

CASE NOTE

Illegal sales of alcohol and asset forfeiture

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The Constitutional Court recently confirmed an order for the forfeiture of a house from which an unlawful shebeen had been run for years (Van der Burg and Another v National Director of Public Prosecutions).¹ In deciding whether to confirm the order of the full bench of the High Court, Justice van der Westhuizen, writing for a unanimous court, addressed the following questions: whether the house was an instrumentality of an offence; whether the illegal sale of alcohol is an organised crime; the proportionality of the crime to the forfeiture under the Prevention of Organised Crime Act 121 of 1998 (the POCA); as well as the impact of the forfeiture on the rights of the children that lived in the house. This judgment comes at a time where issues such as the proposal for the reduction of the legal limit of alcohol for drivers to 0%² are topical, and seems to point to a tougher stance towards the sale and consumption of alcohol in South Africa. The judgment may therefore be seen as a warning that the illegal sale of alcohol and running of a shebeen will no longer be seen as business as usual in cases where the seller does not heed the call to desist such business.

In the case under review, Mr and Mrs van der Burg (the applicants) appealed against a forfeiture order that the full bench of the High Court had granted in terms of the Prevention of Organised Crime Act (POCA), in relation to their house from which they had been selling alcohol illegally and in contravention of section 154(1)(a) of the Liquor Act 27 of 1989. The judgment sets an important legal precedent in so far as the application of the POCA is concerned, as this is the first judgment where a private house has been forfeited to the state as a result of the illegal sale of alcohol and running of a shebeen. Furthermore, the judgment also reiterates the constitutional principle that the best interests of children are the paramount consideration in any matter that affects them, and sets a precedent in so far as how the National Director of Public Prosecutions (NDPP) should protect these interests where they intend to seize a property where children are resident.

This article starts with a description of the facts of the case, which are important as they not only highlight how the police had, without success, employed different law enforcement strategies to get the applicants to stop running their illegal shebeen and selling alcohol illegally, but also how the applicants continued to trade with impunity. The last-mentioned factor weighed severely against the applicants before the courts. The article then provides a brief description of some of the applicable provisions of the POCA which the NDPP invoked against the applicants. A brief description of the arguments advanced by the parties is provided, as well as the findings of the Constitutional Court and the reasons thereof. In conclusion the article provides remarks on the effect of this judgment.

THE FACTS

The applicants were a married couple with four children, three of whom were still minors at the time of the appeal to the Constitutional Court. They were the registered owners of the property situated in Athlone, a residential area in Cape

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Town. The property consisted of a semi-detached house and a wooden and galvanised structure attached to the right side of the house. The applicants had been illegally running a shebeen from the property for years, with liquor being ordered and served in the main house while the wooden structure was used as service, sale and consumption area.³ The main house, including its bedrooms and passage, was used extensively to store liquor.⁴ The property was close to two schools and a church and there were four licensed liquor outlets within a radius of 400 meters from the property, one being a licensed bottle store while the other three had licences permitting liquor consumption on the premises.⁵

The applicants had unsuccessfully applied for a liquor licence in February 2002, but they nonetheless persisted, operating a shebeen unlawfully from the property as they had done since 2002.⁶ Repeated complaints from neighbours about the illegal shebeen's effects on the community and its children were ignored by the applicants. An immediate neighbour sent 50 letters to various government departments, requesting intervention to close the illegal shebeen.⁷ The complaints were, among others, that minors were buying liquor; the shebeen generated undesirable noise; there were physical fights between patrons; the use of vulgar and abusive language; and that some of the patrons became so drunk that they collapsed on the road.⁸

Besides the complaints from the neighbours, the police had carried out 50 actions on the property, including 18 arrests that resulted in charges being withdrawn in two of the cases and payment of admission of guilt fines in the other 16.⁹ The police had also given warnings and seized vast amounts of liquor from the applicants' premises on various occasions.¹⁰ Despite these police interventions, the applicants continued to run an illegal shebeen. This resulted in the police deciding that 'due to lack of resources, to stop with further search and seizure operations at the property as conventional enforcement strategies had failed to have any effect on the applicants.'¹¹

As a result of this the NDPP brought an application for a preservation order against the applicants' property, which was granted,¹² but despite this order the applicants continued with their illegal shebeen. The NDPP then applied for a forfeiture order against the property in terms of section 50(1)(a) of the POCA, which was granted by the High Court and upheld by the full bench of the same High Court.¹³ The applicants approached the Supreme Court of Appeal, but this application was dismissed by the said court.¹⁴ This resulted in the applicants approaching the Constitutional Court, submitting that the interpretation of the POCA was a constitutional issue. They argued that the Constitutional Court recognised that forfeiture of property affects constitutional rights and that in their case the forfeiture was in violation of their constitutional rights.

THE LAW

The main arguments centred around the application and interpretation of the POCA. The POCA aims, among others, to introduce measures to combat organised crime, money laundering and criminal gang activities; to prohibit certain activities relating to racketeering activities; to provide for the prohibition of money laundering and for an obligation to report certain information; to criminalise certain activities associated with gangs; to provide for the recovery of the proceeds of unlawful activity; and for the civil forfeiture of criminal assets that have been used to commit an offence, or assets that are the proceeds of unlawful activity.¹⁵ Section 38 of the POCA states that a preservation order may be made in relation to a property that is an instrumentality of an offence referred to in Schedule 1, or is the proceeds of unlawful activities.¹⁶ The preservation order is aimed at prohibiting any person, subject to such conditions and exceptions as may be specified in the order, from dealing with the preserved property in any manner.

Once the property is preserved, the National Director of Public Prosecutions may, in terms of section 48(1) of the POCA, make an application that the preserved property be forfeited to the State. Section 50 of the POCA provides that the

High Court shall, subject to section 52, make an order applied for under section 48(1) if it finds on the balance of probabilities that the property concerned is an instrumentality of an offence referred to in Schedule 1 or is the proceeds of unlawful activities.¹⁷

In this instance the Constitutional Court had to consider the aforementioned provisions and measure them against several constitutional rights in order to determine whether the order of the High Court was appropriate.

THE PARTIES' ARGUMENTS

The applicants argued that section 50(1)(a), which permits the forfeiture of a property which is an instrumentality of an offence, only applied to the offences covered by the POCA, therefore only those in Schedule 1; that the forfeiture provisions had been used abusively to punish them for activities which the ordinary criminal law mechanisms were readily capable of curtailing; that the forfeiture of their property was far more serious than the seriousness of the offence and thus inappropriate; and that the forfeiture of their property would leave them and their children homeless, which was in breach of their constitutional right to protection from arbitrary deprivation of property.¹⁸

The NDPP opposed the applicants' leave to appeal for lack of reasonable prospects of success and argued that the appeal be dismissed.

The Centre for Child Law (CCL) was admitted as *amicus curiae* (friend of the court) and argued that the Constitution obliges the court to consider the best interests of the applicants' children before a final determination in relation to the forfeiture of the house can be made.¹⁹ The CCL contended that a *curator ad litem* should be appointed to compile a report on the impact of the forfeiture of the property on the applicants' children. They furthermore argued that in all matters where the POCA is invoked and children's best interests are at stake, there is a constitutional obligation to ensure that those interests are regarded as of paramount importance.

THE FINDINGS

The Constitutional Court found that the applicants had not made a case for the setting aside of the forfeiture order. In particular, the applicants' argument that the POCA was not applicable to the offence of selling liquor without a licence was unconvincing, and the forfeiture was not disproportionate.²⁰ On the question of whether a *curator ad litem* should be appointed to compile a report on what is in the best interests of the applicants' children, the court found that it was not necessary. However, in terms of the Children's Act, an investigation should take place in the Children's Court to determine whether the children were in need of care and protection.²¹ Fortunately, the Constitutional Court did not stop there, but set guidelines as to the obligations of the NDPP when considering the preservation and forfeiture of a property where children are resident.²²

Instrumentality of an offence

The applicants' submission before the Constitutional Court was that, while their property was an instrumentality of an offence under section 154(1)(a) of the Liquor Act, it was not an offence listed in Schedule 1 of the POCA and therefore could not be forfeited.²³ The Constitutional Court approached this issue by raising two questions: firstly whether the POCA applies to an offence not created by the POCA itself, and secondly what the interpretation was of item 33 of the POCA.²⁴

In answering the first question, the Constitutional Court referred to its *Mohunram and Another v Director of Public Prosecutions and Another*²⁵ (*Mohunram v NDPP*) judgment which dealt with the premises of a glass and aluminium business being preserved because an illegal gambling business had been taking place there too.²⁶ In *Mohunram* the court had written three judgments, approaching the question as follows:

- The majority of the court, per DCJ Moseneke, left the question open and stated that the conclusion reached on the issue of

proportionality did not compel a decision on this point; that the issue was not properly before the court; and that the argument amounted to an impermissible collateral challenge to the constitutional validity of section 50(1)(a).²⁷

- J Sachs agreed that the matter was not properly before the court and when dealing with this matter under the proportionality enquiry, stated that there was no obligatory jurisdictional requirement that the instrument of an offence be shown to have a connection with organised crime.²⁸
- According to J van Heerden, the forfeiture provisions apply to offences not created by the POCA as the amendments thereto had made it clear that it applies to offences committed before and after its commencement. Therefore it has wider ambit than that of offences that were created by the POCA, substantiated by *National Director of Public Prosecutions v Cook Properties*,²⁹ where it was held that the POCA is designed to reach far beyond organised crime, money laundering and criminal gang activities. She concluded that the ambit of the POCA was not limited to so-called organised crime offences.³⁰

Having considered the above, the court found that although the POCA does not explicitly identify the unlawful activity or offence at issue in this matter, namely the illegal sale of alcohol and running of a shebeen, at first glance the language of the statute as well as its aims suggest that its forfeiture provisions do apply to the property at which the unlawful selling of liquor occurs.³¹

The second question related to the interpretation of item 33 of Schedule 1 of the POCA. The item provides that a property that is an instrumentality of any offence, the punishment whereof may be a period of imprisonment exceeding one year without the option of a fine, may be preserved and forfeited under the POCA. The applicants contended, firstly, that item 33 was not applicable since the Liquor Act permits the court to impose a fine; secondly, that item 33 only applies where there is a mandatory sentence of imprisonment for a year or more and where the court is

precluded from imposing a fine; and, lastly, that the provisions of the POCA are draconian and should be limited to property used in the commission of extremely serious offences. The Constitutional Court disagreed and stated that:

- The first argument is unpersuasive as the POCA differentiates between penalty clauses that empower the court to impose either a fine or imprisonment with the option of the fine, from those which impose a fine and in default of payment of the fine a period of imprisonment. In the latter cases, only when the fine goes unpaid will a sentence of imprisonment be triggered.³²
- In relation to the second argument, the interpretation the applicants seek to advance would require a reading of the word ‘may’ in item 33 as ‘must’, which is inconsistent with the clear words of the POCA, as a sentence of imprisonment for more than one year without the option of a fine is competent and not mandatory.³³
- Lastly, the provisions of the POCA are not draconian, as they enable the court to consider variations in, on the one hand, the seriousness of the offence committed and, on the other, the manner and circumstances in which it was committed. The seriousness of the offence often depends on the manner and circumstances, but this does not mean that the forfeiture provisions of the POCA may not be applied to offences that are not regarded as extremely serious.³⁴

The Constitutional Court explained that under section 163(1)(a) of the Liquor Act, a person who is convicted of contravening section 154(1)(a) is liable to a fine, or to imprisonment for a period of not more than five years. The sentence that a court may impose is either a fine, or imprisonment for up to five years without the option of a fine. A period of imprisonment exceeding one year without the option of a fine is a penalty a court can impose and fits squarely within the ambit of item 33.³⁵

Proportionality of the forfeiture

In finding that the forfeiture was proportionate in the circumstances, the Constitutional Court reasoned that:

- The provisions of the POCA were not used whimsically or as a ‘top-up’ to punish the applicants for activities that ordinary criminal law mechanisms were readily capable of curtailing. The arrests, admissions of guilt, seizures of liquor and the preservation order did not show a failure to employ ordinary criminal law instruments, but rather that the continuation of the criminal conduct was more profitable, even with the sanctions imposed, than ceasing to engage in criminal conduct.³⁶ Therefore the forfeiture was a last resort that sought to put an end to the criminality by removing the main instrument used in its commission.³⁷ This was not an abuse of the POCA or the criminal justice system and also did not offend against the Constitution.³⁸
- The argument that the seriousness of the forfeiture, when weighed against the seriousness of selling liquor without a licence, did not justify the forfeiture, was not convincing, as ‘ordinary criminal law’, which was the first port of call in this case, had failed to deal with the evil.³⁹ The court relied on Mohunram’s judgment, where the court endorsed the view that where the relationship between the illegal activity and the primary objectives of the POCA is proximate, the court should more readily grant the forfeiture order than in cases where the same is tenuous.⁴⁰
- The possible homelessness of the applicants and their children was a relevant factor that could not be overlooked, but the proportionality enquiry was aimed at balancing the constitutional imperative of law enforcement and combating crime, as well as the seriousness of the offence, against the right not to be arbitrarily deprived of property.⁴¹ The court did not agree that the requirements for eviction under the Prevention of Illegal Eviction from and Unlawful Occupation Act 19 of 1998 (PIE) had to be considered under the proportionality enquiry, as the forfeiture did not necessarily

result in eviction.⁴² An enquiry under the PIE would still have to be undertaken where occupation has become unlawful as a result of a forfeiture order, and would take into account whether the eviction was just and equitable.⁴³

The Constitutional Court remarked that selling liquor without a licence is not necessarily organised crime, or generally regarded as a crime as serious as murder or rape, or the theft of millions. However, the manner in which it was committed, coupled with the patent harm that its commission was causing, had to result in the conclusion that forfeiture was proportionate and appropriate in this case.⁴⁴

Children’s rights

The Constitution provides in section 28(2) that the best interests of the child are of paramount importance in every matter that concerns the child. The Constitutional Court acknowledged its previous decisions on the interpretation of section 28(2)⁴⁵ and the fact that, to the extent that the applicants’ children might be affected by the forfeiture order, the court had to consider their interests.⁴⁶ The questions at hand were, firstly, who should raise the interests of children who may be affected in forfeiture proceedings under the POCA; secondly, should a consideration of the interests of the children form part of the proportionality enquiry, and lastly, did this case require the appointment of a *curator ad litem* to ensure separate representation of the children and an assessment of their situation before a decision on the forfeiture could be reached?

According to the Constitutional Court:

- The parents must invoke the interests of the children in their proceedings, but state institutions bear a responsibility to address this issue even when the parents have not raised it.⁴⁷ Furthermore, the High Court is not only the upper guardian of children, but also obliged to uphold the rights and values of the Constitution in all matters concerning children, including applications for the forfeiture of property which provides a home or shelter to

children. It is the duty of the court to consider the specific interests of the children.⁴⁸ Officers of the court such as the NDPP are expected to assist the court to the best of their ability with all the relevant information at their disposal.⁴⁹

- The children's circumstances play a role in the proportionality enquiry, as this analysis is specifically aimed at ameliorating the harsh effects that forfeiture may have on the right not to be deprived arbitrarily of property, and the possibility of homelessness.⁵⁰ However, the children's interests also require specific and separate consideration in addition to the attention they might get in the proportionality analysis, as they may require an intervention that would be independent of the conclusion reached on forfeiture at the end of the proportionality enquiry.⁵¹
- There was sufficient information before it, and the High Court, to consider the interests of children, and due consideration had been given to this aspect.⁵² The applicants never raised the issue that their children would be rendered homeless if the forfeiture order was granted, and the court had found that the applicants were business-orientated and would be able to find alternative accommodation for themselves and their children with the money that they made from their other business of selling vegetables.⁵³ There was therefore no need for the appointment of a *curator ad litem*.⁵⁴

The Constitutional Court expressed concern that the applicants' children might be in need of care and protection, and ordered the Department of Social Development to open a Children's Court enquiry and investigate this matter in terms of the Children's Act.⁵⁵

Developing existing forfeiture jurisprudence

In deciding the *Van der Burg v NDPP* matter, the Constitutional Court drew from previous judgments relating to forfeiture under the POCA. While the said judgments did not pertain to the forfeiture of a private home on the grounds of illegal sale of alcohol and running of a shebeen, the applicable principles under the POCA remain

the same. In *Prophet v National Director of Public Prosecutions*⁵⁶ (*Prophet v NDPP*) the Constitutional Court found that the forfeiture of a house from which drugs were being manufactured, in contravention of the Drugs and Drug Trafficking Act 140 of 1992, was proportional and that the house was an instrumentality of an offence.⁵⁷ *Prophet* had unconvincingly argued that the POCA was aimed at syndicates and not against individual persons and that there were ulterior motives for the use of the POCA against him as a 'test run' before going after the persons for whom the legislation was intended.⁵⁸ In the *Mohunram v NDPP* matter *Mohunram* ran an illegal gambling business from his legal glass and aluminium business premises, in contravention of various provisions of the KwaZulu-Natal Gambling Act 10 of 1996.⁵⁹ The majority of the Constitutional Court found that *Mohunram's* business premise was an instrumentality of an offence,⁶⁰ but that the forfeiture was not proportional as the ordinary criminal sanctions were adequate and the forfeiture order extended beyond a legitimate reach.⁶¹

In all three cases, the offences committed fell under the ambit of other primary legislation under which the offenders could and were prosecuted. In the *Prophet* case the prosecution was unsuccessful on a technicality; in *Mohunram v NDPP* fines and forfeiture of the gambling machines under that Gambling Act were enforced, whereas in the *Van der Burg v NDPP* matter countless ordinary criminal law mechanisms were unsuccessful. What is clear from the *Prophet*, *Mohunram* and *Van der Burg* judgments is that applicability of the POCA has a wide reach and will be used to curb crimes that ordinarily may not have been thought to fall thereunder, even where other measures have been invoked against the relevant parties. The offences in *Prophet v NDPP* and *Mohunram v NDPP* might not have been as widespread and easily detectable as the one in *Van der Burg v NDPP*. Therefore, *Van der Burg v NDPP* may have left those who sell alcohol illegally and run illegal shebeens with serious concerns.

There is some comfort to find in the Mohunram v NDPP majority judgment. The Constitutional Court made it clear that the aim of using the POCA is to remove the incentives for the crime and to adequately deter the offender and the broader community. In *Van der Burg v NDPP*, the forfeiture was the only way to get the illegal sale of alcohol and running of a shebeen to stop. Arguably, the Van der Burgs could start the same illegal business at their new house, however, the impunity with which they had acted over many years weighed against them and led to the Constitutional Court finding that the forfeiture was appropriate as the house was an instrumentality of the offence, and that it was proportional to forfeit it to the state in order to stop the illegal sale of alcohol and running of the shebeen.

CONCLUSION

The *Van der Burg* judgment has not only confirmed the application of the POCA in relation to combating the crime of illegal sale of alcohol and running of a shebeen, but has also added to the existing child rights jurisprudence in South Africa. The Constitutional Court judgment of *M v S*⁶³ introduced an era where the best interests of children are considered central in the process of determining whether a prison sentence is suitable or not for their offending primary caregivers. *S v M* has been cited in numerous judgments and continues to have a profound impact in protecting children's rights.⁶⁴ The *Van der Burg* judgment is a further addition to the jurisprudence and confirms the Constitutional Court's commitment to protect children's constitutional rights. If more cases such as that of the Van der Burgs are to arise, the clear obligation imposed on the courts and the state to ensure that the interests of children are protected when the POCA is applied, is a landmark development.



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NOTES

1. 2012 (2) SACR 331 (CC).
2. The National Road Traffic Amendment Bill of 2012 proposes to, amongst others, amend the legal blood alcohol

concentration limit for private drivers from 0.05g/100 ml to 0.02g/100 ml and from 0.02g/ml to 0.00g/ml for professional drivers.

3. *Van der Burg v NDPP* para[5] – [6], 335.
4. *Van der Burg v NDPP* para[6], 336.
5. *Ibid*, para[8].
6. *Ibid*, para[9].
7. *Van der Burg v NDPP* para[11], 337.
8. *Ibid*.
9. *Ibid*, para[12].
10. *Ibid*.
11. *Van der Burg v NDPP* para[13] 338.
12. *Ibid*, para[14].
13. See above as well as *Van der Burg v NDPP* para[15] – [16], 338.
14. *Van der Burg v NDPP* para[17] 338.
15. The Preamble of the POCA.
16. Section 38(2) (a) and (b).
17. Section 50(1) (a) and (b).
18. *Van der Burg v NDPP* para[26] 341.
19. *Ibid*, para[27].
20. *Van der Burg v NDPP* para[38] p 345 and para [51], 349.
21. *Van der Burg v NDPP* para[71] – [72] 355.
22. *Van der Burg v NDPP* para[68] – [70], 354.
23. *Van der Burg v NDPP* para[31], 343.
24. *Ibid*, para[32].
25. 2007 (2) SACR 145 (CC).
26. *Van der Burg v NDPP* para[33], 344.
27. *Van der Burg v NDPP* para[36], 344-345.
28. *Van der Burg v NDPP* para[37], 345.
29. *Van der Burg v NDPP* para[35], 344.
30. *Ibid*.
31. *Van der Burg v NDPP* para[38], 347.
32. *Ibid*, para[45].
33. *Ibid*, para[46].
34. *Ibid*, para[47].
35. *Van der Burg v NDPP* para[48]- [49], 348.
36. *Van der Burg v NDPP* para[51], 349.
37. *Ibid*.
38. *Ibid*.
39. *Ibid*, para[53].
40. *Ibid*, para[54].
41. *Van der Burg v NDPP* para[58] – [60], 351.
42. *Van der Burg v NDPP* para[60], 352.
43. *Ibid*.
44. *Van der Burg v NDPP* para[56], 350.
45. In particular, the interpretation of section 28(2) read together with section 28(1) in *S v M* (Centre for Child Law as Amicus Curiae) 2008 (3) SA 232 (CC), and the dicta therein that “every child has his or her own dignity. If a child is to be constitutionally imagined as an individual with a distinctive personality, and not merely as a miniature adult waiting to reach full size, he or she cannot be treated as a mere extension of his or her parents, umbilically destined to sink or swim with them.”
46. *Van der Burg v NDPP* para[63], 352.
47. *Van der Burg v NDPP* para[68], 354.
48. *Ibid*.
49. *Ibid*. The Constitutional Court also remarked that the failure of the parents to emphasise the interests of their children of the possible manipulation of the children's situation to suite the objectives of parents, may not be held against the children.
50. *Van der Burg v NDPP* para[69], 354.

51. Ibid, para[70].
52. *Van der Burg v NDPP* para[73], 355.
53. Ibid.
54. Ibid, para[74].
55. *Van der Burg v NDPP* para[75] – [79], 356.
56. 2007 (6) SA 169 (CC). Hereafter *Prophet v NDPP*.
57. *Prophet v NDPP* para[1]-[12], 175.
58. *Prophet v NDPP* para[16], 180.
59. *Mohunram v NDPP* para[5], 228. The illegal gambling business consisted of 57 gaming machines that were unregistered and no permit for their storage had been obtained by Mohunram.
60. *Mohunram v NDPP* para[110], 261.
61. *Mohunram v NDPP* para[129] to [136], 267 to 269.
62. *Mohunram v NDPP* para[134], 268.
63. 2008(3) SA 232 (CC).
64. See D Erasmus, *There is something you are missing: What about the children?: Separating the rights of children from those of their caregivers*, 25 SAPL 24, 2011, and A Skelton and M Courtenay, *Beyond S v M: Children of perpetrators who are primary caregivers*, 25 SACJ 180, 2012.