THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 855/2016

In the matter between:

ASHLEY BROOKS **FIRST APPELLANT**

CHARLENE SYBIL BROOKS **SECOND APPELLANT**

and

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS **RESPONDENT**

Neutral citation: *Brooks v NDPP* (855/16) [2017] ZASCA 42 (30 March 2017)

Coram: Ponnan, Willis, Zondi, Mocumie JJA and Schippers AJA

Heard: 20 February 2017

Delivered: 30 March 2017

Summary: Application for forfeiture order in terms of s 48(1) of the Prevention of Organised Crime Act 121 of 1998 : whether residential property is instrumentality of an offence : property used in contravention of ss 82(*a*) and 83(*b*) of the Diamonds Act 56 of 1986 : whether forfeiture constitutionally disproportionate.

ORDER

On appeal from: Northern Cape Division of the High Court, Kimberley (Mamosebo AJ):

1. The appeal is upheld with costs.
2. The order of the High Court is set aside and replaced with:
   'The application is dismissed with costs.'

JUDGMENT

Schippers AJA (Mocumie JA concurring):

[1] This is an appeal against a forfeiture order made under s 50(1) of the Prevention of Organised Crime Act 121 of 1998 (POCA), in terms of which immovable property ie Erf 23285 Kimberley, located at 2 Norris Street, Kimberley (the property), was declared forfeit to the State on the basis that it was an instrumentality of an offence (illegal diamond-dealing) as contemplated in POCA. The appellants are the registered owners of the property. The second appellant's interest in the property was excluded from the forfeiture order, in terms of s 52(1) of POCA. The Northern Cape Division of the High Court, Kimberley (Mamosebo AJ) ordered the curator bonis to pay her one half of the net proceeds of the property upon its disposal.

Factual background

[2] The basic facts are uncontroversial. At the relevant times, the first appellant, Mr Ashley Brooks (Brooks), was the holder of a prospecting right in terms of s 18(3) of the Mineral and Petroleum Resources Development Act 28 of 2002 (the Mineral

Resources Act), to prospect for alluvial diamonds on a farm in the Northern Cape. Brooks was also the holder of a mining permit issued in terms of s 27 of the Mineral Resources Act, which authorised him to mine for alluvial diamonds on the same farm. A part of the property was used as an office from where Brooks conducted his business.

[3] From 14 October 2011 until 22 January 2014, the police, more specifically, members of the Directorate of Priority Crimes Investigations (DPCI) in the Northern Cape, were involved in a national covert operation authorised by the respondent, the National Director of Public Prosecutions (the NDPP), in terms of s 252A of the Criminal Procedure Act 51 of 1977.[1] This operation was aimed at criminal syndicates and gangs involved in racketeering activities, illegal dealing in unpolished diamonds,[2] and using premises and other places not registered as a diamond trading house in contravention of the Diamonds Act 56 of 1986 (the Diamonds Act).

[4] Between March 2013 and February 2014, the police, with the aid of Mr Colin Erasmus (Erasmus), and an undercover agent (the agent) sold unpolished diamonds in some 19 transactions to various individuals in the Northern Cape. Erasmus, who used to work for De Beers as a diamond sorter, is a convicted diamond smuggler who operated in Johannesburg, Cape Town and the Northern Cape. Brooks is his nephew. Erasmus made an affidavit which formed part of the forfeiture application in which he said that he knew Brooks very well; that Brooks engages in illicit diamond transactions; that he told Brooks that the agent had diamonds for sale; and that he (Erasmus) met most of the dealers through Brooks.

[5] This is how the illicit diamond-dealing was uncovered. Brooks arranged each transaction between the dealer and the agent. Warrant Officer Potgieter of the DPCI (Potgieter) – who was the handler, tested and weighed the diamonds, which had serial numbers, in the presence of the agent, and instructed him to sell them to the

[1] Section 252A (1) of the CPA states: 'any law enforcement officer, official of the State or any other person authorised thereto for such purpose (hereinafter referred to in this section as an official or his or her agent) may make use of a trap or engage in an undercover operation in order to detect, investigate or uncover the commission of an offence, or to prevent the commission of any offence, and the evidence so obtained shall be admissible if that conduct does not go beyond providing an opportunity to commit an offence: Provided that where the conduct goes beyond providing an opportunity to commit an offence a court may admit evidence so obtained subject to subsection (3).'

[2] The Diamonds Act 56 of 1986 defines 'unpolished diamonds' inter alia, as diamonds in their natural state, diamonds which have a small number of polished facets or diamonds that are provisionally shaped but require further working.

dealer within a specific price range. The agent was given a diamond scale, and audio and video equipment was concealed on his person to record the transaction. He met Brooks and the dealer at the property, where the diamonds were examined, the purchase price paid in cash and the diamonds handed over. The agent or the dealer paid Brooks between R8 000 and R10 000 for the use of the property, or because he facilitated the transaction. Brooks received R58 000 in total. The agent handed over the cash paid by the dealer to Potgieter together with the audio and video equipment. The cash was deposited into a bank account under the control of the police, and the audio and video recordings were safely stored.

[6] Of the 19 transactions, ten took place at the property between 20 March 2013 and 22 January 2014. The agent sold 78 unpolished State diamonds to the value of R9 689 073 for cash totalling R6 212 810. Erasmus was present when most of these transactions took place. The diamonds were sold to the respondents cited in an application which the NDPP launched in the court a quo, in terms of s 48(1) of POCA, for an order that the R6.2 million in cash and the property be forfeited to the State. All these illegal transactions were completed in the presence of Brooks on the property, except for one in which the price for the diamonds was paid elsewhere.

[7] It is common ground that except for Mr Joseph Van Graaf (Van Graaf), the fifth respondent in the forfeiture application, none of the dealers or the agent has a licence to deal in unpolished diamonds; and that the property is not registered as a diamond trading house, as required under the Diamonds Act. It is alleged that Van Graaf contravened the Diamonds Act by purchasing diamonds from a person other than a dealer as defined in that Act.[3]

[8] Save for the appellants, the respondents in the forfeiture application did not oppose the grant of a forfeiture order in respect of the property. None of them opposed forfeiture of the R6.2 million in cash.[4] This is hardly surprising, since the

[3] Section 26(*a*) of the Diamonds Act authorises the South African Diamond and Precious Metals Regulator to issue a diamond dealer's licence, which entitles the holder to carry on business as a buyer or seller of unpolished diamonds. In terms of s 82*(a)* of the Diamonds Act, it is an offence to contravene s 20 of the Act (which proscribes the purchase of any unpolished diamond from a person other than a dealer - the holder of a diamond dealer's licence). This offence is punishable with a fine not exceeding R250 000 or imprisonment not exceeding 10 years, or both such fine and imprisonment (s 87(*a*)).

[4] Mr Patrick Mason and Mr Kevin Urry, two of the dealers, initially opposed the grant of the order that the cash of R6.2 million be forfeited to the State. However, their opposition to that relief was struck out when they failed to deliver their opposing affidavits.

cash was instrumental in the various offences of illicit diamond dealing, and virtually all the respondents do not hold a diamond dealer's licence.

[9] The second appellant raised the so-called 'innocent owner' defence to the grant of a forfeiture order. In summary, it is this. She and Brooks are married in community of property. They have two children who, at the time of the forfeiture application, were aged nine and six, respectively. In 2012 they bought the property, then a vacant piece of land, for R70 000. They pooled their savings and income, and with a loan from Mr. Patrick Mason (Mason), an illegal diamond dealer and the third respondent in the forfeiture application, built a house on the land. Brooks and Mason are in business together. The second appellant has not furnished any details of the loan from Mason, neither has she given any indication whether the property is encumbered. She says that it has been the family home since the end of 2012; that it is not utilised for any other purpose; and that she had no knowledge of illegal diamond dealing on the property, which took place whilst she was at work.

[10] The second appellant states that she is a social worker employed by the Department of Social Development, Northern Cape, earning a gross salary of R9 615 per month. She says that her husband, Brooks, is a partner in a business known as 'GA Delwery' and earns an average monthly income of R10 000. She goes on to say that she first became aware that her husband was involved in illegal diamond transactions when he was arrested in August 2014.

[11] The court a quo excluded the second appellant's interest in the property from the forfeiture order. In accordance with the decision of this court in *Mazibuko*,[5] the court ordered the curator *bonis* to pay her one half of the net proceeds from the sale of the property, which it held was her separate property. There is no cross-appeal against that order. The court a quo found that the property was an instrumentality of offences of illicit diamond dealing; that it was indispensable to the success of those transactions; and that forfeiture was not disproportionate.

[12] Before dealing with the law relating to forfeiture, it is appropriate at this point to consider whether the court a quo should have condoned the late filing of Brooks' opposing affidavit in the forfeiture application.

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[5] *Mazibuko & another v National Director of Public Prosecutions* [2009] ZASCA 52; 2009 (6) SA 479 (SCA).

The condonation application

[13] Brooks chose not to deal with the merits of the forfeiture application. Instead, in a confirmatory affidavit made on 17 February 2015 in support of his wife's opposition to forfeiture, Brooks denied that he was involved in any illegal diamond transactions on the property (the confirmatory affidavit). Subsequently Brooks made an opposing affidavit on 25 March 2015 (the opposing affidavit) and asked the court a quo to condone its late filing. The basic reason for the delay in filing that affidavit was that Brooks relied on the advice of his former attorneys concerning the procedure that had to be followed in opposing the forfeiture application.

[14] In the opposing affidavit, Brooks again denies the allegations against him, in particular that he was involved in any criminal offence or that he received R58 000. He then analyses the illegal transactions in Erasmus' affidavit and says that not all the transactions took place on the property, which was incidental to the commission of the offences. The opposing affidavit really contains no defence to the NDPP's case that the property was an instrumentality of the offences. Mr Pretorius, who appeared for the appellants, rightly conceded that the opposing affidavit takes their case no further. However, it contains Brooks' version why a forfeiture order should not be granted (albeit that his version is essentially the same as the second appellant's). Although it was delivered out of time, there was no prejudice to the NDPP.[6] Indeed, he delivered a replying affidavit in which he dealt in some detail with the allegations in the opposing affidavit. In the circumstances, given that a case should be decided on all the facts relevant to the issues in dispute, and the absence of prejudice, the opposing affidavit should have been admitted in evidence. I have therefore taken it into account in this judgment.

Forfeiture: the law

[15] The present state of the law regarding forfeiture of property under POCA may fairly be outlined as follows. The process starts when the NDPP applies for a preservation of property order in terms of s 38 of POCA. Section 38(2) provides inter alia that a high court shall make such an order:

'if there are reasonable grounds to believe that the property concerned –

(a) is an instrumentality of an offence referred to in Schedule 1; or

[6] Compare: *Dengetenge Holdings (Pty) Ltd v Southern Sphere Mining and Development Co Ltd* [2013] ZASCA 5; [2013] 2 All SA 251 (SCA).

(b) is the proceeds of unlawful activities;'

[16] Section 48(1) of POCA provides that if a preservation of property order is in force the NDPP may apply for an order forfeiting to the State the property that is subject to a preservation order. Forfeiture proceedings under POCA are proceedings *in rem*. It is the property which is proceeded against and by resort to legal fiction, held guilty and condemned as though it were conscious instead of inanimate. The focus is not on the wrongdoer but on the property used to commit an offence, or property which constitutes the proceeds of crime. Forfeiture proceedings are not conviction-based: they may be instituted even when there is no prosecution.[7]

[17] Where a forfeiture order is sought, the court undertakes a two-stage enquiry. The first is whether the property in issue was an instrumentality of an offence, more specifically, whether there is a functional relation between the property and the crime. At this stage, the focus is on the role the property plays in the commission of the crime, not the state of mind of the owner. The second stage arises after finding that the property was an instrumentality of the offence, in which the court considers whether certain interests should be excluded from forfeiture. At this stage the owner's state of mind comes into play.[8]

[18] In terms of s 50(1) and (2) of POCA, and subject to s 52 (which deals with the exclusion of interests in property), a high court is obliged to make a forfeiture order if it finds on a balance of probabilities that the property concerned is an instrumentality of an offence or the proceeds of unlawful activities. It is *not* the NDPP's case that the property constitutes the proceeds of unlawful activities.

[19] POCA defines 'instrumentality of an offence' as meaning inter alia, 'any property which is concerned in the commission or suspected commission of an offence'. But that definition must be restrictively construed. Not every material object or immovable property concerned in an offence is liable to forfeiture as that would cast the net too wide. There must be a reasonably direct link between the property and its criminal use. Put differently, the property must facilitate or make possible the

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[7] *National Director of Public Prosecutions & another v Mohamed NO & others* 2002 (2) SACR 196 (CC); 2002 (4) SA 843 (CC) paras 16 and 17.

[8] *National Director of Public Prosecutions v RO Cook Properties (Pty) Ltd; National Director of Public Prosecutions v 37 Gillespie Street Durban (Pty) Ltd & another; National Director of Public Prosecutions v Seevnarayan* 2004 (2) SACR 208 (SCA) para 21.

commission of the offence in a real and substantial way. It must be instrumental in, and not merely incidental to, the commission of the offence.[9] Providing a location is not enough: the property, in its character or in the way it is used, must itself in some way make the offence possible or easier.[10] Each case, obviously, must be decided on its own facts.[11]

[20] Before granting a forfeiture order under POCA, a court must enquire as to whether such an order would amount to an arbitrary deprivation of property in violation of s 25(1) of the Constitution.[12] The proportionality rule was tersely stated by Nugent JA in *Van Staden*:[13]

'To avoid an order for forfeiture … being arbitrary, and thus unconstitutional, a court must be satisfied that the deprivation is not disproportionate to the ends that the deprivation seeks to achieve. In making that determination the extent to which the deprivation is likely to afford a remedy for the ill sought to be countered, rather than merely being penal, will necessarily come to the fore, bearing in mind that the ordinary criminal sanctions are capable of serving the latter function.'[14]

[21] The Constitutional Court likewise has held that the standard of proportionality under POCA amounts to no more than that forfeiture should not constitute arbitrary deprivation of property or the kind of punishment not permitted by s 12(1)*(e)* of the Constitution.[15]

Was the property an instrumentality of an offence?

[22] The NDPP contends that there are reasonable grounds to believe that the property is an instrumentality of an offence under a law relating to the illicit dealing in precious stones contained in Schedule 1 to POCA (item 27); and offences referred to in Chapter 3 or 4 thereof, concerning the proceeds of unlawful activities and criminal

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[9] *Cook Properties* fn 8 above paras 31-32.
[10] *National Director of Public Prosecutions v Parker* 2006 (1) SACR 284 (SCA) para 30.
[11] *Cook Properties* fn 8 above para 32.
[12] *Van Der Burg & another v National Director of Public Prosecutions & another* [2012] ZACC 12; 2012 (2) SACR 331 (CC) para 25. Section 25(1) of the Constitution reads:
'No one may be deprived of property except in terms of the law of general application, and no law may permit arbitrary deprivation of property.'
[13] *National Director of Public Prosecutions v Van Staden & others* 2007 (1) SACR 338 (SCA).
[14] *Van Staden* para 8; *Mohunram & another v National Director of Public Prosecutions & another (Law Review Project as Amicus Curiae)* 2007 (4) SA 222 (CC) para 74 per Van Heerden AJ, para 121 per Moseneke DCJ.
[15] *Van Der Burg* fn 12 above para 25. Section 12(1)*(e)* of the Constitution provides that everyone has the right to freedom and security of the person, which includes of the right not to be treated or punished in a cruel, inhuman or degrading way.

gang activities (item 32). The founding affidavit states that the property, which is not a registered diamond trading house as contemplated in the Diamonds Act, was used as premises for illegal diamond-dealing; and that the property and the cash used in the illicit transactions were deliberately chosen, and were integral to the commission of the offences. The affidavit further states that that the property was repeatedly utilised to commit the offences, that Brooks was paid for its use and that the cash of some R6.2 million constitutes both an instrumentality of the various offences and the proceeds of crime.

[23] I interpose to mention that on a proper construction of POCA, it seems that the same money can have both statutory characters of being an instrumentality and proceeds at one time. The one character does not exclude the other and they are not antithetical as these terms are used in POCA. The R6.2 million was clearly an instrumentality of the various offences of illegal diamond dealing because it was concerned in the commission of the offences: without payment for the unpolished diamonds, the offences could not have been committed. On the facts of this case the R6.2 million also constitutes the proceeds of unlawful activities, defined in POCA inter alia, as ‘property derived, directly or indirectly, in connection with or as a result of any unlawful activity carried on by any person’. This is buttressed by the fact that none of the respondents in the forfeiture application placed any evidence before the court a quo as to their sources of income on the one hand, and their expenditure on the other, to show that there is no significant discrepancy between the two; or indeed that the R6.2 million is money derived from legitimate sources of income. They must know the source of their assets and what they have been living on. The inference is inescapable that the R6.2 million used to pay for the unpolished diamonds can only be derived from crime.

[24] The appellants’ answer to the NDPP’s case is a bald denial. Brooks denies that he was involved in any illicit diamond dealing, that any such transaction took place on the property and that the property was an instrumentality of any offence. The second appellant supports her husband’s stance and to that end, filed his confirmatory affidavit. She too, explicitly denies that between March 2013 and January 2014, ten illicit diamond transactions took place on the property as set out in the founding affidavit in the forfeiture application. She says that she was not a party

to, and had no knowledge of, the illegal diamond dealing that took place on the property.

[25] The principles governing disputes of fact in motion proceedings are well-established. An applicant who seeks final relief on motion must accept the version of his opponent in the event of a conflict, unless the court considers that the latter's allegations do not raise a real, genuine or bona fide dispute of fact, or are so far-fetched or clearly untenable that the court is justified in rejecting them merely on the papers.[16] Where, as in this case, the facts are such that the disputing party must necessarily possess knowledge of them and be able to provide an answer or countervailing evidence, but rests his case on a bare denial, generally a court will have difficulty in finding that a real or bona fide dispute of fact exists.[17]

[26] As regards the illicit diamond dealing that took place on the property and Brooks' role in it, the appellants' denials do not raise a real and bona fide dispute of fact. They are plainly untenable. The evidence conclusively shows that Brooks facilitated each illegal diamond transaction; that those transactions took place on the property; that the dealers paid R6.2 million for unpolished diamonds; that pursuant to the illicit transactions Brooks received R58 000; and that the R6.2 million was declared forfeit to the State.

[27] The question then is whether the property was used in a real and substantial way, which made the commission of the offences possible or easier. To begin with, it was repeatedly used as a place to trade in unpolished diamonds, in contravention of s 83*(b)* of the Diamonds Act.[18] In keeping with the objects of the Act, which include control over the possession, purchase and sale of diamonds, s 44 prohibits the use of any premises as a diamond trading house, without a diamond trading house licence and registration of such premises as a diamond trading house. The Diamonds Act defines a 'diamond trading house' as the premises at which the holder of a diamond trading house licence may facilitate local buying and selling of unpolished diamonds.

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[16] *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634E-635C.
[17] *Wightman t/a JW Construction v Headfour (Pty) Ltd & another* 2008 (3) SA 371 (SCA) para 13.
[18] Section 83 concerns offences relating to trading in diamonds. Section 83*(b)* provides that any person who contravenes s 44 (using any premises as a diamond trading house without the requisite licence and registration of that premises as a diamond trading house under the Act) is guilty of an offence.

[28] So, the frequent use of the property as a place to facilitate the buying and selling of unpolished diamonds not only renders the property itself instrumental in the offence of using the property as a diamond trading house, but also points to a direct and immediate connection between the property and the numerous offences of unlawful trading in unpolished diamonds that took place there.

[29] Given the nature of the offences and how frequently the property was used to facilitate them, it is necessary to consider Brooks' control of the property and the illicit transactions in some detail. Brooks used the property as his office. As owner, he controlled the possession and use of the property, which was practically effective. He repeatedly allowed the property to be used as a *de facto* diamond trading house. He set up and facilitated each illicit transaction that took place there, in his presence. He chose the property as a suitable place where: buyers of unpolished diamonds would meet the seller; the price would be negotiated; the diamonds would be weighed and examined (in some cases using a diamond tester, a diamond light and a jeweller's loupe); and large amounts of cash would exchange hands without any paperwork. Brooks also stored cash on the property to pay for unpolished diamonds, as is shown below.

[30] By virtue of his involvement in the industry as the holder of a prospecting and mining permit, Brooks knew which dealers would be willing to engage in the illegal purchase of unpolished diamonds at the property. And the dealers whom he called to the property always showed up. In fact, on 20 March 2013 Brooks arranged with not one, but two dealers, Mason and Mr Mahmoud Ahmad (Mahmoud), to purchase diamonds on the property. Mahmoud bought two unpolished diamonds for R128 000 right there and then, and wanted to give the undercover agent R8 000. Instead, the money was given to Brooks for the use of the property. After each transaction, save for one, the dealer or the agent returned to the property for the price in cash.

[31] There can be no question that the property made the commission of the offences possible or easier. The dealers did not merely happen to be there when they committed the offences: they were there by prior arrangement to trade in unpolished diamonds, as Mr Pretorius fairly conceded. This shows a persistent

pattern of association between the dealers and the property.[19] The property provided a safe and secure place for the commission of the offences, away from the public eye and, so Brooks and the dealers thought, detection by the police. Significant quantities of diamonds – in one instance 19 – were examined, weighed and tested. Large amounts of cash - in one transaction R1.25 million and in another, R1.9 million – were brought, counted and exchanged hands on the property. A total of 78 diamonds amounting to R6.2 million were frequently sold over a period of ten months, which clearly establishes a course of criminal conduct.

[32] The safety and security which the property offered emboldened dealers to return to it to engage in more than one transaction. Mason did three illegal diamond deals on the property at different times. On 28 March 2013 he bought six diamonds for R260 000. After the price was agreed upon, he left to fetch the money while the agent waited at the property. An hour later Mason returned with only R200 000 and told Brooks to give the agent the balance of R60 000, which he did. This shows not only that Brooks was directly involved in that illicit transaction, but also that he stored money on the property to purchase unpolished diamonds. On 18 June 2013 Mason bought six diamonds for R640 000. On 15 October 2013 he bought six diamonds for R1.25 million, but in this transaction Mason was not present and Brooks examined the diamonds and paid the undercover agent. The agent says that in all these transactions he gave Brooks R10 000, which was the norm for the use of the property and for his role as the middleman. On 11 April 2013 Mason bought six unpolished diamonds for R250 000 at the property. However, the diamonds were examined at Mason's house and the purchase price was paid at the Leisure Lodge in Kimberley. This was the only transaction not completed at the property.

[33] Likewise, Van Graaf returned to the property to engage in more than one illicit diamond transaction. On 25 April 2013 he bought six unpolished diamonds for R240 000 and on 30 July 2013, another six for R650 000. During the transaction at the property on 25 April 2013, there was an argument about the price. As the agent left, Van Graaf called him back and offered him R250 000, which he accepted. Van Graaf then told Brooks to get the money. Brooks fetched R250 000 from a building next to the house, put it into a plastic bag and gave it to the agent. This too, shows Brooks' involvement in that transaction and that he stored money on the property to

[19] *Parker* fn 10 above para 39.

buy diamonds. The agent gave Brooks R10 000 because the transaction took place on the property, and handed R240 000 in cash to his handler.

[34] The safety, secrecy and security offered by the property is also demonstrated by the fact that some dealers were not even present when unpolished diamonds were bought on their behalf and they parted with large amounts of cash. As already stated, Brooks bought six diamonds on behalf of Mason for R1.25 million at the property. Similarly, another dealer sent two of his henchmen to the property to examine and buy 19 unpolished diamonds for R1.9 million.

[35] The appellants however contend that the property was not an instrumentality of the offences because it was not adapted in any way to facilitate illicit diamond-dealing; diamonds were not stored there but brought on to the property by the agent; and having regard to the period during which the transactions took place, they were 'isolated transactions'. The appellants are however mistaken. *Parker* provides a complete answer. In that case the police conducted ten 'sting' operations at certain premises over a year. Each time traps successfully obtained a range of illegal drugs. This court held that the immovable property was an instrumentality of the offence of dealing in drugs. Cameron JA said:

> 'The importance of the case is that in the absence of evidence of adaptation or storage, the NDPP sought to establish instrumentality on the basis of the repeated use of the premises as a venue for drug deals. And the evidence indeed shows that the property was the base for a very considerable drug-dealing business. Here the ten successful stings over the year of surveillance are telling, for they show that many more such transactions must have taken place during that period.'[20]

[36] What all of this shows, is the following. The relationship between the use of the property and the commission of the offences was neither tenuous nor remote. The involvement of the property was not merely incidental to the commission of the offences: it was put to use in a positive sense and was a means through which the crimes were committed. The property was the base for a significant, organised and well-funded illicit diamond-dealing business. Given these facts, Brooks' business association with Mason, the repeated use of the property by Brooks, Mason and Van Graaf who feature prominently in the illegal diamond-dealing that took place there,

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[20] *Parker* fn 10 above para 34.

the inference is irresistible that the property was utilised to facilitate many more illicit diamond transactions.[21] It is also an inevitable inference that but for their arrest, Brooks and the dealers would have continued to use the property as a base for illicit diamond-dealing.

[37] In *Parker*,[22] Cameron JA said that the difficulties in determining criminal instrumentality come acutely to the fore with immovable property. But this is not such a case. The evidence that the property was instrumental in the commission of the offences is compelling.

[38] On the totality of the evidence, I am satisfied that the court a quo was correct in holding that the NDPP had established on a balance of probabilities that the property was an instrumentality of the offences of illicit trading in unpolished diamonds.

Proportionality

[39] Once it established that the property was an instrumentality of an offence, a court is obliged to embark on a proportionality enquiry.[23] This enquiry is aimed at balancing the constitutional imperative of law enforcement and combating crime and the seriousness of the offence, against the right not to be arbitrarily deprived of property.[24]

[40] This court has said that forfeiture is aimed primarily at crippling or inhibiting criminal activity; and that it is likely to have its greatest remedial effect where crime has become a business.[25] The Constitutional Court has held that the closer the criminal activities are to the primary objectives of POCA, the more readily a court should grant a forfeiture order. Conversely, the more remote the offence in issue is to the primary purpose of POCA, the more likely that forfeiture would be disproportionate.[26] In this regard, it bears mentioning that the overall purpose of POCA is to counter the rapid growth, both nationally and internationally, of organised

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[21] *Parker* fn 10 above paras 34 and 39.
[22] *Parker* above para 28.
[23] *Prophet v National Director of Public Prosecutions* 2006 (2) SACR 525 (CC); 2007 (6) SA 169 (CC) para 58.
[24] *Van Der Burg* fn 12 above para 58.
[25] *National Director of Public Prosecutions v Vermaak* 2008 (1) SACR 157 (SCA) para 11. In *Cook Properties* fn 8 above para 18 it was held that forfeiture operates as both a penalty and deterrent.
[26] *Mohunram* fn 14 above paras 126 and 145; *Van Der Burg* fn 12 above para 54.

crime, money laundering, criminal gang activities and racketeering, which present a danger to public order and safety; and threatens economic stability and the rights of all.[27]

[41] The facts show that the property was the base for an ongoing, organised and well-funded criminal enterprise involving diamond-dealing, huge amounts of cash and inevitably, money laundering. And the uncontroverted evidence is that the offences were committed in the course of a broader enterprise of criminal activity, involving amongst others, Brooks, Mahmoud and Mason. Brooks introduced Erasmus and the agent to these dealers. Mahmoud seems to be a big player in the criminal enterprise. He, in turn, introduced the agent to a dealer, one Komalin, who told the agent that he has a plane on which he could transport the agent with diamonds and money. Komalin asked the agent to provide them with diamonds to the value of R5 million and offered to buy the agent a vehicle to travel from and to Kimberley. In another illicit diamond transaction on 2 September 2013 involving Mahmoud and Komalin, Mahmoud gave Erasmus R45 000. Two weeks later Komalin was involved in another illegal diamond deal at his home where Mahmoud was present. In January 2014 Mahmoud was involved in a further illicit transaction. Mason, Brooks' business associate, told the agent to put diamonds on tender at the business of Mr Derrick Corns (Corns). Subsequently Corns also engaged in an illegal transaction at his home. The police later established that Corns is in fact Mr Kevin Urry, the same person who had sent his henchmen to the property to buy diamonds for R1.9 million.

[42] Although these illicit transactions did not take place at the property, they form part of the wider undercover operation and would not have been possible had Brooks not introduced the agent to the dealers in question. More fundamentally, however, they underscore the point that an order of forfeiture is especially appropriate where, as in this case, the offences have been committed in the course of a broader criminal enterprise. I cannot put the point better than Nugent JA did in *Vermaak*:[28]

'Where an offence has been committed in the course of a broader enterprise of criminal activity that is being conducted by the offender in association with others it can serve not only to inhibit the particular offender from continuing that activity but also to arrest

[27] *Mohamed* fn 7 above paras 14-15.
[28] *Vermaak* fn 25 above para 11.

the continuance of that activity by others who are party to the ongoing enterprise. And even where the offence is committed in the course of an ongoing criminal enterprise that is being conducted by the offender alone the withdrawal of property is capable of having a severely inhibiting effect on its continuance. It seems to me, in other words, that forfeiture is likely to have its greatest remedial effect where crime has become a business.'

[43] The use of the property as a base for illegal diamond-dealing, as a *de facto* diamond trading house and as part of a criminal enterprise, is organised action against the forces of law. Organised crime and illegal diamond-dealing are a serious threat to the legitimate economy, national stability and security of the country.[29] The inclusion of these crimes in Schedule 1 to POCA is therefore not surprising.[30] They are extremely difficult to detect. That is why the police had to conduct an extensive undercover operation for some two years. Given the significant number of diamonds illegally traded, the frequency of those transactions at the property and the request to the agent to provide diamonds of R5 million, the inference is irresistible that both the demand for diamonds and the profits derived from illicit diamond-dealing, are high. Contrary to the finding by the court a quo, the diamonds used in the undercover operation, valued at some R9.7 million, have not been recovered and are probably in the hidden criminal underworld. It is precisely for these reasons that POCA was enacted: to deprive criminals of property that has been used to commit an offence and the proceeds of their criminal conduct. In my opinion, forfeiture in this case would serve the broader societal purpose of: (a) deterring persons from using property to commit crime, in particular, Brooks and the participants in the criminal enterprise; (b) eliminating or incapacitating some of the means by which crime may be committed; and (c) advancing the ends of justice by depriving those involved in crime of the property concerned.[31]

[44] Having regard to the nature and gravity of the offences that took place at the property and the illegal activities exposed in the undercover operation; and their adverse impacts on the economy, stability and security of the country, it cannot be suggested that in these circumstances, forfeiture is a means of either substituting the ordinary criminal remedies for illicit diamond-dealing, or 'topping up' any criminal penalties that might be imposed on the dealers involved in the illicit transactions that

[29] *Prophet* fn 23 above para 68
[30] Items 27 and 32 of Schedule 1 to POCA.
[31] *Cook Properties* fn 8 above para 18.

took place on the property.[32] And, with respect, I do not think that the lawgiver intended the forfeiture provisions of the Diamonds Act to be exhaustive, so as to exclude the forfeiture provisions of POCA.[33] I say this essentially for two reasons. It would mean, for example, that immovable property not used as a home or residence, but exclusively used as a base for illegally trading in unpolished diamonds, would be beyond reach of POCA's forfeiture provisions. That would negate the purposes of POCA. Secondly, the forfeiture provisions of the Diamonds Act are strictly circumscribed: only money or property 'paid or delivered to … a member or agent of the South African Police in pursuance of an agreement for the delivery or acquisition of unpolished diamonds, shall upon . . . conviction . . . be forfeited to the State.'[34] As Sachs J observed in *Mohunram*:[35] '[POCA] has its own rationale and own objectives, which should be jealously guarded.'

[45] As to the impact of forfeiture on the rights of an innocent spouse married in community of property such as the second appellant, where co-ownership of the joint estate is indivisible, in *Mazibuko* Nugent JA concluded that a proper construction of s 57(1) of POCA, addresses the issue of indivisibility of the joint estate, and avoids arbitrary deprivation of property.[36] That provision, which requires the curator bonis to deposit the proceeds of the sale of property into the Criminal Assets Recovery Accout, contemplates the exclusion of any interest under s 52, such as a contingent interest in the proceeds of a sale of immovable property, as happened in this case.[37] The construction which Nugent JA placed on s 57(1) of POCA, in my opinion, not only gives effect to the objects of POCA, more specifically that property owners like Brooks, 'must exercise responsibility for their property and . . . account for their stewardship of it in relation to its possible criminal utilisation',[38] but is also fair and just in relation to the innocent spouse. Otherwise viewed, it would mean that forfeiture cannot be ordered in a case where the parties are married in community of property, notwithstanding that the interest of the innocent spouse has been excluded under s 52 of POCA.

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[32] *Vermaak* fn 25 above para 12.
[33] Judgment of Ponnan JA para 66.
[34] Section 91(1) of the Diamonds Act.
[35] *Mohunram* fn 14 above para 152.
[36] *Mazibuko* fn 5 above paras 52-55.
[37] *Mazibuko* fn 5 above para 54.
[38] *Cook Properties* fn 8 above para 29.

[46] I come now to the appellants' allegations in their answering affidavits regarding proportionality. There are essentially two. The first is that that the property is the family home; and the second, that the amount of R58 000 which Brooks received (which the appellants deny) is insignificant compared to the value of the property (its market value was R960 000 in 2014). It should be noted that these allegations were put up as a defence to the NDPP's claim that the property was an instrumentality of the offences. In its judgment however, the court a quo had regard to the question whether a forfeiture order would amount to an arbitrary deprivation of the property and the appellants' claim that Brooks received only R58 000 which is disproportionate to the value of the property. On the authority of *Prophet*,[39] the court a quo held that given the nature of the offences and the extent to which the property was used as an instrument thereof, forfeiture was not disproportionate and that the amount which Brooks received was not decisive of this issue. In my view, this decision cannot be faulted, for the reasons advanced herein.

[47] What remains is the impact of forfeiture of the property on the rights of the appellants' children. Section 28(2) of the Constitution provides that a child's best interests are of paramount importance in every matter concerning the child. In *Van Der Burg*, the Constitutional Court stated that to the extent that children may be affected by a forfeiture order, a court must consider their interests in the proportionality enquiry; that in forfeiture proceedings parents are expected to invoke the interests of their children, but if they fail to do so, the court has a duty to consider the children's interests; and that officers of the court like the NDPP are expected to assist the court in this regard.[40]

[48] Whilst it is true that the onus of establishing the requirements of a forfeiture order in terms of s 50 of POCA, including proportionality, rests on the NDPP, some factual material relevant to the proportionality analysis will often be peculiarly within the knowledge of the owner of the property concerned; and where the NDPP establishes a *prima facie* case, the owner bears an evidentiary burden to place material before the court to rebut that case.[41]

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[39] *Prophet* fn 23 above para 69.
[40] *Van Der Burg* fn 12 above paras 62-63, 65 and 68-69.
[41] *Mohunram* fn 14 above para 75.

[49] On this aspect of the matter, the statement by Laws LJ in *Mahmood*,[42] cited with approval by Ackermann J in *First National Bank*,[43] must be borne in mind: 'in the law context is everything.'

[50] On the facts described above, the NDPP made out a *prima facie* case for forfeiture of the property. In my view, nothing turns on the fact that the NDPP initially was of the view that Brooks was the owner of the property: the second appellant was not thereby prejudiced, and was granted an opportunity of opposing the forfeiture order and placing all the relevant facts, particularly those in relation to the children, before the court a quo. But in her opposing affidavit the second appellant simply says:

> '16. My husband, myself and our two children at present reside on the immovable property and have been doing so since approximately the end of 2012.
> 17. The immovable property is thus utilised as our family home and is not [used] for any other purpose.'

[51] What is striking about the second appellant's affidavit is that she does not say that the interests of the children would be adversely affected if the property were to be forfeited. And this, when she is a qualified social worker. It may safely be accepted that she is acutely aware of the rights of children enshrined in the Constitution, as well as the provisions of the Children's Act 38 of 2005, specifically as regards children in need of care and protection. But first and foremost, the second appellant is a mother and there is nothing in the papers to even suggest that she, or her husband, do not have the best interests of their children at heart. In their opposing affidavits, there is not a hint that the children are in any kind of need, or that they would be at risk in the event of a forfeiture order being granted. Neither, do the appellants suggest that they or their children would be rendered homeless pursuant to a forfeiture order. Had that been the case, or if the children were in any way at risk or in need, I have no doubt that the second appellant would have raised it. Instead, the high watermark of the appellants' case is that the property is their family home. The most readily apparent and plausible inference to be drawn from

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[42] *R (Mahmood) v Secretary of State for the Home Department* [2001] 1 WLR 840.
[43] *First National Bank of SA t/a West Bank v Commissioner, South African Revenue Service & another; First National Bank of SA Ltd t/a West Bank v Minister of Finance* 2002 (4) SA 768 (CC) para 63.

these facts is that the children will not be adversely affected by the grant of a forfeiture order.[44]

[52] This finding applies *a fortiori* in the instant case. In their answering affidavits the appellants did not even suggest that they or their children (whose need for shelter are bound up with that of their parents) would be rendered homeless upon forfeiture of the property. Neither could they. They can comfortably afford alternative accommodation. They do not earn paltry incomes: the first appellant earns R10 000 and the second, R 9 615 per month. They do not appear to be persons of modest means. In addition, the property appears to be bond-free. According to a valuation certificate attached to the answering affidavit, the market value of the property in September 2014 was R960 000. The second appellant's half share excluded from forfeiture is thus in the order of R480 000, which, together with their monthly income, would enable the appellants to buy another property. And, of course, Brooks consciously assumed the risk of losing the property when he used it as a base for an organised illegal diamond-dealing business.

[53] Finally, the court a quo specifically had regard to *Van Der Burg*[45] in deciding whether the grant of a forfeiture order would amount to an arbitrary deprivation of property in violation of s 25(1) of the Constitution. The court would thus have been alive both to the interests of the children and the fact that the appellants' did not allege that they or their children would be rendered homeless if the property were forfeited to the State.

[54] I consider that on the evidence before the court a quo, the order of forfeiture was properly made. On this part of the case I would therefore dismiss the appeal.

[55] In the result I would make the following order:

1. Paragraphs 2 and 10 of the order of the court a quo are set aside and replaced with the following order:

'Condonation is granted for the late filing of the opposing affidavit by the first respondent, Mr Ashley Brooks. There is no order as to costs as regards both the application for condonation and the forfeiture application.'

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[44] *AA Onderlinge Assuransie-Assosiasie Bpk v De Beer* 1982 (2) SA 603 (A) at 614H-615B; *Cooper & another NNO v Merchant Trade Finance Ltd* 2000 (3) SA 1009 (SCA) para 7.

[45] *Van Der Burg* fn 12 above.

2. Save as aforesaid, the appeal is dismissed.

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A Schippers

Acting Judge of Appeal

Ponnan JA (Willis and Zondi JJA concurring):

[56] The issue in this appeal is whether the family home of the appellants and their two minor children should be forfeited to the State in terms of chapter 6 of POCA. That depends: first, on whether the property was an instrumentality of an offence under the Act; and if it was, then second, whether, it is liable to forfeiture. My colleague Schippers AJA has answered both questions against the appellants, the Brooks and in favour of the respondent, the NDPP. He accordingly proposes that the appeal be dismissed. I feel constrained to disagree. I do not propose to restate the facts or history to the litigation because these are captured adequately in the judgment of my learned colleague.

[57] I shall first comment on what I perceive to be the rather tenuous connection between the property sought to be forfeited and the illegal conduct on the part of the first appellant, Mr Brooks. Chapter 6 provides for forfeiture where it is established on a balance of probabilities that property has been used to commit an offence or (and this does not arise in this case) is the proceeds of unlawful activities. POCA defines 'instrumentality of an offence' as meaning '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'. In *NDPP v RO Cook Properties,* this court pointed out that 'in adopting this definition the legislature sought to give the phrase a very wide meaning.'[46] The judgment further emphasised that 'a literal application of the provision could lead to arbitrary deprivation of property.'[47] *Cook Properties*[48] accordingly favoured a narrow reading of 'instrumentality of an offence'.

[58] The correct interpretation of the concept 'instrumentality of an offence' in the context of POCA was considered by the Constitutional Court in *Prophet*.[49] As Van Heerden AJ explained in *Mohunram*,[50] in considering the meaning of the phrase 'an instrumentality of an offence' the Constitutional Court in *Prophet* adopted the

[46] See *Cook Properties* fn 8 above para 12.
[47] See *Cook Properties* above para 15.
[48] See *Cook Properties* above para 21.
[49] *Prophet* fn 23 above.
[50] *Mohunram* fn 14 above para 44.

interpretation accepted by the Supreme Court of Appeal in a trilogy of cases.[51] Van Heerden AJ added:

'In the first of those cases, *Cook Properties*, Mpati DP and Cameron JA said that "(i)t is clear that in adopting this definition the Legislature sought to give the phrase a very wide meaning". They held, however, that in order to ensure that application of the forfeiture provision does not constitute arbitrary deprivation of property in violation of s 25(1) of the Constitution ". . . the words 'concerned in the commission of an offence' must . . . be interpreted so that the link between the crime committed and the property is reasonably direct, and that the employment of the property must be functional to the commission of the crime. By this we mean that the property must play a reasonably direct role in the commission of the offence. In a real or substantial sense the property must facilitate or make possible the commission of the offence. As the term 'instrumentality' itself suggests . . . the property must be instrumental in, and not merely incidental to, the commission of the offence. For otherwise there is no rational connection between the deprivation of property and the objective of the Act: the deprivation will constitute merely an additional penalty in relation to the crime, but without the constitutional safeguards that are a prerequisite for the imposition of criminal penalties.'

In other words, the determining question is

". . . whether there is a sufficiently close link between the property and its criminal use, and whether the property has a close enough relationship to the actual commission of the offence to render it an instrumentality" '[52]

[59] *Mahomed (1)* pointed out that chapter 6's primary focus is 'not on wrongdoers but 'on property that has been used to commit an offence.'[53] 'The thing is here primarily considered as the offender, or rather the offence is attached primarily to the thing.' (*Bennis v Michigan*).[54] In giving meaning to 'instrumentality of an offence' the focus is not on the state of mind of the owner, but rather on the role the property plays in the commission of the crime.[55] The majority decision in *Bennis* sparked controversy amongst commentators. It has been suggested that the majority was unsuccessful in articulating a justification for the forfeiture. The court failed, so it has been suggested, to acknowledge the reasons why forfeiture emerged in the areas of admiralty and revenue collection. That false analogy caused the court not to engage

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[51] See *Cook Properties* above paras 6-32; See *Prophet* above paras 10-17 and *Parker* fn 10 above para 14.
[52] See *Cook Properties* above para 32.
[53] *National Director of Public Prosecutions & another v Mohamed NO & others* 2002 (2) SACR 196 (CC); 2002 (4) SA 843 (CC) para 17.
[54] *Bennis v Michigan* 516 U.S. 442 (1996) at 447.
[55] See *Cook Properties* above para 21.

in a substantive due process analysis. Had it done so, it would have concluded that forfeiting the property of an innocent owner is unconstitutional. Accordingly, the decision is one that 'neither logic nor history supports'. *Bennis* relies on the legal fiction of 'guilty property', namely that the property, and not the owner, is guilty and reiterates that property is the focus of forfeiture proceedings and not the guilt or innocence of the property owner.[56]

[60] In the dissenting opinion in *Bennis*,[57] Justice Stevens (with whom Justice Souter and Justice Breyer joined) identified three different categories of property that are subject to seizure: (a) pure contraband; (b) proceeds of criminal activity; and (c) tools of the criminal's trade. It was stated: as to (a), the government has an obvious remedial interest in removing the items from private circulation, however blameless or unknowing their owners may be; as to (b), which traditionally covered only stolen property - return to its original owner has a powerful restitutionary justification; and, as to (c), which includes tools or instrumentalities that a wrongdoer has used in the commission of a crime, also known as 'derivative contraband' - forfeiture is more problematic 'both because of its potentially far broader sweep and because the government's remedial interest in confiscation is less apparent'. The facts of this case demonstrate that the subject property was certainly not contraband, nor was it acquired with the proceeds of criminal activity. Moreover, its principal use was entirely legitimate.

[61] This case differs from other similar cases in at least the following crucial way:[58] the property did not actually facilitate the commission of the crimes in any particular manner nor was it adapted to facilitate or further that illegal purpose. The property sought to be forfeited bore no necessary connection to the offences committed by Mr Brooks. It is true that some of the transactions were concluded at

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[56] See, inter alia, Ronald F. Labedz 'Innocents Beware: Has Bennis v Michigan Made Assets Forfeiture Too Easy?' Northern Illinois University Law Review (1997) issue 2 at 268-376; Paul Dryer 'Bennis v Michigan: Guilty Property-Not People-Is Still the Focus of Civil Forfeiture Law' (1997) *University of Toledo Law Review* issue 2 vol 28; M. Kathyn Wagner 'Forfeiting the Foundation of American Jurisprudence: Bennis v Michigan' (1996) *University of Cincinnati Law Review* issue 1 vol 66.

[57] See *Bennis* above at 459.

[58] In *Mohunram* fn 14 above, the premises were used for operating gambling machines without a licence.
In *Van Der Burg* fn 12 above, the property was utilised as an illegal shebeen.
In *Parker* fn 10 above, the property was used to conduct a trade in drugs.
In *Prophet* fn 23 above, the property was adapted and equipped for the manufacture of a drug.
In *Mazibuko* fn 5 above, the property was used for the manufacture of drugs.

the property, but they might just as well have occurred in a multitude of other locations – as many actually did. But, that some of the transactions were concluded there, as also, at other places was purely incidental to their commission. The location and appointment of the property itself played no distinctive role in the commission of the offences. It is thus difficult for me to see how property bearing no reasonably direct connection to the offences other than serving as the location for the transactions could constitute an instrumentality of those offences. The nexus thus seems to me insufficient between the property and the offences committed. I accordingly entertain serious reservations as to whether there was a 'direct functionality'[59] between the property and the offences in question but, I shall nonetheless, for present purposes, assume – without deciding – that the use to which the property was put rendered it 'an instrumentality'. I do so because the conclusion that I reach on the second leg of the appeal does not compel a conclusion on this aspect.

[62] The Bill of Rights provides that 'no law may permit arbitrary deprivation of property.'[60] Civil asset forfeiture constitutes a serious incursion into well-entrenched civil protections, particularly those against the arbitrary deprivation of property. In *Mkontwana,*[61] the Constitutional Court stated the following:

'…[T]here must be sufficient reason for the deprivation otherwise the deprivation is arbitrary. The nature of the relationship between means and ends that must exist to satisfy the section 25(1) rationality requirement depends on the nature of the affected property and the extent of the deprivation. A mere rational connection between means and ends could be sufficient reason for a minimal deprivation. However, the greater the extent of the deprivation the more compelling the purpose and the closer the relationship between means and ends must be.'

[63] Our courts have generally been astute to the fact that forfeiture of the instrumentalities of crime can produce arbitrary and unjust consequences.[62] It is thus the task of the court to ensure that the deprivation of property that will result from a forfeiture order is not arbitrary. It is indeed so that s 50(1) is couched in peremptory terms. It provides that a court 'shall' make a forfeiture order if it finds on the civil

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[59] See *Cook Properties* fn 8 above para 14.
[60] Section 25(1) of the Constitution of the Republic of South Africa Act 108 of 1996.
[61] *Mkontwana v Nelson Mandela Metropolitan Municipality & another*; *Bisset & others v Buffalo City Municipality & others*; *Transfer Rights Action Campaign & others v MEC*, *Local Government and Housing, Gauteng, & others* (*KwaZulu-Natal Law Society & Msunduzi Municipality as Amici Curiae*) 2005 (1) SA 530 (CC) para 35; See also *First National Bank of SA Limited t/a Wesbank v Commissioner for the South African Revenue Services* fn 43 above.
[62] See *Mohunram* fn 14 above para 120.

standard of balance of probabilities that the property sought to be forfeited is an instrumentality of an offence. However, as Moseneke DCJ pointed out in *Mohunram,* our courts in this context 'have consistently interpreted "shall" to mean "may". They have correctly held all requests by State prosecutors for civil forfeiture to the standard of proportionality which amounts to no more than that the forfeiture should not constitute arbitrary deprivation of property . . . .'[63] Albeit not a statutory requirement, proportionality is a constitutional imperative. It is an equitable requirement that has been developed by our courts to curb the excesses of civil forfeiture. The proper application of a proportionality analysis weighs the forfeiture and, in particular, its effect on the owner concerned, on the one hand, against the purposes the forfeiture serves, on the other.[64]

[64] According to the Constitutional Court in *Prophet,* the nature and gravity of the offence in question, the extent to which ordinary criminal law measures (when properly enforced) are effective in dealing with it, its public impact and potential for widespread social harm and disruption, are all factors that should also weigh in the enquiry as to whether a forfeiture order would be constitutionally disproportionate.[65] *Mohunram*[66] held that it would be wrong for POCA to be utilised in a manner which blurs the distinction between the purposes and the methods of criminal law enforcement, on the one hand, and those of civil law, on the other. 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. In that case,[67] Moseneke DCJ noted that if the forfeiture sought occurs within the context of POCA, additional and countervailing considerations come into the proportionality analysis - the nature of the crime must be probed keeping in mind the predominant purpose of POCA. 'The forfeiture must advance the purpose that POCA proclaims. Otherwise, the forfeiture, being the means, will be misaligned with the predominant ends pursued by POCA.'

[65] In deciding whether or not the forfeiture would be proportionate, the question whether the instrumentality of the offence is sufficiently connected to the main purpose of POCA must be considered. Mr Brooks and the others who participated in

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[63] See *Mohunram above* para 121.
[64] See *Mohunram above* para 58.
[65] See *Prophet* fn 23 above, paras 58, 63 and 68.
[66] See *Mohunram* above para 72.
[67] See *Mohunram* above para 124.

these offences have been prosecuted for contraventions of the Diamonds Act 56 of 1986. The trial is still ongoing. If convicted, that Act prescribes fairly harsh penalties for its contravention.[68] What is more is that provision is there made for forfeiture.[69] There is thus considerable force in the contention that in framing the provisions of the Diamonds Act, the Legislature had made specific provision for forfeiture and in so doing, signified an intention that the forfeiture regime so created would suffice to meet the mischief sought to be addressed by the enactment. Ordinarily, it may be accepted that, when the Legislature designates a set of remedies to combat specified offences, those remedies are intended to be effective and exhaustive. This must be so in the present case. It follows that forfeiture in terms of POCA as well, may be doubly punitive.

[66] The means that chapter 6 employs (forfeiture of instrumentalities of crime) must at the very least be rationally related to its purposes. According to *Cook Properties*,[70] the inter-related purposes of chapter 6 include: (a) removing incentives for crime; (b) deterring persons from using or allowing their property to be used in

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[68] Section 87 of the Diamonds Act headed 'Penalties', provides:
Any person who is convicted of an offence under this Act shall be liable-
(a) in the case of an offence referred to in section 82 (a) or (b), to a fine not exceeding R250 000, or to imprisonment for a period not exceeding ten years, or to both such fine and such imprisonment;
(b) in the case of an offence referred to in section 82 (c), 83 (a) or 84 (a), to a fine not exceeding R100 000, or to imprisonment for a period not exceeding four years, or to both such fine and such imprisonment;
(c) in the case of an offence referred to in section 83 (b) or 84 (b), to a fine not exceeding R50 000, or to imprisonment for a period not exceeding two years, or to both such fine and such imprisonment; and
(d) in the case of an offence referred to in section 82 (d), 83 (c), (d) or (e), 84 (c) or (d), 85 or 86, to a fine not exceeding R25 000, or to imprisonment for a period not exceeding twelve months, or to both such fine and such imprisonment.

[69] Section 91 headed 'Forfeiture' provides:
(1) Notwithstanding anything to the contrary in any other law contained, any money or property which a person has paid or delivered to an inspector or a member or agent of the South African Police in pursuance of an agreement for the delivery or acquisition of unpolished diamonds, shall upon the conviction of that person of an offence under this Act in connection with such an agreement be forfeited to the State.
(2)(a) A forfeiture in terms of subsection (1) shall not affect any right which any person other than the convicted person may have to the property forfeited if he satisfies the court concerned-
(i) that he did not know that such property was being used or would be used for the purpose of or in connection with the commission of the offence in question; or
(ii) that he could not prevent such use.
(b) Paragraph (a) shall not apply to any money so forfeited.
(3) The provisions of section 35 (4) of the Criminal Procedure Act, 1977 (Act 51 of 1977), shall mutatis mutandis apply in respect of a right referred to in subsection (2), and for the purposes of such application-
(a) a reference in the said section to the court shall be construed as a reference to the court which has convicted the person referred to in subsection (1); and
(b) a reference in the said section to a declaration of forfeiture shall be construed as a forfeiture in terms of subsection (1).

[70] See *Cook Properties* fn 8 above para 18.

crime, (c) eliminating or incapacitating some of the means by which crime may be committed; and, (d) advancing the ends of justice by depriving those involved in crime of the property concerned. At least (b) and (d) are penal in nature. At core then, forfeiture seeks to prevent illegal uses both by preventing further illicit use of the property and by imposing an economic penalty, thereby rendering illegal behaviour unprofitable. As laudable as those motives may be, there is no escaping the draconian nature of the forfeiture; particularly in as far as Ms Brooks is concerned. None of those considerations find application to her. The High Court concluded that she 'should succeed with her innocent owner defence' or more accurately put 'her ignorant owner defence'.[71] There was no cross appeal by the NDPP and, in my view, there was simply no basis on which that finding by the High Court could be assailed. *Cook Properties*, unlike us, did not have to confront, what it described as the serious constitutional question, whether forfeiture is permissible when the owner (in this instance Ms Brooks) has 'committed no wrong of any sort, whether intentional or negligent, active or acquiescent'.[72]

[67] The statute does not readily provide an answer to the question. Accordingly, one must look beyond the language of the statute. The complete lack of blameworthiness ascribable to Ms Brooks in this case is significant. I daresay, elementary notions of fairness require some attention to the impact of a seizure on the rights of an innocent spouse in the position of Ms Brooks. The appellants are married in community of property and the property belongs to their joint estate. The rights of spouses who are married in community of property - sometimes called 'tied' co-ownership - are not divisible.[73] In this case, Ms Brooks did not entrust the property to her husband; he was entitled to use it - as was she - by virtue of their co-ownership. I shrink from the notion that the value of her co-ownership is beneath the law's protection. There is no reason to think that the threat of forfeiture will deter an individual, such as her, from acquiring jointly with her husband a family home, or for that matter from marrying him in the first place, if she neither knows nor has reason to know that he plans to put it to illicit use. It goes without saying that now that Ms Brooks is aware of the use to which the property has been put by her husband, and the risk that such use poses for her two minor children and herself, she will, I am

[71] See *Cook Properties* above para 25.
[72] *Cook Properties* above para 26.
[73] *Mazibuko* fn 5 above para 48.

sure, certainly be more vigilant in the future. For now though the matter must be approached on the basis that she has done no wrong.

[68] The absence of any deterrent value reinforces the punitive nature of the forfeiture in this case. Ms Brooks has done nothing that warrants punishment - she cannot be accused of negligence or of any other dereliction in allowing her co-owner husband to use their family home. I accept that this approach may raise all manner of difficulty in proving collusion, or disproving the lack thereof, by the alleged innocent owner and the wrongdoer, but whatever validity that aspect might have in another case of this kind, it has none here. It is clear that Ms Brooks did not collude with her husband to commit the offences. If anything, she was very much the victim of his conduct. Surely, Ms Brooks cannot be accused of failing to take 'reasonable steps' to prevent the illicit behaviour because, being unaware of such behaviour, she is just as blameless as if a stranger, rather than her husband, had used the property in a criminal enterprise.

[69] It appears to me that the remedial interest in this forfeiture falls far short of that found present in some of our other cases.[74] Forfeiture may serve remedial ends when removal of certain items (such as a burglar's tools) will prevent repeated violations of the law (such as housebreaking).[75] But confiscating Ms Brooks home would not preclude her husband, were he inclined, from using other venues, since all that is needed to commit these offences is a place – any place, reasonably sheltered from prying eyes. I accept that forfeiture is a strong weapon in the State's arsenal in the war against organised crime. And, I also do not lose from sight the sophistication of many who engage in a life of crime and who may well be ingenious enough to insulate their property from forfeiture. But, it is important to recognise that each forfeiture proceeding is based upon unique circumstances. Here, in addition to the lack of a sufficient nexus between the property and the offences, the property was legitimately acquired long before their commission.

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[74] See for example *Prophet v National Director of Public Prosecutions* 2007 (6) SA 169 (CC); *Van Der Burg & another v National Director of Public Prosecutions and another* 2012 (2) SACR 331 (CC); *National Director of Public Prosecutions v Parker* 2006 (3) SA 198 (SCA).

[75] By way of example, *Bennis* (at 465) refers to *United States v One Assortment of 89 Firearms* 465 U.S. 354 (1984) at 364 (confiscation of unregistered shotguns); and *C J Hendry Co.* v *Moore* 318 US 133 (1943) (seizure of fishing nets used in violation of state fishing laws).

[70] Aside from Ms Brooks, the interests of the two minor children also come into the reckoning. The importance of the children's participation was emphasised in *Christian Education South Africa v Minister of Education*.[76] In *Du Toit v The Magistrate & others*[77] this court said the following:

'In striking the appropriate balance adequate weight must be accorded to the interests of the children. Article 3(1) of the United Nations Convention on the Rights of the Child, 1989 (UNCRC) requires that: "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration." Closer to home, this is echoed in art 4(1) of the African Charter on the Rights and Welfare of the Child, 1990 (ACRWC). . . .'

The Children's Act 38 of 2005 was drafted pursuant to South Africa's obligations under the UNCRC, the ACRWC and the Constitution. Sections 10, 14 and 15 of the Children's Act are a cluster of provisions designed to ensure that children's rights are protected and their dignity is upheld in any proceedings affecting them.[78]

In terms of s 28(2) of the Constitution, in all matters concerning children (including litigation)[79] their best interests are of paramount importance. . . . The reach of s 28(2) extends beyond those rights enumerated in s 28(1): it creates a right that is independent of the other rights specified in s 28(1).[80] Section 28(2), read with s 28(1), establishes a set of rights that courts are obliged to enforce.[81] In *S v M*[82] para 15, the Constitutional Court observed that:

'The ambit of the provisions is undoubtedly wide. The comprehensive and emphatic language of s 28 indicates that just as law enforcement must always be gender-sensitive, so must it always be child-sensitive; that statutes must be interpreted and the common law developed in a manner which favours protecting and advancing the interests of children; and that courts must function in a manner which at all times shows due respect for children's rights. As Sloth-Nielsen pointed out:

"[T]he inclusion of a general standard ('the best interest of a child') for the protection of children's rights in the Constitution can become a benchmark for review of all proceedings in which decisions are taken regarding children. Courts and administrative authorities will be

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[76] *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC) para 53.
[77] *Du Toit v The Magistrate & others* [2016] ZASCA 15; 2016 (2) SACR 112 (SCA) para 11-12.
[78] *Centre for Child Law v Governing Body of Hoërskool Fochville & another* [2015] ZASCA 155; [2015] 4 All SA 571 (SCA) para 23.
[79] *Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development & others* [2009] ZASCA 8; 2009 (2) SACR 130 (CC) para 130; *S v M (Centre for Child Law as Amicus Curiae);* 2008 (3) SA 232 (CC) paras 14-26.
[80] See *DPP, Transvaal v Minister of Justice and Constitutional Development* above para 72.
[81] See *S v M* fn 80 above para 14.
[82] See *S v M* above.

constitutionally bound to give consideration to the effect their decisions will have on children's lives."'

[71] It is so that in *Van Der Burg*, the Constitutional Court confirmed a forfeiture order granted by the full court, but efforts to compare or equate the facts of one case to those of another are unlikely to be of assistance. In *Van Der Burg*, the property had been used for the business of crime, namely the sale of liquor without a licence, for more than six years. Conventional law enforcement strategies, including almost 60 instances of police action, had failed to deter the owners. The property, which consisted as well of an onsite consumption area, was located approximately 30 metres from a primary school, 100 metres from a Catholic Church and 900 metres from a high school. As the Constitutional Court observed '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.'[83] As far as the possibility of homelessness resulting from forfeiture is concerned, the Constitutional Court accepted that 'the high-court benches dealt with the concerns about the children adequately. The information before them was not insufficient for this purpose.'[84]

[72] Although clearly distinguishable on the facts, *Van Der Burg* did lay down certain principles that are instructive for present purposes. First, the circumstances of children necessarily play a role in the proportionality enquiry.[85] Second, 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. 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. Accordingly, the children's interests require specific and separate consideration, in addition to the attention they might get in the proportionality analysis.[86] Third, whilst the interests of the parents and their children necessarily overlap, the children's interests may well differ from the parents' in a case like this. There may thus be a significant divergence and even a conflict between the parents' and the children's interests. The critical question is whether the information before the court is sufficient to consider the interests of the children, or whether the appointment of a curator to

[83] See *Van Der Burg* fn 12 above para 75.
[84] See *Van Der Burg* above para 74.
[85] See *Van Der Burg* above para 69.
[86] See *Van Der Burg* above para 70.

present this information is necessary. Where there is insufficient information about the children or where the information before the court leaves some doubt regarding the children's wellbeing — the court may need to appoint a curator to conduct an independent assessment of the children's interests.[87]

[73] Neither the lack of ascribable culpability on the part of Ms Brooks nor the interests of the minor children merited even a mention in the proportionality analysis of the High Court. Having found that the property was 'an instrumentality of an offence', the High Court approached the proportionality enquiry thus:

'27. Mr and Mrs Brooks [Brooks] contended in their opposing affidavits that if the Court were to declare their property forfeit that decision would be disproportional regard being had to the fact that Mr Brooks received only R58 000.00 whereas the property has been evaluated and its market value was about R960 000.00. Nkabinde J in the *Prophet* matter made the following remarks at para 69 on this aspect:

"It is perhaps worth pointing out that, as Ackerman JA noted in *FNB*, the precise linguistic formulation of the proportionality test may make little difference. In that case the Court said:

'(T)he requirement of such an appropriate relationship between means and ends is viewed as methodologically sound, respectful of the separation of powers between Judiciary and Legislature . . . and suitably flexible to cover all situations. It matters not whether one labels such an approach an "extended rationality" test or a "restricted proportionality" test. Nor does it matter that the relationship between means and ends is labelled "a reasonably proportional" consequence, or "roughly proportional", or "appropriate and adapted" or whether the consequence is called "reasonable" or "a fair balance between the public interest served and the property interest affected".' It is clear, as I have outlined above, that the forfeiture of the property in this case is neither significantly disproportionate nor disproportionate, given the nature of the relevant offence, and the extent to which the property was used as an instrument of that offence. The applicant's argument that the forfeiture of his property in this case constituted an "arbitrary deprivation of property" inconsistent with the Constitution must therefore fail.

Finding: I therefore find that it is not disproportionate to order forfeiture in this matter. The amount received by Mr Brooks should not be the deciding factor in determining proportionality as contended for by the couple. Crucial in the matter is the involvement of the property in the commission of the offences.'

[74] Why the High Court thought that 'it is not disproportionate to order forfeiture in this matter' remained unexplained. Here, unlike in *Van Der Burg*, there was no

[87] See *Van Der Burg* above paras 71-72.

investigation of any kind appertaining to the children. We thus do not know whether there was any divergence of interests between the parents and the minor children or whether it was necessary for a *curator ad litem* to have been appointed to represent them. In a matter such as this, it is the duty of the court to consider the specific interests of the children[88] and yet consideration of the children's best interests did not feature at all in the proportionality enquiry. The High Court approached the enquiry as if the children's right to shelter and the parents' rights regarding property and housing are inseparable and indistinguishable. And, having found, without even a mention of the children, that forfeiture was not disproportionate, there was no further consideration as to whether further steps should be taken to investigate what would be best for the children. In *Hoërskool Fochville,* it was emphasised that the child's right to be heard and to have his or her views taken into account, has been recognised as forming part of South African law.[89] The result of the High Court's approach is that in a matter which materially impacted on their wellbeing, the voice of the two minor children had been silenced.

[75] It is no answer to suggest that it was for the Brooks to show that they or their children would be rendered homeless upon forfeiture of the property.[90] In *Mohunram*,[91] Moseneke DCJ opined that it 'would be entirely inappropriate to lumber a person facing forfeiture proceedings under s 48 of POCA with the burden to plead the defence of proportionality'. He added, '[i]n my view, the NDPP itself, when initiating proceedings under s 48, should place before the court adequate facts that will allow the court to adjudicate properly on an application for forfeiture under s 50(1), and in particular, on whether the forfeiture sought is constitutionally proportionate.' In this regard, it is important to point out that the term *onus* is not to be confused with the burden to adduce evidence.[92] Importantly in *Mohunram*,[93] Van

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[88] See *Hoërskool Fochville* fn 79 above para 68.
[89] See *Hoërskool Fochville* above para 20.
[90] Judgment of Schippers AJA para 50-52.
[91] See *Mohunram* fn 14 above para 130.
[92] See *Hoërskool Fochville* fn 79 above para 18. See also *Pillay v Krishna & another* 1946 AD 946 at 952-953, where Davis AJA stated:
'[I]n my opinion, the only correct use of the word *onus* is that which I believe to be its true and original sense, namely the duty which is cast on a particular litigant, in order to be successful, of finally satisfying the court, that he is entitled to succeed on his claim, or defence, as the case may be, and not in the sense merely of his duty to adduce evidence to combat a *prima facie* case made by his opponent.' See also *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd* 1977 (3) SA 534 (A) at 548.
[93] See *Mohunram* above para 75.

Heerden AJ was at one with the learned Deputy Chief Justice on that aspect, when she stated:

'It is the task of the court to ensure that the deprivation of property that will result from a forfeiture order is not arbitrary. The proportionality assessment is a *legal* one, based on an evaluation of all the relevant factors in the full factual matrix of the particular case. The *onus* of establishing that all the requirements for a forfeiture order in terms of s 50 of POCA - including that of proportionality - have been met, rests on the NDPP throughout. However, as some of the factual material relevant to the proportionality analysis will often be peculiarly within the knowledge of the owner of the property concerned, the owner who is faced with a *prima facie* case established by the NDPP would in the usual course be well-advised to place this material before the court. This does *not*, however, shift the *onus* of proof to the owner in question; it merely places on the owner an evidentiary burden or, as it is sometimes called, a burden of adducing evidence in rebuttal.'

[76] Thus, before faulting the Brooks' poor showing on this aspect, it may be as well to first subject the NDPP's application papers in the matter to more careful scrutiny. On 22 August 2014, the NDPP approached the High Court *ex parte* for a preservation of property order in terms of s 38(1) of POCA. In support of that application it was stated: '33.1 The cash and the house were deliberately chosen and used to facilitate the commission of illicit dealing in unpolished diamonds;

. . .

33.4 The house is also the place where the large sums of cash at times were handed over.'

The application succeeded and on 12 September 2014 the order of court was published in the government gazette. On 9 December of that year, the NDPP applied in terms of s 48(1) of POCA for an order that the property, the subject of the preservation order, be declared forfeit to the State. In support of that application, it was asserted that 'Jacobus Smit [Mr Smit is a Senior Financial Investigator attached to the Asset Forfeiture Unit] has also established that the First Respondent [Mr Brooks] is the owner of the house (which is worth approximately R520 000).' Mr Brooks response to that allegation was:

'25. Insofar, as the allegation made by Somaru in paragraph 27 of his affidavit that I am the registered owner of the house, I reiterate what I have said above namely, that I, together with my wife are the registered owners of the property in undivided shares and I respectfully refer the above Honourable Court to annexure "AB4" in support hereof. I therefore deny the allegation made in paragraph 27 of Somaru's affidavit insofar as it may suggest that I am the sole owner thereof.'

[77] That is where matters were allowed to rest until Ms Brooks, who had not been cited as a respondent by the NDPP, sought leave to intervene. In an affidavit filed during February 2015 in opposition to the relief sought by the NDPP, Ms Brooks stated:

'11. I note from the founding affidavit of the Deponent Bishun Somaru (Somaru) and in particular, paragraph 27 thereof, he alleges that one Jacobus Smit has established that the 1st Respondent is the owner of the property.

. . .

14. I find it astonishing that notwithstanding, the fact that it was established by the valuators appointed by the curator bonis that I am also the registered owner of the immovable property, Somaru in his founding affidavit makes no mention hereof but simply states that 1st Respondent is the owner of the immovable property.

15. At the time of us purchasing the immovable property, the property was not developed and with contributions from both the 1st Respondent and myself we built a dwelling on the property. My husband and I pooled our income and the savings from our joint incomes over the years have been used to inter alia contribute to the building cost on the immovable property. I am also aware of the fact that my husband obtained a loan from one Patrick Mason to assist us to build the aforesaid dwelling.

16. My husband, myself and out two children at present reside on the immovable property and have been doing so since approximately the end of 2012.

17. The immovable property is thus utilised as our family home and is not for any other purpose.

18. I first became aware of the allegations raised against my husband as being a party to illegal diamond transactions during or about the 22nd of August 2014 when he was arrested.

19. Prior to the 22nd of August 2014, I had no knowledge of the above mentioned allegations.

20. I deny that either I or the children were parties to any of he alleged transaction or had any knowledge thereof. This is our home where we live as any ordinary couple with their children in South Africa would do.

. . .

27. I reiterate my previous statement that the purpose of the immovable property is to provide accommodation for our family and as such is utilised as our family home. I submit that in light of what I have stated herein, it cannot be said that the immoveable property was used to commit any crime.

28. I note from the various affidavits placed before the above Honourable Court that no allegation is made by any of the deponents thereto that I was a party to or had any knowledge of any alleged illegal diamond transactions.

29. I submit that another important factor to be considered is that the immovable property was purchased during March 2012 and since the improvement thereof toward the end of March 2012, our family has occupied the immovable property as our family home. The first alleged transaction on which that the Applicant relies is alleged to have taken place on 20 March 2013. That would mean that a year had in fact passed since purchasing the immovable property and months after we occupied the immovable property.

30. It is my contention that even if the allegations made by the Applicant is correct (which is not admitted), the amounts which the 1st Respondent is alleged to have received for his participation in the alleged illegal diamond transactions are relatively small amounts. . . .'

None of those allegations were challenged by the NDPP. In a replying affidavit filed on behalf of the NDPP it was stated:

'The First Respondent should take note thereof that Chapter 6 proceedings under POCA is focused, no on wrongdoers, but on property that has been used to commit an offence or which constitutes the proceeds of crime. The guilt or wrongdoing of the owners or possessors of property is, therefore, not primarily relevant to the proceedings. Further and detailed legal argument will be advanced in this regard at the hearing of this matter.'

. . .

The contents hereof are noted. The Applicant is aware that it is trite in our law that where parties are married in community of property, a joint estate is formed and therefore never intended to intentionally exclude any party and/or the 10th Respondent from the proceedings. Further and detailed legal argument will be advance at the hearing of this matter.'

[78] Accordingly, on a proper reading of the papers, it is plain that the NDPP appeared not to appreciate that it had to place adequate facts before the court to satisfy it that the forfeiture sought would be constitutionally proportionate and, more importantly, that it bore an onus in this regard. In consequence, its founding papers approached the matter as if merely establishing that the property was an instrumentality, would, without more, entitle it to a forfeiture order. The NDPP rather laconically alluded to Mr Brooks and was simply silent about Ms Brooks and the children. There was no attempt to adduce any evidence that in relation to all of them and, more especially Ms Brooks and the two minor children, the forfeiture would not be constitutionally excessive. Whilst it is expected that parents must invoke the interests of their children in proceedings like these and it is important that they do so, the NDPP bears no less a responsibility when the parents have failed to adequately do so. Here the children were raised only obliquely by Ms Brooks. Her raising them, as also the incidence of use to which the property was put by her husband in the overall criminal enterprise, the value of the financial benefit derived from the offences

and the fact that the property had been acquired by legitimate means and primarily used for a legitimate purpose as a family home, brought to the fore, by implication at least, that a forfeiture on all the facts of this case would be disproportionate. Even in reply that went unanswered by the NDPP.

[79] The High Court is not only the upper guardian of children, but it 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, the NDPP is expected to assist the court to the best of its ability with all relevant information at their disposal.[94] In that the NDPP failed. There is not even a passing reference in its papers to the minor children. It approached the matter as if the children did not exist and their interests did not feature at all in the decision the court had been called upon to make. These failures, by adults, to articulate properly and emphasise the interests of the children can hardly be held against the children. Whilst it may not be possible to draw a bright line that will separate the permissible from impermissible forfeitures of property of innocent owners (in the position of Ms Brooks) and their children, I am convinced that the blatant unfairness of this seizure places it on the unconstitutional side of that line.

[80] The High Court appears to have thought it sufficient to exclude from the operation of the forfeiture order Ms Brooks' interest in the property in terms of s 52 of POCA on the basis that her interest was legally acquired, and that she neither knew nor had reasonable grounds to suspect that the property was an instrumentality. In that, the High Court called in aid the judgment of Nugent JA in *Mazibuko.* It is important to recognise that in that case the appeal was not directed against the forfeiture order of the High Court, rather it was confined to the order to exclude from the forfeiture order the ignorant owner's interest in the property. *Mazibuko* was thus not concerned with the equitable resolution of the uncomfortable conflicts exposed by this case, namely, whether or not a forfeiture order would in the circumstances of this case be proportionate and thus constitutionally permissible.

[81] The facts point to the disproportionate nature of the forfeiture order in this case. There can be no serious claim that the confiscation sought by the NDPP is not

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[94] *Van Der Burg* fn 12 above para 68.

punitive. Fundamental fairness prohibits the punishment of innocent people. I regard it as axiomatic that persons should not be punished when they have done no wrong. The unique facts of this case demonstrate that Ms Brooks and her children are entitled to the protection of that rule. ‘Improperly used, forfeiture could become more like a roulette wheel employed to raise revenue from innocent but hapless owners whose property is unforeseeably misused, or a tool wielded to punish those who associate with criminals, than a component of a system of justice.’[95]

[82] I accordingly hold that the forfeiture order made under s 50(1) of POCA against the appellants is disproportionate and, in the result, the appeal must be upheld. I can find no reason in this case why the costs should not follow the event.

[83] In the result:

1. The appeal is upheld with costs.
2. The order of the High Court is set aside and replaced with:
   'The application is dismissed with costs.'

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V M Ponnan

Judge of Appeal

[95] *Bennis v Michigan* 516 U.S. 442 (1996) at 456.

APPEARANCES:

For Appellants:	B Pretorius
	Instructed by: Roelofse Meyer Inc, Port Elizabeth Kramer Weihnmann & Joubert, Bloemfontein
For Respondent:	E B Ontong
	Instructed by: Office of the State Attorney, Kimberly Office of the State Attorney, Bloemfontein