CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 75/11
[2012] ZACC 12

In the matter between:

HILDA VAN DER BURG	First Applicant
EDWARD VAN DER BURG	Second Applicant
and	
NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	Respondent
together with	
CENTRE FOR CHILD LAW	Amicus Curiae

Heard on : 8 March 2012

Decided on : 12 June 2012

JUDGMENT

VAN DER WESTHUIZEN J (Mogoeng CJ, Yacoob ADCJ, Cameron J, Froneman J, Jafta J, Khampepe J, Maya AJ, Nkabinde J, Skweyiya J and Zondo AJ concurring):

Introduction

[1] In this matter the constitutional imperative of law enforcement and combating crime,[1] as given effect to in the forfeiture provisions of the Prevention of Organised Crime Act[2] (POCA), must be balanced against the constitutional guarantee against the arbitrary deprivation of property.[3] The best interests of children who may be affected by forfeiture, or by the criminal environment giving rise to it, must also be considered.

[2] It is an application for leave to appeal against a judgment of the Full Court of the Western Cape High Court,[4] which dismissed an appeal challenging an order under POCA granting the forfeiture of the residential property of the first and second applicants. The applicants want the forfeiture order to be set aside. They argue that this Court should condone the late lodging of their application for leave to appeal, grant leave to appeal and hold that the forfeiture provisions of POCA do not apply to this case and that forfeiture is disproportionate in the circumstances. The respondent, the National Director of Public Prosecutions (NDPP), requests the dismissal of the application for leave to appeal for lack of reasonable prospects of success, alternatively, that the appeal be dismissed.

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[1] In *F v Minister of Safety and Security and Others* [2011] ZACC 37; 2012 (1) SA 536 (CC); 2012 (3) BCLR 244 (CC) at para 138 Froneman J noted that "[i]t is accepted in our law that there is a constitutional duty on the police to prevent, combat and investigate crime and to protect the inhabitants of the Republic." See also *Carmichele v Minister of Safety and Security and Another (Centre for Applied Legal Studies Intervening)* [2001] ZACC 22; 2001 (4) SA 938 (CC); 2001 (10) BCLR 995 (CC). Section 205(3) of the Constitution states:

> "The objects of the police service are to prevent, combat and investigate crime, to maintain public order, to protect and secure the inhabitants of the Republic and their property, and to uphold and enforce the law."

[2] 121 of 1998.

[3] See below n 25 for the wording of section 25(1) of the Constitution.

[4] *Van der Burg and Another v National Director of Public Prosecutions* [2011] ZAWCHC 75 (Full Court decision).

[3] The Centre for Child Law was admitted as amicus curiae. The amicus contends that the Constitution obliges a court to consider the best interests of the applicants' children before a final determination can be made on the forfeiture.[5] Thus the amicus requests the Court to appoint a curator ad litem to prepare a report concerning the impact the forfeiture would have on the applicants' children.

[4] The questions to be determined are whether—

(a) the forfeiture provisions of POCA apply to this case and in particular to the criminal offence committed here;

(b) the forfeiture of the applicants' property would be proportionate or disproportionate in the circumstances; and

(c) the Constitution requires this Court to appoint a curator ad litem to represent the interests of the children by filing a report to be taken into account in deciding the merits of the forfeiture order, or to take alternative measures to ensure that the best interests of the children are duly considered under the circumstances.

Factual and litigation background

[5] A fairly detailed account of the factual and litigation history of this matter is relevant to the determination of the issues. The applicants are a married couple with four

[5] See [27] below for the wording of section 28(2) of the Constitution.

children, three of whom are minors.[6] They are registered owners of property they bought in November 2000 for R169 000.00. A mortgage bond for R135 000.00 was registered against the property in favour of Standard Bank of South Africa. The market value of the property at the time of the forfeiture application in 2006 was approximately R350 000.00. In the same year Standard Bank obtained judgment against the applicants for payment of the amount of R139 538.43 plus interest and an order declaring the property specially executable.

[6] The property is situated at 25A Birdwood Street, Athlone, a residential area in Cape Town. The building on the property – a semi-detached house – consists of an open-plan kitchen and living area, three bedrooms, a bathroom and passage. A wooden and galvanised structure is attached to the right side of the house. The applicants have been illegally running a shebeen[7] from the property for years. Liquor is ordered from and served in the main house and the wooden structure is used as a service, sale and consumption area in the shebeen operation.[8] Police investigations on the property have revealed that the main house, including its bedrooms and passage, is also used

[6] The High Court decision below n 17 at para 10, handed down in December 2008, mentioned that all the children were minors. The applicants' written submissions before this Court state that three of the four children are minors. In her answering affidavit before the High Court, deposed to in February 2007, the first applicant referred to her affidavit filed in the proceedings relating to the preservation order which was granted in October 2006. At the time the latter affidavit was drafted the applicants' children were 5, 7, 10 and 17 years of age, respectively.

[7] A "shebeen" is an unlicensed liquor outlet.

[8] In the Full Court decision above n 4 at para 5, Le Grange J found that there is a wooden and galvanised structure attached to the right side of the house and also that liquor was ordered from and served in the main house and the wooden structure. In their founding affidavit before this Court the applicants submit that the Full Court took little notice of their submission that the wooden and galvanised structure was non-existent by the time the matter went to trial. In the same affidavit, it is submitted further that the storing of liquor in the house no longer took place by the time the matter went to trial.

extensively to store liquor. Indeed, it appears that a great deal of the property is used for illegal shebeen activity.

[7] St. Raphael's Primary School is about 30 metres from the property. The entrance to the school is directly in line of sight of the property. Next to the school, approximately 100 metres from the house, is St. Mary's Roman Catholic Church. About 900 metres from the property, also in Birdwood Street, is the Star High School, whose learners use Birdwood Street to get to the railway station and thus have to pass the property.

[8] Four licensed liquor outlets exist within a radius of 400 metres of the property. One of these has a bottle store licence and the other three liquor licences permitting liquor consumption on the premises.

[9] The applicants unsuccessfully applied for a liquor licence in February 2002. It is not in dispute that the shebeen has been operating unlawfully from the property. In the Full Court decision it is stated that the applicants have carried on their illegal conduct since 2000, when they bought the home.[9]

[9] Above n 4 at para 8.

[10] The money made by the applicants from trading liquor illegally is not their only income. It would appear from the evidence that the applicants have earned at least R6 000.00 per month from two fruit and vegetable stalls.[10]

[11] Neighbours have repeatedly complained about the effects of the shebeen on their children and neighbourhood. An immediate neighbour has written over 50 letters to various government departments in an attempt to bring an end to the unlawful selling of liquor from the property. She has described how people enter the premises throughout the day and night and leave with liquor purchased there. Patrons sit and drink in the carport and in the backyard, on benches specifically put up for them. On many occasions minors buy liquor and drink it on the premises. The shebeen generates undesirable noise. Physical fights break out regularly between the patrons; the applicants often join the fracas. Extremely vulgar and abusive language is commonplace. Some of the patrons become so drunk that they collapse on the road on either Birdwood Street or Carrington Street (the street that runs perpendicularly off Birdwood Street). Patrons hurl bottles at one another, as well as against the walls surrounding the neighbours' properties. They

[10] It is not entirely clear how much the applicants earn from these stalls. Before the High Court the applicants, in their answering affidavit, averred that they earn R500.00 per week per stall from the rental of their stalls and an additional R500.00 per week per stall from their share in the profits generated from the stalls. This would seem to amount to R8 000.00 per month. The court calculated an amount of R6 000.00. In the High Court decision below n 17, Gassner AJ stated that the applicants make R500.00 per week from the rental of the stalls and R500.00 per week per stall from the profit share. Le Grange J, in the Full Court decision above n 4, accepted the R6 000.00 amount. In their founding affidavit before this Court, the applicants aver that both lower courts improperly latched onto these facts, which date back to 2002 and did not exist when the matter went to trial. They moreover state that the lower courts were incorrect to find that they would not be left destitute and that they could find alternative accommodation if their property was forfeited. Also, they aver that because of the financial difficulty experienced by the Athlone CBD, their stalls suffered a "huge financial dip" and that this dip is the reason they defaulted on their mortgage bond payments. It seems that the applicants are approbating and reprobating on this point.

urinate in full view of the public, in the yard of the premises, on the street and against the boundary wall and they trespass on the neighbour's property in order to gain access to the shebeen.

[12] There have been more than 50 police actions on the property, including 18 arrests. The applicants have themselves been arrested.[11] In two of the cases in which arrests were made, the charges were withdrawn, while admission of guilt fines were paid in the other 16. In each instance there was no dispute that liquor was being unlawfully sold on the property. The police gave oral[12] and written[13] warnings to the applicants on numerous occasions to cease the unlawful selling of liquor. In addition to these arrests and warnings, the police have seized vast amounts of liquor from the premises, on various occasions.[14]

[13] These police interventions have not stopped the criminal activity, which continues day and night. It seems to be a large operation. The applicants have "runners" who do

[11] Also, according to the Full Court decision above n 4 at para 38, "an employee of the [applicants] was brutally murdered in the house and both [applicants] were arrested for this crime."

[12] According to the Full Court decision above n 4 at para 13, an oral warning was given on 18 April 2002. According to the High Court decision below n 17 at para 15, oral warnings were issued on 23 November 2002, 1 October 2003, 1 February 2003, 3 July 2003 and 22 February 2004.

[13] In both Full Court and High Court decisions above n 4 at para 13, and below n 17 at para 15, respectively, it is stated that written warnings were given on 2 September 2003, 11 November 2003, 18 November 2003, 21 November 2003, 17 December 2003, 6 January 2004, 28 June 2004, 28 June 2005, 8 November 2005 and 1 February 2006. According to the Full Court decision above n 4 at para 13, written warnings were also given on 23 April 2002, 1 May 2002, 22 October 2002, 10 January 2003, 23 January 2004, 21 April 2004 and 8 June 2005 and according to the High Court decision below n 17 at para 15, written warnings were also given on 21 January 2004 and 23 April 2004.

[14] According to the High Court decision below n 17 at para 19, the police seized liquor at the property on 5 August 2006, 9 August 2006, 28 September 2006 and 21 November 2006.

much of the work for them. They seem to persist in the unlawful conduct because of its profitability. Indeed, the police decided—

> "due to lack of resources, to stop with further search and seizure operations at the property as conventional law enforcement strategies failed to have any effect on the [applicants]."[15]

[14] As a result of these unsuccessful efforts the NDPP launched an application for a preservation order in respect of the property. A provisional preservation order was granted in June 2006 and the order was made final in October of that year. Despite the preservation order, the applicants continued unabated with the unlawful activity.

[15] In January 2007 the NDPP applied to the High Court for a forfeiture order against the property in terms of section 50(1)(a) of POCA.[16] On 22 December 2008 Gassner AJ[17] granted the order after finding that the property was instrumental to the commission of the crime of selling liquor without a licence and that forfeiture would be proportionate in the circumstances.[18]

[15] Full Court decision above n 4 at para 14.

[16] See [20] below for the wording of section 50(1)(a).

[17] *National Director of Public Prosecutions v Hilda Van der Burg and Another* (CPD) Case No 5597/06, 22 December 2008, unreported (High Court decision).

[18] Id at paras 29 and 39.

[16] The applicants appealed to the Full Court and argued that illegally selling liquor is not an offence in terms of Chapter 6 of POCA,[19] as POCA only relates to "organised crime offences" and not to criminal activity by individuals. They argued that the property therefore could not be an instrumentality of an offence as envisaged by POCA. They also contended that the forfeiture of the property is manifestly disproportionate to the offence they committed.[20]

[17] On 16 March 2011 the Full Court dismissed the applicants' appeal. It held that the offence fell squarely within the ambit of POCA, that the property was a direct "instrumentality of an offence" within the meaning of section 1 of POCA[21] and that the forfeiture was not disproportionate. The applicants sought leave to appeal to the Supreme Court of Appeal. On 30 June 2011 their application was dismissed with costs.

[18] The applicants ask this Court for leave to appeal against the Full Court decision. They submit that the interpretation of POCA is a constitutional issue and that this Court has recognised that forfeiture affects constitutional rights.

[19] See below [20]-[23] for an explanation of the forfeiture process under section 50(1)(a) of POCA.

[20] Full Court decision above n 4 at para 17.

[21] See [21] below for the definition of "instrumentality of an offence", as defined in section 1.

Constitutional and statutory framework

[19] The general objectives of POCA – according to its long title – are to combat organised crime, money laundering and criminal gang activities, to ensure recovery of the proceeds of unlawful activity and to provide for the civil forfeiture of criminal property that has been used to commit an offence.[22]

[20] The forfeiture provisions in Part 3 of Chapter 6 of POCA lie at the heart of this dispute. Section 50(1)(a) states:

> "The High Court shall, subject to section 52, make an order applied for under section 48(1) if the Court finds on a balance of probabilities that the property concerned is an instrumentality of an offence referred to in Schedule 1".

[21] An "instrumentality of an offence" is defined in section 1 of POCA as—

> "any property which is concerned in the commission or suspected commission of an offence at any time before or after the commencement of this Act, whether committed within the Republic or elsewhere".

[22] The long title of POCA states:

> "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; for the civil forfeiture of criminal property that has been used to commit an offence, property that is the proceeds of unlawful activity or property that is owned or controlled by, or on behalf of, an entity involved in terrorist and related activities; to provide for the establishment of a Criminal Assets Recovery Account; to amend the Drugs and Drug Trafficking Act, 1992; to amend the International Co-operation in Criminal Matters Act, 1996; to repeal the Proceeds of Crime Act, 1996; to incorporate the provisions contained in the Proceeds of Crime Act, 1996; and to provide for matters connected therewith."

[22] Section 48(1) of POCA empowers the NDPP to apply to a High Court for a forfeiture order, where there is a preservation order already in force over the property sought to be forfeited.[23] This is so in this case.

[23] Schedule 1 lists a number of offences for which forfeiture would be a competent consequence. These include "any offence the punishment wherefore may be a period of imprisonment exceeding one year without the option of a fine", in Item 33.

[24] The offence in this case, which has repeatedly resulted in police action, is the selling of liquor without a license, criminalised by the Liquor Act.[24] Section 163(1)(a) determines its penal sanction:

> "Any person who is guilty of an offence in terms of this Act, shall on conviction be liable in the case of an offence referred to in section 154(1)(a) or (i) or 159(a), (b), (fA) or (i), to a fine or to imprisonment for a period of not more than five years".

[25] The Constitution recognises the right not to be arbitrarily deprived of one's property.[25] This Court and the Supreme Court of Appeal have recognised that in the

[23] Section 48(1) provides:

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

[24] Section 154(1)(a) of the Liquor Act 27 of 1989 states:

> "Any person who sells any liquor otherwise than under a licence or an exemption by or under section 3 or 4 shall be guilty of an offence."

[25] Section 25(1) of the Constitution states:

consideration of forfeiture under POCA, a proportionality enquiry has to be done, based on this right. In *Mohunram v National Director of Public Prosecutions*[26] Van Heerden AJ held that "the purpose of the proportionality enquiry is to determine whether the grant of a forfeiture order would amount to an arbitrary deprivation of property in contravention of section 25(1) of the Constitution."[27] In the same case, Moseneke DCJ stated that:

> "[Courts] have correctly held all requests by State prosecutors for civil forfeiture to the standard of proportionality which amounts to no more than that the forfeiture should not constitute arbitrary deprivation of property or the kind of punishment not permitted by section 12(1)(e) of the Constitution."[28] (Footnote omitted.)

[26] The applicants also rely on the constitutional recognition of the right of access to adequate housing,[29] as well as the right not to be evicted from one's home without a court order, after a consideration of all the relevant circumstances, recognised in the

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> "No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property."

[26] *Mohunram and Another v National Director of Public Prosecutions and Another (Law Review Project as amicus curiae)* [2007] ZACC 4; 2007 (4) SA 222 (CC); 2007 (6) BCLR 575 (CC) (*Mohunram*).

[27] Id at paras 56. See also *Mohunram* id at para 130.

[28] Id at para 121. See also *Prophet v National Director of Public Prosecutions* [2006] ZACC 17; 2007 (6) SA 169 (CC); 2007 (2) BCLR 140 (CC) (*Prophet*) at para 58; *National Director of Public Prosecutions v Vermaak* 2008 (1) SACR 157 (SCA) (*Vermaak*) at para 9; *National Director of Public Prosecutions v Van Staden and Others* 2007 (1) SACR 338 (SCA) (*Van Staden*) at paras 4-6; *Prophet v National Director of Public Prosecutions* 2006 (1) SA 38 (SCA) at paras 30 and 37; *National Director of Public Prosecutions v Mohunram and Others* 2006 (1) SACR 554 (SCA) at para 5 and *National Director of Public Prosecutions v R O Cook Properties (Pty) Ltd; National Director of Public Prosecutions v 37 Gillespie Street Durban (Pty) Ltd and Another; National Director of Public Prosecutions v Seevnarayan* 2004 (2) SACR 208 (SCA) (*Cook Properties*) at para 15.

[29] Section 26(1) states:

> "Everyone has the right to have access to adequate housing."

Constitution[30] and in the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act[31] (PIE). The applicants argue that this Court must not merely consider the effect of forfeiture as a factor in assessing proportionality. It must approach the forfeiture as if it were an eviction and consider all relevant circumstances, including the rights and needs of the elderly, children and others, when deciding whether to grant the eviction order, as required by section 4(6) or (7) of PIE.

[27] The amicus' contention – that the forfeiture should not be granted until and unless a curator ad litem has been appointed to represent the children's interests – is based on section 28(2) of the Constitution. This provision states that "[a] child's best interests are of paramount importance in every matter concerning the child." The amicus also stresses the children's rights to family or parental care and to basic shelter.[32]

[30] Section 26(3) states:

> "No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions."

[31] 19 of 1998. See section 4(6) and (7) of PIE. The text of section 4(7) is quoted below n 79.

[32] Section 28(1) provides, in relevant part:

> "Every child has the right—
>
> . . .
>
> (b) to family care or parental care, or to appropriate alternative care when removed from the family environment;
>
> (c) to basic nutrition, shelter, basic health care services and social services".

[28] In this case, some of the provisions of the Children's Act[33] may assist to protect the interests of the applicants' children. Section 47(1) of this Act, which refers to the procedures in Chapter 9 of the Act, provides:

> "If it appears to any court in the course of proceedings that a child involved in or affected by those proceedings is in need of care and protection as is contemplated in section 150,[34] the court must order that the question whether the child is in need of care and protection be referred to a designated social worker for an investigation contemplated in section 155(2)." (Footnote added.)

Other provisions of the Act set out the procedures to be followed.[35]

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[33] 38 of 2005.

[34] Section 150(1) of the Children's Act lists certain circumstances which, if found to inhere in the child's case, render the child in need of care and protection. It states, in relevant part:

> "A child is in need of care and protection if, the child—
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> . . .
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> (f) lives in or is exposed to circumstances which may seriously harm that child's physical, mental or social well-being".

[35] Section 155 explains the procedures to be followed, before and after the Children's Court decides either that the child is or is not in need of care and protection. Firstly, under section 155(1)—

> "[a] children's court must decide the question of whether a child who was the subject of proceedings in terms of section 47, 151, 152 or 154 is in need of care and protection."

Secondly, in addition to the requirement of reporting the matter to the relevant provincial department of social development under section 155(3), section 155(2) provides:

> "Before the child is brought before the children's court, a designated social worker must investigate the matter and within 90 days compile a report in the prescribed manner on whether the child is in need of care and protection."

In the case that the report concludes that the child is not in need of care and protection, section 155(4)(a) requires that the report indicates the reasons for the conclusion and gets submitted to the Children's Court for review. Under section 155(4)(b), the report must also indicate recommendatory measures to assist the family, "where necessary".

In the case that the report concludes that the child is in need of care and protection, section 155(5) requires that the child be presented before the Children's Court. Section 155(6) empowers the Children's Court to make certain orders while it decides whether the child is in need of care and protection. Section 155(7) empowers the Children's Court to make any order under section 156 where it finally decides that the child is in need of care and protection. Section 155(8) lists the orders the Children's Court is empowered, in certain circumstances, and obliged, in others, to make once it has decided that the child is not in need of care and protection. Under section 155(9) the Children's Court must have regard to the report of the designated social worker when deciding the question of whether a child is in need of care and protection.

Condonation

[29] Before the questions central to this application are addressed, two preliminary issues need to be resolved. The first is whether condonation should be granted for the late filing of the application for leave to appeal. The application should have been filed by 21 July 2011, but was filed on 25 July. The application was however served on the NDPP within time. The applicants explain that they lacked the financial resources to launch the application timeously and required time to borrow money from various sources. It seems that no prejudice was suffered as a result of the delay. The NDPP does not oppose condonation. It is in the interests of justice to grant condonation.

Leave to appeal

[30] The second preliminary issue is whether leave to appeal should be granted. It is in the interests of justice to grant leave, because the determination of the issues at stake will impact on the constitutional rights mentioned[36] and especially on the best interests of the child. It cannot be said that the application bears no prospects of success.

Are POCA's forfeiture provisions applicable?

[31] In deciding whether forfeiture should be granted under section 50(1)(a) of POCA, the threshold question is whether the property concerned constitutes an instrumentality of

[36] In *Prophet* above n 28 at para 46-7 this Court held that section 39(2) of the Constitution enjoins courts to interpret POCA in light of section 25 of the Constitution and, as such, constitutes a constitutional issue.

an offence referred to in Schedule 1.[37] Before this Court the parties do not dispute that the property is indeed the instrumentality of an offence: selling liquor without a license under section 154(1)(a) of the Liquor Act.[38]

[32] Two questions then need to be answered. One concerns the applicability of POCA's forfeiture provisions to an offence not created by POCA itself; and the other the interpretation of Item 33 of Schedule 1 of POCA.[39]

[33] On the first, it must be determined whether section 50(1)(a)[40] should be interpreted to require that the relevant offence is indeed one covered by POCA, even though this is not expressly stated in the section or in Schedule 1. In *Mohunram*, which concerned illegal gambling that occurred on the premises of a glass and aluminium business, the amicus – although it did not contest the constitutional validity of section 50(1)(a) – advanced precisely this:

> "[B]efore the instrumentalities of wrongdoing can be declared forfeit, the act or omission must be 'an organised crime offence' as contemplated in POCA and, *in addition*, the 'offence' must be one referred to in Schedule 1. Thus, the reference to Schedule 1 simply

[37] Section 50(1)(a) of POCA, quoted in [20] above. In *Prophet* above n 28 at para 58, Nkabinde J stated:

> "The general approach to forfeiture *once the threshold of establishing that the property is an instrumentality of an offence has been met* is to embark upon a proportionality enquiry". (Emphasis added.)

[38] Above n 24.

[39] See Chapters 2, 3 and 4 of POCA, entitled "Offences relating to racketeering activities", "Offences relating to proceeds of unlawful activities" and "Offences relating to criminal gang activities", respectively.

[40] See [20] above for the wording of section 50(1)(a) of POCA.

> limits the ambit of the offences under POCA that can provide the basis for the grant of the forfeiture order.
>
> . . .
>
> [The amicus] . . . contended that there is no denying that the Legislature intended the forfeiture to be obligatory once the requirements of section 50 were satisfied. Parliament could never have harboured such an intention, the [amicus] submitted, unless it envisaged that the only offences for which an order of forfeiture based on instrumentality would be competent would be those offences created by POCA itself."[41]

[34] Three judgments were given in *Mohunram*. Van Heerden AJ rejected the amicus' argument and found that the forfeiture provisions did apply to the offence in that case.[42] Firstly, she relied on an amendment to POCA[43] which was enacted to make it clear that the provisions of Chapters 3, 5 and 6 are applicable in respect of instrumentalities of offences and proceeds of unlawful activities that occurred before the commencement of POCA.[44] Therefore, because POCA as amended makes it clear that it applies to offences committed before and after its commencement, it "has a wider ambit than that of offences that were 'created' by POCA, and which thus only existed from its date of commencement".[45]

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[41] *Mohunram* above n 26 at paras 16 and 20.

[42] Id at para 34 where Van Heerden AJ, after her deliberation on this point, declared:

> "I remain unconvinced by the [amicus'] contention that Chapter 6 of POCA can reasonably be interpreted so as to apply only to so-called 'organised crime offences'."

Langa CJ, Madala J, Van der Westhuizen J and Yacoob J concurred in the judgment of Van Heerden AJ.

[43] Prevention of Organised Crime Second Amendment Act 38 of 1999 (Amendment Act).

[44] *Mohunram* above n 26 at para 21.

[45] Id at para 24.

[35] Secondly, she relied on the Supreme Court of Appeal decisions in *National Director of Public Prosecutions v Van Staden* (which held that the provisions of POCA are "designed to reach far beyond organised crime and apply also to cases of individual wrongdoing")[46] and *National Director of Public Prosecutions v Cook Properties* (which held that POCA "is designed to reach far beyond 'organised crime, money laundering and criminal gang activities'").[47] She concluded that the wording of POCA as a whole makes it clear that its ambit is not limited to so-called "organised crime offences".[48]

[36] Moseneke DCJ and Sachs J, with majority support,[49] left the question open. Moseneke DCJ did so for three main reasons. Firstly, the conclusion he reached on the proportionality enquiry did not compel a decision on the point.[50] Secondly, the issue was not properly before the Court.[51] Lastly, he held that the argument amounted to an impermissible collateral challenge to the constitutional validity of section 50(1)(a).[52]

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[46] *Van Staden* above n 28 at para 1. (Footnote omitted.)

[47] *Cook Properties* above n 28 at para 65.

[48] *Mohunram* above n 26 at para 25.

[49] Mokgoro J and Nkabinde J concurred in the judgment of Moseneke DCJ and Kondile AJ and O'Regan J concurred in the judgment of Sachs J.

[50] *Mohunram* above n 26 at para 114. Moseneke DCJ concluded that forfeiture would not be proportionate in the circumstances at para 137.

[51] Id at para 114, Moseneke DCJ stated that:

> "[T]he proper scope of civil forfeiture in Chapter 6 and particularly the proper scope of section 50(1) and the attitude of the Supreme Court of Appeal on these matters were not debated before the High Court or the Supreme Court of Appeal. They were raised for the first time in this Court."

[52] Id.

[37] Sachs J remarked that "no bright lines can be drawn between organised crime and private criminal activities",[53] but agreed that the matter was not properly before the Court.[54] He accordingly dealt with the factors raised unsuccessfully by Mr Mohunram in an attempt to exempt the property from forfeiture, within the proportionality enquiry,[55] and assumed for the purposes of the judgment that "there is no obligatory jurisdictional requirement that the instrument of an offence be shown to have a connection with organised crime".[56]

[38] In the current matter no constitutional attack – for example based on over-breadth – was levelled against section 50(1)(a) or any other provision of Chapter 6 of POCA. Moreover, unlike in *Mohunram*, no alternate construction of section 50(1)(a) was advanced by any of the parties. To hold that section 50(1)(a) has the additional requirement that the crime is one specifically covered by POCA would probably require a declaration of invalidity or a reading-down of the legislation. A decision on the constitutional validity of the provision is not called for in this case. Therefore, although POCA does not explicitly identify the unlawful activity or offence at issue in this matter, the facial 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.

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[53] Id at para 140.

[54] Id. He stated that "[n]o challenge was made to [the] constitutionality [of Chapter 6 of POCA] and we are obliged to apply the provisions on the assumption that they are constitutional."

[55] Id at para 141.

[56] Id at para 140.

[39] Relying on decisions of this Court and the Supreme Court of Appeal, the applicants further submit that the provisions of Chapter 6 of POCA are not applicable to this case because they—

(a) do not form part of the ordinary strategies of law enforcement[57] and can only be used when the ordinary penalties are inadequate or inappropriate to address crime;[58]

(b) are intended to remove the incentive for crime[59] and are not punitive in nature even though their effects are; [60] and

(c) are not applicable when the offence, as is the case with selling liquor without a licence, presents no difficulties to detect and prosecute and does not exhibit the same challenges ordinarily associated with the combat of organised crime.[61]

[40] In line with Sachs J's reasoning above,[62] these are factors that are taken into account as part of the proportionality analysis and not when deciding, as a matter of

[57] Id at para 72 where Van Heerden AJ held:

> "There is no justification for resorting to the remedy of civil forfeiture under POCA as a *substitute* for the effective and resolute enforcement of 'ordinary' criminal remedies."

[58] *Van Staden* above n 28 at para 7.

[59] *National Director of Public Prosecutions and Another v Mohamed NO and Others* [2002] ZACC 9; 2002 (4) SA 843 (CC); 2002 (9) BCLR 970 (CC) at para 15.

[60] *Mohunram* above n 26 at para 42.

[61] *Van Staden* above n 28 at para 7.

[62] *Mohunram* above n 26 at para 141. See [37] above.

principle, whether POCA's forfeiture provisions are applicable in a particular case. The proportionality issue is dealt with below.

[41] I therefore conclude that the forfeiture provisions of POCA are applicable to this case.

[42] The next question relates to the interpretation of Item 33. As indicated earlier, the offence attracts a sentence of "a fine or . . . imprisonment for a period of not more than five years".[63] The question is whether this penalty is covered by Item 33, which mentions "any offence the punishment wherefore may be a period of imprisonment exceeding one year without the option of a fine".[64]

[43] In their written submissions the applicants contend that the offence of illegal dealing in liquor is not an offence referred to in Item 33. Their counsel did not pursue this in oral argument. The points raised in writing are therefore dealt with briefly.

[44] Firstly, the applicants submit that because the Liquor Act permits the court to impose a fine, the offence does not fall within the ambit of Item 33. They argue that a construction of Item 33 covering a legislative penalty that permits the court to impose a fine, renders the phrase "without the option of a fine" redundant and would moreover

[63] [24] above.

[64] This is because the property must be the "instrumentality of an offence *referred to in Schedule 1*", under section 50(1)(a) of POCA. (Emphasis added.)

render Items 1 to 32 of Schedule 1 redundant. This they argue would violate the presumption against legislative superfluity.

[45] This argument is unpersuasive. POCA clearly distinguishes penalty clauses that empower a court to impose either a fine or imprisonment without the option of a fine, on the one hand, from those which impose a fine *and in default of payment thereof* a period of imprisonment, on the other. In the latter instances it is only once the fine goes unpaid that a sentence of imprisonment is triggered. Item 33 does not apply to the many statutes in the last-mentioned category, but it does to the first.

[46] Secondly, the applicants argue that Item 33 applies only where there is a mandatory sentence of imprisonment for a year or more and where the court is precluded from imposing a fine. This interpretation would require reading the word "may" in Item 33 as "must", which is plainly unconvincing as it is inconsistent with the clear words of the statute. A sentence of imprisonment for more than one year without the option of a fine is competent, not mandatory.[65] This is supported by the Supreme Court of Appeal

[65] This conclusion is bolstered by the approval in *National Director of Public Prosecutions v Engels* 2005 (3) SA 109 (CPD), at para 33, of a holding in the unreported judgment of *National Director of Public Prosecutions v Christopher Patterson and Another* CPD Case No 12100/99, 24 April 2001, unreported:

> "[T]he pattern to be deduced from items 1-32 of the Schedule is that the Legislature had not curtailed the sentence options to those providing for unsuspended imprisonment only. This also means, impliedly, that the most severe offences or sentences are not limited to (only) unsuspended imprisonment without the option of a fine. Why then, when interpreting item 33, should one hold that in that item, only Acts not allowing fines to be imposed should be capable of forming a basis for forfeiture under POCA?" (Footnote omitted.)

holding in *Van Staden* that a section of the National Road Traffic Act,[66] which provides that a person who is convicted of driving under the influence of intoxicating liquor is liable to "a fine or to imprisonment for a period not exceeding six years",[67] fell within the ambit of Item 33.[68] I agree. Section 163(1)(a) of the Liquor Act is manifestly similar.

[47] Thirdly, the applicants contend that the provisions of POCA are draconian and should be limited to property used in the commission of extremely serious offences. The NDPP retorts that Schedule 1 of POCA is intended to cast the net "fairly widely", to include all offences which may result in a sentence of imprisonment for more than a year, without the option of a fine. In *National Director of Public Prosecutions v Vermaak* Nugent JA remarked:

> "[I]t is now well established, and was repeated in *Van Staden*, that an order for forfeiture may be made only if the deprivation in a particular case is proportionate to the ends at which the legislation is aimed, and distinctions between different classes of offence will feature heavily in that part of the enquiry. I might add that I also think it is far more productive to make those distinctions at that stage of the enquiry, when broadly framed distinctions will suffice, than at the jurisdictional stage, when distinctions need

[66] 93 of 1996.

[67] Section 65(1) read with section 89(2).

[68] *Van Staden* above n 28 at para 10. See also *Cook Properties* above n 28 at para 42, where the Supreme Court of Appeal held:

> "The NDPP pinned this part of the forfeiture case to section 20(1) of the Sexual Offences Act. And keeping a brothel is made an offence not by section 20(1), but by section 2. That is a scheduled offence only through the oblique route of item 33 ('any offence the punishment wherefore may be a period of imprisonment exceeding one year without the option of a fine'). Punishment for contravening section 2 is imprisonment for a period not exceeding three years with or without a fine not exceeding R6 000 in addition to such imprisonment. So on this basis keeping a brothel does fall within the Schedule."

> necessarily to be precisely defined and have the real potential to produce anomalies. No doubt that is why, as has already been found, the legislature did not contemplate classes of offences being distinguished at the jurisdictional stage."[69]

[48] POCA enables a court to consider variations in the seriousness of the offence committed, on the one hand, and the manner and circumstances in which it was committed, on the other, especially given that the former often depends on the latter. This does not mean that the forfeiture provisions of POCA may not be applied to offences that are not regarded as extremely serious. It is indeed the purpose of the proportionality enquiry to avoid arbitrary deprivation of property and to ameliorate the potentially unjust consequences that could follow if the forfeiture is grossly disproportional to the offence.

[49] In conclusion, 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 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. This fits squarely within the ambit of Item 33.

[69] *Vermaak* above n 28 at para 9.

Proportionality

[50] Three aspects, raised by the applicants, are considered under this heading. First, were the forfeiture provisions used abusively or to "top up" the ordinary criminal law enforcement mechanisms and penalties contrary to the rationale and objectives of POCA?[70] Linked to this question is the seriousness of the forfeiture measured against the seriousness of the offence. Third, what is the relevance of the possible homelessness of the applicants and their children and of section 26 of the Constitution – and PIE, prohibiting illegal evictions – to determining the proportionality of the forfeiture?

[51] On the first aspect, the facts of this case show that the forfeiture provisions were not used whimsically (or as a "top up") to punish the applicants for activities which the ordinary criminal law mechanisms were readily capable of curtailing. The evidence of all the arrests, admissions of guilt, seizures of liquor and preservation order do 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. In other words, "crime pays". The forfeiture was sought

[70] In *Mohunram* above n 26 at para 152, Sachs J held:

> "POCA was not adopted with a view to providing either a substitute for, or a top-up of, ordinary forms of law enforcement. It has its own rationale and its own objectives, which should be jealously guarded."

In *Van Staden* above n 28 at para 7, Nugent JA opined:

> "Incursions upon conventional liberties that are justified by the particular difficulties encountered in the detection and successful prosecution of organised crime are not similarly justified in cases of ordinary crime that do not present those difficulties. I do not think it is permissible to look to one threat that the Act aims at combating (the threat posed by organised crime) in order to justify its application in relation to a quite different threat (the threat that is posed, for example, by drunken driving) that does not present the same challenges."

as a last resort to put an end to the criminality by removing the main instrument used in its commission.[71] This is not an abuse of POCA or the criminal justice system and does not offend the Constitution.

[52] As to the seriousness of forfeiture weighed against the seriousness of selling liquor without a licence, the applicants' reliance upon *Van Staden* is not convincing. In that case it was stated:

> "It must be borne in mind that drunken driving, which does not ordinarily result from organised illicit activity, and presents no special difficulties to detect and prosecute, can attract substantial penalties, and the ordinary criminal law ought to be the first port of call to combat the evil. For the Act exists to supplement criminal remedies in appropriate cases and not merely as a more convenient substitute."[72]

[53] The "ordinary criminal law" was indeed the first port of call in this case, but has failed to deal with the evil. The patent and ongoing harm caused by the unlawful conduct requires alternative measures, even if harsh, to bring the unlawful activity to an end. The property plays a major role in the ongoing commission of the offence.

[71] The affidavit of Mr Van Lill, submitted with the papers of the respondent, explains the three-pronged approach to bringing illegal shebeens in line with the Liquor Act and the law. The first leg is to encourage shebeen owners to comply with the law and apply for licenses. The second leg ("the co-operative approach") is to promote a "culture of compliance" by shebeen owners who have not yet brought themselves in line with the Liquor Act. The third or "hard approach" is reserved, inter alia, for shebeens "where there are community complaints about public disturbances, due to noise levels, loitering, drunk and disorderly behaviour, etc. Here the strategy is to conduct focussed police activity with the main objective of closing the premises down permanently."

[72] *Van Staden* above n 28 at para 7 (noted in *Mohunram* above n 26 at para 153).

[54] In *Mohunram* this Court endorsed the view that, where the relationship between the illegal activity and the primary objectives of POCA is proximate, the court should more readily grant a forfeiture order than in cases where the same relationship is tenuous.[73] In *Vermaak* the Supreme Court of Appeal opined that the more the offence is committed in the course of a broad and protracted enterprise of criminal activity, the more appropriate a forfeiture order would be.[74]

[55] The facts of this case show that the applicants have used the property for their business of crime for more than six years. Conventional law enforcement strategies including almost 60 instances of police action have failed to deter them. The same applies to the preservation order. The forfeiture is aimed at crippling or terminating the criminal activity, not at achieving a punitive consequence. It is a good example of what forfeiture in POCA is aimed at achieving by targeting the instrumentality of crime.

[56] Selling liquor without a license 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 has been committed, coupled with the patent harm that its commission is causing, must result in a conclusion that forfeiture is proportionate and appropriate in

[73] *Mohunram* above n 26 at para 145 where Sachs J held that—

> "the closer the criminal activities are to the primary objectives of POCA, the more readily should a court grant a forfeiture order. Conversely, the more remote the activities are from these objectives, the more compelling must the circumstances be to make such an order appropriate."

Moseneke DCJ "join[ed] Sachs J in emphasising that the more remote the offence in issue is to the primary purpose of POCA, the more likely it is that forfeiture of the instrumentality of the crime is disproportionate", at para 126.

[74] *Vermaak* above n 28 at paras 11-3.

this case. The applicants conduct their illegal activity with barefaced disregard for the law. In fact, the applicants' counsel contended on their behalf that the forfeiture would be pointless since they would simply re-open their shebeen elsewhere. The countless difficulties that the police have experienced in stopping their criminal conduct seem to give them impetus to persist. Their use of "runners" to carry out the illegal activity from the property on their behalf indicates the extent to which the conduct is part of a co-ordinated business to profit from criminal activity. This is precisely what POCA targets.[75]

[57] The negative consequences of selling liquor illegally might not be the same as those of selling drugs like "tik" in *Prophet v National Director of Public Prosecutions*,[76] but very significant harm is being caused by the applicants' conduct. This is clear from the response of neighbours and the proximity of schools.[77]

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[75] The preamble to POCA states, for example:

> "AND BEARING IN MIND that it is usually very difficult to prove the direct involvement of organised crime leaders in particular cases, because they do not perform the actual criminal activities themselves, it is necessary to criminalise the management of, and related conduct in connection with enterprises which are involved in a pattern of racketeering activity".

[76] See *Prophet* above n 28 at para 68 where Nkabinde J commented:

> "The illicit production and use of these substances undermines the legitimate economy and threatens the national stability and security of the country. In addition, they pose a serious threat to the health, welfare and safety of human beings, particularly young people and children, and adversely affect the social and economic foundations of our society. The rapid expansion of drug markets in small residential laboratories creates immeasurable social problems. The sexual abuse of young children, domestic problems, violence inside and outside of the home, health and instability in the Western Cape are attributable in part to the use of 'tik' and the prevalence of mini-laboratories in residential areas."

[77] See the High Court decision above n 17 at para 12, where it was observed that the "Concerned Residents of Athlone also stated that the 'neighbourhood experiences problems associated with alcohol and drug abuse, violence, child and woman abuse'."

[58] As to the third of the abovementioned aspects of the proportionality analysis, the applicants submit that forfeiture would leave them and their children homeless. The proportionality requirement is aimed, on the one hand, at balancing the constitutional imperative of law enforcement and combating crime and the seriousness of the offence against, on the other, the right not to be deprived arbitrarily of property. But the possible homelessness of the applicants and their children is a relevant factor which may not be overlooked.[78] For the purposes of forfeiture, it makes a difference whether the property instrumental in crime is for example an uninhabited factory building, or a home.

[59] The immediate question is of course whether the applicants and their children will indeed be rendered homeless upon forfeiture of the property. The applicants' bald allegation of homelessness does not seem to be borne out by the facts. As found by the Full Court, the applicants have not shown that their monthly income is insufficient to lease another home while supporting their children. In any event, the possibility of losing a home is certainly a consequence worth considering when one persistently uses it for a criminal business venture.

[60] The applicants submit that the requirements for eviction under PIE[79] – which give effect to section 26(3)[80] of the Constitution – must be considered within the

[78] In *Prophet* above n 28 at para 67 Nkabinde J, in the proportionality assessment, took account of the fact that "[t]he forfeiture will . . . not leave [Mr Prophet] destitute because he receives rentals from immovable property in another area." (Footnote omitted.)

[79] Section 4(7) of PIE provides:

proportionality enquiry under POCA. If the eviction is not just and equitable, forfeiture will not achieve its purpose as the applicants will be able to carry on with their unlawful activity from the property, they argue. This argument is not convincing. Forfeiture under POCA does not necessarily result in eviction. PIE's protection ensures that eviction may only be ordered when it is just and equitable to do so, after a consideration of all the relevant circumstances. The trigger for eviction under PIE is unlawful occupation. Once a forfeiture order is granted, the occupation may well become unlawful. But an enquiry under PIE still has to take place, if and when an eviction order is sought. The forfeiture enquiry should not anticipate the eviction one; they are separate and governed by two different statutes. All the factors relevant to the question whether eviction would be just and equitable under PIE must be considered when a decision on eviction has to be taken. A decision on eviction under PIE is not the same as a decision on forfeiture under POCA.

[61] The Full Court's finding on proportionality cannot be faulted. Forfeiture is not disproportionate in the circumstances of this case.

> "If an unlawful occupier has occupied the land in question for more than six months at the time when the proceedings are initiated, a court may grant an order for eviction if it is of the opinion that it is just and equitable to do so, after considering all the relevant circumstances, including, except where the land is sold in a sale of execution pursuant to a mortgage, whether land has been made available or can reasonably be made available by a municipality or other organ of state or another land owner for the relocation of the unlawful occupier, and including the rights and needs of the elderly, children, disabled persons and households headed by women."

[80] Section 26(3) of the Constitution states that no one may be evicted from their home without a court order after consideration of all the relevant circumstances. See above n 30.

The children

[62] Section 28(2) of the Constitution states that a child's best interests are of paramount importance in every matter concerning the child. This Court has held that section 28(2), read with section 28(1), establishes a set of children's rights that courts are obliged to enforce.[81] Law enforcement must always be child-sensitive and courts must at all times show due regard for children's rights.[82]

[63] To the extent that the applicants' children may be affected by the forfeiture order, a court must consider their interests. Providing guidelines for the sentencing of a primary caregiver in *M*,[83] it was stated that constitutionally a child cannot be treated as a mere extension of his or her parents, "umbilically destined to sink or swim with them."[84] Children are vulnerable. Their needs and the impact of social and economic circumstances on them will differ in degree to those of adults and deserve separate and focussed consideration.

[81] *S v M (Centre for Child Law as amicus curiae)* [2007] ZACC 18; 2008 (3) SA 232 (CC); 2007 (12) BCLR 1312 (CC) (*M*) at para 14. See also *Minister of Welfare and Population Development v Fitzpatrick and Others* [2000] ZACC 6; 2000 (3) SA 422 (CC); 2000 (7) BCLR 713 (CC) at para 17.

[82] *M* above n 81 at para 15.

[83] Id at para 36.

[84] Id at para 18 Sachs J noted:

> "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."

[64] The amicus emphasises the importance of section 28(2) in these proceedings and submits that when the High Courts granted the forfeiture order, they failed adequately to deal with the children's best interests.[85] Therefore this Court must address the impact of the forfeiture on the children. We were thus urged to appoint a curator ad litem to investigate this and file a report with this Court. Only then can forfeiture be properly considered. The amicus submits that we do not have sufficient information to make a determination regarding the children's best interests, because the children are not separately represented.

[65] Before the admission of the amicus the issue of the best interests of their children was not pertinently raised by the applicants. During oral argument, however, the applicants submitted that the NDPP is not an ordinary litigant; therefore it has positive obligations to protect and promote the rights of children, contained in the Bill of Rights.[86] It was argued that the NDPP played an adversarial role against the children in this matter and thus failed to meet its constitutional duty. The applicants further argued that it would not be in the best interests of the children if the family were to become homeless.

[66] The NDPP argued that in order to determine whether separate representation – like the appointment of a curator – is necessary, one has to be satisfied that the children have a distinct and discrete right or interest, separate from the parents. The NDPP submitted

[85] See [27] above for the text of section 28(2) of the Constitution.

[86] Section 7(2) of the Constitution.

that this test was met in *M*, because the matter dealt with the issue of a caregiver losing her liberty by being sentenced to prison and the right of the children to parental care. The NDPP submits that the children's right to shelter and the applicants' rights regarding housing and not to be arbitrarily deprived of their property are inseparable and indistinguishable in this case; therefore they do not need separate representation. According to the NDPP, the High Court decisions dealt sufficiently with the children's interests and concluded that the children would not be rendered homeless, because the applicants have sufficient income to fund accommodation for themselves and their children.

[67] Following from these submissions, three questions present themselves: Who should raise the interests of children who may be affected in forfeiture proceedings under POCA – the NDPP as applicant, the parents, or the court? Should a consideration of the interests of the children form part of the proportionality enquiry, as suggested during argument? Does this case require the appointment of a curator to ensure separate representation of the children's interests and an assessment of their situation before a decision can be reached on the forfeiture?

Who must raise the children's interests?

[68] Of course it is expected that parents must invoke the interests of their children in proceedings like these and it is important that they do so. But state institutions bear a

responsibility to address this issue, even when the parents have not raised it. The High Court is not only the upper guardian of children, but is 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. In this, officers of the court like the NDPP are expected to assist the court to the best of their ability with all relevant information at their disposal.[87] The failure of parents to emphasise the interests of their children, or the possible manipulation of the children's situation to suit the objectives of parents, may not be held against the children.

How must the children's interests be considered?

[69] It is necessary to determine where the consideration of the interests of the children fits into proceedings like the present under POCA. Should it be during the proportionality enquiry, or is a separate further enquiry necessary? The proportionality analysis essentially balances the seriousness of the crime against the loss of the property. The proportionality requirement is specifically aimed at ameliorating the harsh effects that forfeiture may have on the right not to be deprived arbitrarily of property, but, as indicated above, the possibility of homelessness may also be a relevant fact. Therefore the circumstances of children in this case necessarily play a role in the proportionality enquiry.

[87] See *M* above n 81 at para 36 where Sachs J held that "[t]he prosecution should also contribute what information it can; its normal adversarial posture should be relaxed when the interests of children are involved."

[70] However, the interests of the children are also a separate and important consideration and cannot merely be dealt with as one of several factors weighed on the proportionality scale. As is shown below, the interests of the children may require steps to be taken independently of the conclusion reached on forfeiture at the end of the proportionality enquiry. In my view the children's interests require specific and separate consideration, in addition to the attention they might get in the proportionality analysis.[88]

Should this Court appoint a curator?

[71] I am not persuaded by the NDPP's attempt to distinguish this case from *M* as far as the discrete or distinct interest test is concerned. The NDPP's view that the children's right to shelter and the parents' rights regarding property and housing are inseparable and indistinguishable in this case is, in my view, too rigid and simplistic. Of course the interests of the applicants and their children necessarily overlap. But the children's interests may well differ from the parents' in a case like this. The children primarily need a home, a roof over their heads, in addition to parental care. Although they have a home, a shebeen may not necessarily be the best home for them. The parents wish to keep the house, presumably for them and their children to live in, but certainly also to continue

[88] See *M* id at para 109, where Madala J held that the sentencing judicial officer should be guided by the well-known triad of factors in *Zinn*, namely the crime, the offender and the interests of society (*S v Zinn* 1969 (2) SA 537 (A) at 540G-H) but that the process does not stop there in a case where a primary caregiver's sentence is being considered. The sentencing officer must go beyond these factors and also take into account the impact of imprisonment on the dependants.

with their illegal dealing in liquor. There may thus be a significant difference and even a conflict between the parents' and the children's interests.

[72] The critical question is rather whether the information before the High Courts was sufficient to consider the interests of the children, or whether the appointment of a curator to present this information is necessary. In exceptional circumstances – where there is insufficient information about the children, or where the information before the Court leaves some doubt regarding the children's well-being – the Court may need to appoint a curator to conduct an independent assessment of the children's interests.

[73] In this case the High Court gave due consideration to the question whether the forfeiture would result in the family becoming homeless. The court was satisfied that the applicants and their children would not be left destitute.[89] The Full Court noted that the applicants never raised the issue that their children would be rendered homeless if the forfeiture were granted, but only that it would affect their inheritance. It also considered the impact of the forfeiture on the children, found the applicants to be business-orientated individuals and concluded that they would not be rendered homeless because they have the income from the fruit and vegetable stalls and they could find alternative accommodation for themselves and their children.[90]

[89] High Court decision above n 17 at para 31.

[90] Full Court decision above n 4 at para 37.

[74] Neither the applicants nor the amicus could advance hypothetical facts that could conceivably impact on the forfeiture order. As far as the possibility of homelessness resulting from forfeiture is concerned, the High Court benches dealt with the concerns about the children adequately. The information before them was not insufficient for this purpose. There is no need for the appointment of a curator in this case.

Enquiry under the Children's Act

[75] The potential effects of a forfeiture order on the children are not the only aspect of their situation that requires the attention of this Court, though. Another perhaps more important and urgent concern presents itself. As stated above, there is a significant potential tension between the interests of the children and those of their parents. The parents' desire to continue to deal in liquor illegally from the property may well conflict with the children's interest in residing in a safe and secure environment where their basic needs are met. The children have been growing up in a rowdy shebeen for years and it appears that this will continue – ironically, especially if forfeiture is not ordered. What kind of parental care and shelter have the children had? One has to take a serious look at the environment they are exposed to as a result of ongoing criminal activity. A house from which a shebeen – with all the activities referred to in this case – is run hardly seems like a proper home in which to raise children. The law in many cases forbids the admission of children to places where liquor is sold and consumed, to protect them from an environment that could harm them. The facts reported by neighbours and referred to

earlier in this judgment are stark indeed and do not paint a consoling picture as far as the best interests of the children are concerned.

[76] In short, the situation of the applicants' children may well require special attention, besides in the consideration of the forfeiture order. Chapter 9 of the Children's Act, referred to above, assists in this regard. Section 47(1) enjoins a court to refer the question whether a child is in need of care and protection under section 150 to a designated social worker for investigation, when it appears to the court that the child is in need of care and protection.[91]

[77] It appears that the applicants' children "[live] in or [are] exposed to circumstances which may seriously harm [their] physical, mental or social well-being".[92] They may be in need of care and protection. This Court therefore has a duty to order an investigation to be undertaken by a designated social worker to determine the question whether the applicants' children are in need of care and protection, under section 47(1).

[78] Section 155 of Chapter 9 of the Children's Act sets out the process to be followed, before and after the Children's Court decides whether a child is in need of care and protection. It starts with the compilation of the social worker's report. If the report concludes that the child is not in need of care and protection, then the report is to be

[91] See above [28] for the text of section 47(1).

[92] As per section 150(1)(f) of the Children's Act, above n 34.

submitted to the Children's Court for it to review the reasons for the finding. If the report concludes that the child is in need of care and protection, the child must be brought before that Court, which will make a final determination.[93]

[79] The children's best interests would be served best by this Court setting in motion the Chapter 9 process for a proper investigation to be conducted regarding the impact on them of the shebeen activity in their home. The Children's Court is best suited to make a determination as to the children's fate, as a specialist court created for these matters.

Conclusion

[80] It follows that a case has not been made out to set aside the forfeiture order. The applicants' argument that the forfeiture provisions of POCA and specifically Item 33 do not apply to the offence of selling liquor without a license is unconvincing. The forfeiture is also not disproportionate. The children's interests were considered by the High Courts in the granting of the forfeiture order. The appeal must fail. But an order in terms of the Children's Act must be made to safeguard the best interests of the children, given the environment in which they have been living.

[93] See above n 35 for a more detailed explanation of the process from the time the designated social worker compiles his or her report to the time the Children's Court makes a final determination as to whether the child is in need of care and protection.

Costs

[81] The NDPP sought a costs order against the applicants if the appeal were to fail. However, in view of the general practice in this Court as to litigation to vindicate constitutional rights, no costs order is made.

[82] According to the applicants, they have no funds and did not have money to secure counsel to represent them in this application. This Court requested the Cape Bar Council to assist the applicants. In response, three counsel graciously stepped in. The applicants' attorneys of record also continued to assist them, despite the drying up of funds. We express our appreciation and gratitude to the Cape Bar, counsel and the attorneys for supporting our constitutional democracy by helping litigants to raise their rights for consideration in this Court.

Order

[83] The following order is made:

1. Condonation is granted.
2. Leave to appeal is granted.
3. The appeal is dismissed.
4. The National Director of Public Prosecutions is ordered to engage a designated social worker as contemplated by the Children's Act 38 of 2005 to undertake an investigation as envisaged in section 47(1) read with section 155(2) of that Act, to determine whether the first and second

applicants' minor children are in need of care and protection and to recommend and take appropriate action, if necessary, in terms of that Act.

5. There is no order as to costs.

For the Applicants:	Advocate A Katz SC, Advocate H Slingers and Advocate M Bishop instructed by Derris Attorneys.
For the Respondent:	Advocate G Budlender SC and Advocate H Cronje instructed by The State Attorney.
For the Amicus Curiae:	Advocate R Keightley and Advocate A Skelton instructed by the Centre for Child Law.