provision, to avoid the consequences of the declaration of invalidity. Bishop describes the essential attributes of the reading-in remedy as follows:

‘Reading-in is the opposite of severance. Instead of removing words from legislation, when a court reads-in it adds words to the statute to cure the

¹⁵ Michael Bishop *Remedies*, Chapter 9 in Woolman and Bishop (eds) *Constitutional Law of South Africa* (2 ed) Vol 1 at 9-97.

¹⁶ Op. cit. at 9-97 to 9-98.

constitutional defect. The premise of reading-in is that the relevant part of the statute is found to be unconstitutional. It is also important to distinguish reading-in from reading down and notional severance. With both reading down and notional severance, the text of the legislation remains untouched; it is simply given meaning that conforms to the . . . Constitution. When reading-in, courts change the text.’¹⁷

[66] The basis of reading-in is that the relevant part of the statute is found to be unconstitutional and invalid. By simply striking out the impugned portion from the definition, the court a quo inadvertently left open the possibility of criminals to insulate proceeds of crime from preservation and forfeiture by mingling it with property from legitimate sources. The appropriate remedy would be to read-in words into the definition so as to limit the impugned property to the value prior to the mingling.

[67] The approach advocated in the Palermo Convention as to the extent to which proceeds of crime that have mingled with property acquired from legitimate sources may be liable to forfeiture, is sound as it adequately addresses the evidently arbitrary and disproportionate concerns in the impugned portion of the definition of ‘proceeds of unlawful activities’ in our POCA.

[68] A formulation that reflects international consensus and which is not inconsistent with our Constitution is to be preferred to that which is disproportionate and arbitrary and a clear unjustified encroachment on the right to property. It should be incorporated in the definition through the remedy of reading-in, which is the appropriate remedy in the circumstances.

¹⁷ Ibid. at 9-104 to 9-105.

[69] Reading-in is a necessary and appropriate remedy as opposed to allowing Parliament to correct the defect in the impugned portion of the definition. This is so because if Parliament in its wisdom elected not to correct the identified defect within the period the Court may stipulate, the impugned law 'shall be deemed to be valid', according to Article 25(1)(a) of the Constitution. This would be undesirable as it would deprive the respondents of an effective remedy.

[70] It is so that in deciding to read words into a statute following upon a declaration of invalidity creates the risk of a breach of separation of powers, but the power to alter a statutory provision to make it constitutionally compliant is expressly conferred on competent courts by the Constitution as part of such courts' obligation to enforce or protect constitutional rights and freedoms.¹⁸ On the facts of this case reading-in is justified as it will not only remedy the overbreadth of the definition of 'proceeds of unlawful activities', but it will interfere as little as possible with the parliamentary enactment in question and more importantly still give effect to the purpose of the legislation. Reading-in would be the necessary and appropriate remedy to avoid the inconsistency between the law and the Constitution that resulted in the infringement of the constitutional right to property by the impugned portion of the definition.

[71] If the qualification introduced in the Palermo Convention is applied to the definition of 'proceeds of unlawful activity' in our POCA by way of reading-in, the

¹⁸ Compare the views expressed by the South African Constitutional Court in *National Coalition for Gay and Lesbian Equality & others v Minister of Home Affairs & others* 2000 (2) SA 1 (CC) paras 67 and 68 in this regard.

dual purpose of preventing the mischief which POCA seeks to cure and limiting the risk of disproportionate or arbitrary deprivation of property would equally be served. As explained hereinbefore, the in-built safeguards of the innocent owner's defence do not adequately address the arbitrariness concerns.

Conclusion

[72] In the result, it has been found that the definition of 'proceeds of unlawful activities' is overbroad to the extent that it permits the preservation and possible forfeiture of 'clean' property just because it mingled with property obtained from illegitimate sources. It has also been found that such approach amounts to irrational and arbitrary deprivation of property. It is irrational to preserve and possibly forfeit money lawfully acquired just because it has mingled with tainted money even when the extent to which the funds have mingled can be assessed. It has also been found that to sever the portion from the definition, without more, would not be the necessary and appropriate remedy as that would enable persons to insulate the proceeds of unlawful activities from preservation and forfeiture by intermingling them with property acquired legitimately. In the circumstances, the necessary and appropriate remedy to make would be to read-in words in the definition of 'proceeds of unlawful activities'.

Order

[73] Although the appeal has not succeeded, the order of the court a quo must nevertheless be qualified to incorporate the necessary and appropriate remedy of reading-in. Accordingly, the following order is made:

(a) The appeal is dismissed.

(b) Paragraph 1 of the order of the High Court is replaced with the following sub-paragraphs:

‘1(a) The last portion of the definition of “proceeds of unlawful activities” in section 1 of the Prevention of Organised Crime Act 29 of 2004 which reads “and includes property which is mingled with property that is proceeds of unlawful activity;” is declared unconstitutional and invalid.

1(b) The definition of “proceeds of unlawful activities” in section 1 of the Prevention of Organised Crime Act 29 of 2004 is to be read as though the following words appear at the end of the definition after the word “activity”: “but not exceeding the value of the proceeds of the unlawful activity before mingling.”

(c) The appellants are to pay the respondents costs both in the High Court and in this Court. Such costs to include the costs of two instructed legal practitioners and one instructing legal practitioner.

SHIVUTE CJ

DAMASEB DCJ:

[74] I have had the privilege of reading the draft judgment by the Chief Justice and the dissent by Mainga JA. I have also considered Frank AJA's concurring judgment with the Chief Justice. Like Frank AJA, I concur in the reasoning and order proposed by the Chief Justice and have nothing useful to add to the otherwise erudite exposition of the law as set out by the Chief Justice. For the reasons he gives I too would allow the appeal and make the order he proposes.

DAMASEB DCJ

I concur.

HOFF JA

FRANK AJA:

[75] I concur in the judgment of the Chief Justice. I however wish to address a further aspect which I view to be important in this matter.

[76] It is a fundamental principle of our law that if one wants to claim something from another, one has to establish a basis for such a claim. Thus, in criminal law there is a presumption of innocence (Article 12(1)(d) of the Namibian Constitution)

and the State has to prove that a person allegedly involved in criminal conduct, was 'beyond reasonable doubt' responsible for the crime or offence he or she has been charged with. In civil claims, the claimant must prove on a balance of probabilities that he or she is entitled to his or her claim. Where a temporary or provisional order is sought, the claimant must make out a *prima facie* case for such order which will only become final, once the claim is – usually at some later stage – established on a balance of probabilities (Article 12(1)(a) of the Namibian Constitution).

[77] Section 50 of POCA provides that preservation orders (s 51) and forfeiture orders (s 61) are to be dealt with as civil proceedings and as such the civil approach to such claims by the Prosecutor-General applies.

[78] The general civil approach is that if someone claims something from another in a court of law the claimant has to satisfy the court that he or she is entitled to it. It is the party who asserts who must prove and not the party who denies.¹⁹

[79] The structure of POCA when it comes to preservation orders and forfeiture orders follows the civil approach. Hence, s 51 relating to preservation orders requires an affidavit from a person indicating that the deponent has sufficient information that the property sought to be made the subject of the intended preservation order is 'an instrumentality or an intended instrumentality of an offence referred to in Schedule 1' or the proceeds of unlawful activities and the court must be satisfied that the information on the face thereof indicates

¹⁹ *Pillay v Krishna & another* 1946 AD 946 at 951-954.

reasonable grounds for such belief by the deponent. In short, the Prosecutor-General must convince a court that the information in his or her possession – which must be disclosed – is of such a nature that it is indicative that the property is the instrumentality of a relevant offence or the proceeds of unlawful activities. The court must then still be satisfied that the information relied upon, and taken at face value, amounted to reasonable grounds for the belief relating to the alleged untoward acquisition of property.

[80] The property can be declared forfeited to the State pursuant to s 61 if ‘a court finds on a balance of probabilities’ that the property is either an instrumentality of a defined offence or the proceeds of unlawful activities.

[81] The preservation order – which is a temporary order – has less stringent requirements whereas the final order (forfeiture order) must comply with the normal civil test, ie balance of probabilities.

[82] A preservation order has drastic consequences for the owner of such property. Such owner may not dispose of it and the court may appoint a *curator bonis* to take control thereof and to administer it and may require the Registrar of Deeds to endorse its title deeds with restrictive conditions (s 56 of POCA).

[83] What happened in the present matter is that when the proceeds of the suspected sale on which the Prosecutor-General relies were paid into the bank account of Mr Shilengudwa, there was already a positive balance of N\$5 478 818,71 in respect of which there is no suggestion or evidence whatsoever that

this money represented an instrumentality of a relevant offence or the proceeds of unlawful activity.

[84] The anomaly created by the definition of 'proceeds of unlawful activities', as pointed out in the judgment of the Chief Justice, caused this money in respect of which there is no issue as to its lawfulness to be encompassed in the preservation order.

[85] Whereas there may indeed be a basis to preserve suspected properties in a preservation order based on information which may give rise to reasonable belief that the property is suspect pending a further inquiry to establish, on a balance of probabilities, whether those properties were indeed an instrumentality of a relevant offence or acquired through unlawful activities; there can be no basis to grant a preservation order in respect of a property where no case has been made out whatsoever that such property falls within the ambit of s 51 of POCA.

[86] To submit that the 'innocent owner' provisions give adequate protection in cases such as the present cannot be accepted. As pointed out by the Chief Justice, a preservation order is not without effect and in any event places an onus on such owner which is not justified if there are no averments from the Prosecutor-General that need to be addressed. On what basis must the 'innocent owner', such as in the present matter, be burdened with an onus where there is no evidence whatsoever, that the money already in his bank account prior to the deposit of the suspected money, is in any manner tainted? This is to grant the

Prosecutor-General a claim which was never made, for which no basis was established and which was not sought.

[87] Simply put, where the Prosecutor-General has made no claim with regard to property based on having been acquired contrary to s 51 there is no basis to subject property to a preservation order. To assert the contrary is in my view clearly contrary to Article 18 of the Namibian Constitution.

[88] In view of what I have stated above and for the reasons set out in the judgment of the Chief Justice, I concur that the definition as it stands cannot pass constitutional scrutiny and the words indicated by the Chief Justice must be read in. I accordingly agree with the order proposed by the Chief Justice.

FRANK AJA

MAINGA JA (dissenting):

[89] At issue is the constitutional validity of the words 'and includes property which is mingled with property that is proceeds of unlawful activity' in the definition of 'proceeds of unlawful activity' in s 1 POCA.

[90] The High Court (full bench) determined the words to be unconstitutional and excised the words without more from the rest of the definition. This Court, in the main judgment confirmed the High Court's determination of the words, when in

para 47 it said, 'in its current form, that portion of the definition of proceeds of unlawful activities constitutes an irrational and arbitrary deprivation of property and to that extent it is unconstitutional and invalid'. The main reason for this conclusion is that, 'the in-built safeguards of the innocent owner's defence in s 63 do not adequately address the arbitrariness concerns'.

[91] The main judgment nevertheless found, to which I agree, that the court below by simply severing the impugned words from the definition without more, 'inadvertently left open the possibility of criminals to insulate proceeds of crime from preservation and forfeiture by mingling it with property from legitimate sources'. After a consideration of the Palermo Convention and the options available to the Court, the main judgment found that the appropriate remedy would be to read-in words into the definition replacing the impugned words. The main judgment then ventures into patchwork legislating and reads-in the words 'but not exceeding the value of the proceeds of the unlawful activity before mingling' as adopted from the Palermo Convention.

[92] I cannot join the majority in the conclusion they arrived at, for the reason that the impugned words – given the constitutionally compliant interpretation – do not conflict with the Constitution.

[93] Property for the purposes of POCA means money, 'a virtual asset or virtual token, or any other movable, immovable, corporeal or incorporeal thing and includes any rights, privileges, claims and securities and any interest in the property and all proceeds from the property'.

[94] The meaning of property is complex: it includes liquids, fluids and when mingled or mixed would raise intractable difficulties to separate. That much is appreciated in para 34 of the main judgment.

[95] The majority relied on the Palermo Convention particularly, article 12, as an aid to interpret the impugned words and hinged on article 12(4), the words, ‘. . . be liable to confiscation up to the assessed value of the intermingled proceeds’.

[96] The convention leaves it to the member states to adopt to the greatest extent possible within their domestic legal system, such measures as may be necessary to enable confiscation of (a) proceeds of crime or property the value of which corresponds to that of such proceeds; and (b) property, equipment or other instrumentalities used in or destined for use in offences covered by the Convention. The use of the word property appears to include property not linked to the proceeds of crime. Article 12(2) provides for such measures as may be necessary to enable the identification, tracing, freezing or seizure of any item referred in sub-article 1. Where the proceeds of crime have been transformed or converted in part or in full into other property, such property shall be liable to the measures referred to in the article instead of the proceeds as provided in sub-article 3. Then is sub-article 4 which provides for proceeds of crime that have been intermingled with property acquired from legitimate sources, which property shall, without prejudice to any powers relating to freezing or seizure, be liable to confiscation up to the assessed value of the intermingled proceeds.

[97] The Convention extends discretion to state parties to adopt measures consonant with their domestic legal systems, for the reason that as Ackermann J had put it, 'the formation of property rights and their institutional framework differ, often widely, from legal system to system'.²⁰ He went on to say 'comparative law cannot by simplistic transference, determine the property approach to our property clause that has its own context, formulation and history'.²¹

[98] Our property right in Article 16 of the Constitution provides for acquiring, owning and disposing of all forms of property anywhere in the Republic but the State, a competent body or organ authorised by law may expropriate property in the public interest subject to payment of just compensation in accordance with requirements and procedures to be determined by Act of Parliament. The fundamental freedoms in Article 21 are exercised subject to the law of Namibia, if such law imposes reasonable restrictions on the exercise of the rights and freedoms in sub-article 1. Article 22 provides for limitation upon Fundamental Rights and Freedoms and provides two requirements for such a limitation.

[99] In sum, any right in the Bill of Rights is subject to limitation.

[100] *LAWSA*²² states that mingling and mixing (*confusio et commixtio*) occur when things of more or less equal value belonging to different owners are mingled or mixed so as not to be readily separable. *LAWSA* goes on to say that the two terms are used interchangeably – the term *confusio* (mingling) seems to be

²⁰ *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Services & another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) at 810B, para 97.

²¹ *Ibid.*

²² Joubert (ed) *The Law of South Africa* (2 ed) vol 27 p 227-228.

employed most often in cases where liquids, like wine and oil, or metals are mingled or melted together whereas the term *commixtio* (mixing) applies most often in cases where solids like corn or ostrich feathers belonging to different owners are mixed. The mixture in the case of mingling is considered inseparable when the individual liquids have lost their identity and can only be separated at great cost. In the case of mixing the mixture is regarded as inseparable if it can no longer be ascertained which solids belong to which owner. *LAWSA* continues to state how ownership may be acquired where a *confusio* or *commixtio* has occurred, by instituting a *rei vindicatio* for the portion of the mixture, whereas in the case of mingling the mixture can only be physically separated after the institution of the *actio communi dividundo*.

[101] Where coins or paper money is mixed in such a way that it can no longer be determined which coins or paper money belongs to which owner, special rules apply. *Rei vindicatio* action would be against public policy for the restoration of the currency. Ownership in the mass is taken to have vested in the possessor. If the possessor acted *mala fide* when he mixed the coins he can be sued delictually for the damage he caused and if he acted *bona fide* an action on the ground of unjust enrichment can be instituted against him.

[102] Having regard to what has gone before, in fact it is common sense that there are circumstances where things when mingled, to borrow the words of the main judgment, ‘. . . may raise intractable difficulties of separation’ It is for this reason alone that I would not have interfered with the impugned words in the definition, it serves a legitimate public purpose.

[103] I now turn to consider the word arbitrary.

[104] The Oxford English dictionary defines the word arbitrary, as based on random choice or personal whim. In *First National Bank of South Africa Ltd t/a Wesbank v Commissioner, SARS*²³ the Constitutional Court of South Africa found the words 'in an arbitrary manner' to include 'without sufficient reason'. That court referred to the authors De Waal *et al* who are of the view that a deprivation is arbitrary for purposes of s 25(1) [of the South African Constitution which protects against the arbitrary deprivation of property] 'if it follows unfair procedures, if it is irrational, or is for no good reason. . . .'²⁴

[105] In *National Credit Regulator v Opperman & others*²⁵ the Constitutional Court of South Africa again had this to say on arbitrariness:

'[68] Is the deprivation *arbitrary*? Dealing with a provision of the Customs and Excise Act, this court held in *FNB v CSARS* that a deprivation of property is arbitrary when the law does not provide sufficient reasons for the particular regulatory deprivation in question, or when it is procedurally unfair. A complexity of relations must be considered in testing whether there is sufficient reason for the regulatory deprivation. These include the relationship between the means employed and the ends sought by the legislative scheme; 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 that property. The more extensive the deprivation and the stronger the property interest, the more compelling the state's purpose has to be for having the regulatory deprivation at question in place.

²³ *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Services & another, First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) at 810F, para 99.

²⁴ *Ibid* at 799 para 67.

²⁵ *National Credit Regulator v Opperman & others* 2013 (2) SA 1 CC at 22.

[69] The minister argues that the deprivation is not arbitrary. Counsel for the minister submitted that the procedural leg of the inquiry is satisfied, because a court adjudicates the matter and makes an order. The problem is of course that the court is denied any discretion to decide on a just and equitable order. This court indicated in *Mohunram* that a lack of discretion on the part of a court to forfeit property would result in an arbitrary deprivation of property.

[70] The deprivation at issue here is not of a partial nature; it effectively removes an unregistered credit provider's right to restitution. For this, there must be persuasive reasons. The minister submits that the purpose of the limitation is important, namely to protect the public against unscrupulous moneylenders. The punitive nature of the provision must deter unregistered credit providers from advancing credit to consumers, outside of the regulatory framework.

[71] Though one can be sympathetic to the objects of the provisions, I am not persuaded that the importance and purpose of the limitation, including deterrence and protection of the public, provide sufficient reason for the deprivation embodied in this provision. Whereas regulated deprivation may be permissible to further compelling interests, the state still has to be constrained in how it may pursue those ends. Given that the extent of deprivation here is far-reaching, the purpose should be stated clearly, and the means chosen to accomplish it must be narrowly framed. In this case the means chosen are disproportionate to the purpose, as is further demonstrated by the less restrictive means analysed below under the justification enquiry.

[72] Thus s 89(5)(c) results in arbitrary deprivation of property in breach of s 25(1) of the Constitution.'

[106] Section 89(5) of the South African National Credit Act 34 of 2005 requires a court to order that 'all the purported rights of the credit provider under (an unlawful) credit agreement to recover any money paid or goods delivered to, or on behalf of, the consumer in terms of that agreement' are either cancelled or forfeited to the State.

[107] The POCA bestows on judicial officers discretion to grant or refuse both the preservation and forfeiture orders. Not very long ago in *Prosecutor-General v Paulo & another*²⁶ this Court on 03 May 2023 dismissed the Prosecutor-General's appeal against an unsuccessful forfeiture order in the High Court. Amongst other things, this Court held that 'asset forfeiture is a serious matter and a court cannot forfeit an asset on the evidence presented by the Prosecutor-General.'²⁷ I fail to see how a reasonable court would allow asset forfeiture from legitimate sources for the simple reason that it mingled with an asset from unlawful activities. Where it does so in derogation of the right to property it would be a valid forfeiture under POCA. Under such circumstances, it cannot be said to be arbitrary for it enjoys the sanction of the court of law.

[108] Among other purposes, POCA provides for the recovery of the proceeds of unlawful activities, to provide for the forfeiture of assets that have been used to commit an offence or assets that are the proceeds of unlawful activities.

[109] The POCA in Part 2, ss 51-58, provides for preservation of property and provides other opportunities to the affected parties, namely, notice of preservation of property order, the duration of the order, provision for expenses, variation and rescission of orders. The deponent seeking a preservation order must show that the property concerned is (a) an instrumentality or intended instrumentality of an offence referred to in schedule 1, (b) the proceeds of unlawful activities; or (c) an

²⁶ *Prosecutor-General v Paulo & another* 2023 (2) NR 477 (SC).

²⁷ *Ibid* para 57.

unexplained asset. The court grants the order when satisfied that the information on the face of it that there are reasonable grounds for that belief.

[110] Part 3 ss 59 – 68 provides the procedure for the application for a forfeiture order. Forfeiture is granted in circumstances where it is established on a balance of probabilities that the said property was used or intended to be used in the commission of crime(s) or constitutes proceeds of unlawful activities or is an unexplained asset. Forfeiture provisions provide for evidence either on affidavits or oral evidence. It also provides for the 'innocent owner defence', the protection of interests of third parties and provides other opportunities to affected parties to have forfeiture orders varied or set aside.

[111] Given the preservation and forfeiture processes of POCA, it is safe to say the provisions provide enough cushion for the limitation that may take place especially at the preservation stage.

[112] The majority is saying for the reason of the definition, the N\$5 478 818,71 in the first respondent's Bank Windhoek account became the proceeds of unlawful activities as soon as it had mingled with any amount of the funds realised from the sale of his property. That the first respondent runs the risk of losing both the proceeds of the sale and the property sold to BIPA. That there can be no doubt that in those circumstances the right to lawfully acquire property is breached to the extent that property such as life savings in a bank account may also be preserved and possibly forfeited just because it had intermingled with the proceeds of alleged unlawful activity. The majority concedes that the words/definition 'property which is

mingled with property that is proceeds of unlawful activity' serve a legitimate and important public purpose of ensuring that criminals do not benefit from the proceeds of crime by mingling such proceeds with property received from legitimate sources. But that the overbroad sweep of the definition to also include the preservation and possible forfeiture of 'clean money' just because it mingled with illegitimate funds, without more, amounts to irrational and arbitrary deprivation of property.

[113] Elsewhere in the judgment the majority states that the safeguards or the innocent owner defence in s 63 is not a defence that is there for the asking, the applicant must comply with the stringent requirements therein. The same lamentation was extended to s 65. The applications envisaged in both ss 63 and 65 would come at a greater expense: if an applicant has to win 'it may be a pyrrhic victory a cold comfort to the applicant'. They question, why take property which is known not to be proceeds of unlawful activity and that that is where the irrationality of the impugned words lie. Further that the impugned words negate the essential content of the right to property because it does not specify the ascertainable extent of such negation, nor does it identify the authority on which the limitation is claimed to rest. Finally, that the in-built safeguards of the innocent owner's defence do not adequately address the arbitrariness concerns.

[114] With greatest respect, the majority seem to have turned their backs on the purposes of POCA. The danger posed by the rapid growth of organised crime, money laundering, criminal gang activities and racketeering have been well articulated elsewhere and needs no repetition here. Firstly, in the decision of the

South African Supreme Court of Appeal in *Rautenbach*,²⁸ that court held in relation to the analogous Namibian provisions on preservation and forfeiture, that: 'the Act does not require as a prerequisite to the making of a restraint order that the amount in which the anticipated confiscation order might be made must be capable of being ascertained, nor does it require that the value of the property that it places under restraint should not exceed the amount of the anticipated confiscation order. Where there is good reason to believe that the value of the property that is sought to be placed under restraint materially exceeds the amount in which an anticipated confiscation might be granted, then clearly a court properly exercising its discretion will limit the scope of the restraint (if it grants an order at all), for otherwise the apparent absence of an appropriate connection between the interference with property rights and the purpose that is sought to be achieved – the absence of an appropriate relationship between means and ends, between the sacrifice the individual is asked to make and the public purpose that [it] is intended to serve' will render the interference arbitrary and in conflict with the bill of rights.'²⁹

[115] I associate myself with the sentiments above. To require of the appellant (Prosecutor-General) in applications for preservation orders that every amount or value of property sought to be preserved be capable of being ascertained as the majority proposes defeats the purpose of POCA. The Constitution provides for limitation of rights provided the law providing the limitation is of a general application, not negating the essential content of the right and it shall specify the ascertainable extent of such limitation and identify the authority on which to enact such limitation is claimed to rest.

²⁸ *National Director of Public Prosecutions v Rautenbach & another* 2005 (4) SA 603 (SCA).

²⁹ *Ibid* at 621C-E, para 56.

[116] POCA is of a general application, it does not target the respondents only. The preservation order *in casu* specified the balances in the two accounts held at Bank Windhoek. The authority of the preservation order was the proceeds of the unlawful sale paid into the two accounts which justified the preservation order.

[117] The words 'but not exceeding the value of the proceeds of the unlawful activity before mingling' does not advance the case for the respondents in any way. Their circumstances remain the same as before. That is so when regard is had to what I illustrate *infra*. The proceeds of unlawful activity is the proceeds of the sale of the property, ie N\$18 000 000. We know for a fact that the proceeds of the purchase price were paid to the respondents: N\$16 982 583,01 in the first respondent's Bank Windhoek account and N\$1 031 956,16 into the second respondent's FNB account. The N\$1 000 000 of second respondent's share paid into her account was used to settle her youngest daughter's study loan in the USA. First respondent's account held a balance of N\$5 478 818,71 before the N\$16 982 583,01 was paid into that account. To recover the N\$18 000 000 and possibly the interest that might have accumulated, the N\$1 031 956,16 paid to the second respondent which the Prosecutor-General did not pursue would have had to be recouped from the first respondent's clean money in accordance with the definition replacing the impugned words. It too (the replacing definition) like the impugned words interferes in the property acquired from legitimate sources. That interference can never be said to be arbitrary and therefore irrational. The respondents are not entitled to the portion recouped from the clean money as the shortage from the proceeds of the unlawful activities has to be recovered. In my

opinion that is the portion of the property that has mingled with proceeds of unlawful activities. The words 'and includes property which is mingled with property that is proceeds of unlawful activity' when interpreted as the sentiments in the *Rautenbach* case above, reaches a coherent and practical outcome. The interpretation preferred by the majority leads to absurdity – property is taken for the mere reason of mingling. It cannot be and could not have been the intention of the Legislature when those words were enacted given the purpose of the Act and the provisions on preservation and forfeiture of property. That is so if regard is had to the comprehensive provisions/procedures constituting preservation and forfeiture and the attendant opportunities laid therein. The impugned words should be understood in that context and should have been left well alone.

[118] In any event, as already stated, no reasonable court would order a property preservation or forfeiture which is far in excess of the proceeds of unlawful activities or for the only reason that it mingled with property that is proceeds of unlawful activity. In both the preservation and forfeiture provisions the courts retain the discretion to refuse or grant the orders. In the present case the balance in the two accounts held by the first respondent at Bank Windhoek stood at N\$19 045 400,87. That amount in my opinion does not materially exceed the N\$18 000 000 and there was every reason to restrain the whole amount.

[119] Finally the majority found the in-built safeguards provided in ss 63 and 65 to be insufficient. A court is entitled to lament or criticise a provision or provisions in an Act or the Act as whole, but its ultimate duty is to interpret that provision or the law. Van der Westhuizen J on point said, 'interpretation is a cooperative venture

between legislature and judge, bounded by mutually understood rules, in which the latter seeks to give meaning to the text enacted by the former'.³⁰ Compare the observation of Lord Bingham, where he said, 'Judges are expected to deal with the text by engaging in judicial interpretation, not "judicial vandalism"'.³¹

[120] In my opinion nothing is wrong with the safeguards in ss 63 and 65. The intended application(s) in the provisions are no different to other civil processes, like default, summary, rescission judgments etc. Even if one were to accept that the provisions therein are stringent as the majority suggests, the measures in the Act are needed to deal effectively with organised crime and related gang activities. Recently in *Itula*³² this Court approved the principle that the Legislature's enacted text includes only words that matter³³ or that the Legislature does not intend to enact invalid or purposeless provisions.³⁴ Ours is an adversarial system, therefore incurred expenses in any application under ss 63 and 65 come with the territory and cannot be ground for declaring a statutory provision constitutionally invalid.

[121] On costs, I would order appellant to pay half the costs of the respondents for reason that appellant's alternative relief, although I do not agree with the legislative endeavours the majority delved in, succeeded. In fact, the appeal salvaged the order of severance by the High Court, without more, which left the door open for criminals to protect their ill-gotten gains from preservation and forfeiture.

³⁰ *National Credit Regulator v Opperman & others* 2013 (2) SA 1 CC at 29F-30A, para 99.

³¹ *Ibid* fn. 113.

³² *Itula & others v President of the Republic of Namibia & others* (A2-2024) NASC (28 February 2025).

³³ *National Credit Regulator v Opperman & others* 2013 (2) SA 1 CC at 30A, para 99.

³⁴ *Ibid* fn. 114.

[122] For the reasons above I respectfully dissent.

MAINGA JA

APPEARANCES

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RESPONDENTS:

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