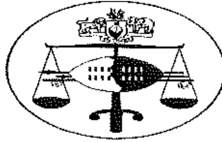

IN THE HIGH COURT OF ESWATINI

HELD AT MBABANE **CASE NO. 901/2020**

In the matter between:

THE DIRECTOR OF PUBLIC PROSECUTIONS APPLICANT

and

FRANCES PIETER VAN RAVENSWAAY WHELPTON 1st RESPONDENT

DANILLA WHELPTON 2nd RESPONDENT

JUDGMENT

Neutral Citation: *The Director of Public Prosecutions v Frances Pieter van Ravensway Whelp/on and Another (901/2020) SZHC 102 [2020] (13th May 2022)*

Qoram:

MAPHANGAJ

Date Heard: y!h and 8th September 2021

Date Delivered: 13th May 2022

Summary: *Civil Law and Practice - Urgent Applications for civil preservation and forfeiture* of *property brought on ex-parte basis - Proceedings under Part VIII* of *the Prevention* of *Organised Crime Act,* of *2018 which came into operation on 6th June 2018; Admitted facts pointing to the factual circumstances and events pertaining to the acquisition* of *the property occuring priopr to the commencement* of *the Act*

Prevention of *Organised Crime Act and definitions* of *'property' broad to include money - further definition* of *proceeds* of *'instrumentality* of *an offence' and proceeds* of *unlawful activities defined in broad terms to include property whether acquired before* or *after the commencement* of *the Act - Whether Part VIII and in particular Sections 42 and 52* as *pertains to property* as *defined in the Act operate retrospectively - Respondents contending that the presumption against retrospectivity in the application* or *operation* of *statutes as read with Section 119* of *the Constitution* of *Eswatini favour a restrictive interpretatino* of *the Act.*

Civl Procedure - whether a partty against whom preservation orders under the POCA Act may anticipate a forfeiture application brought in terms of *the Act and raise objections to challenge the procedural regularity and legality* of *proceedings on legal grounds including a constitutional challenge outside the narrow parameters* of

the Section 49 statutory rescission grounds under the POCA Act.

Constitutional Law - definition between the concepts* of *retroactive legislation and enactments that have retrospective operation discussed and distinguished.

Held that the provisions* of *ss42 and 52* of *the Act as well as PART VIII are to be construed to operate in a non retrospective (prospective) manner and in that regard s119* of *the Constitution* of *Eswatini which prohibits the enactment by Parliament* of *retroactive legislation in the sense* of *adversely affecting the personal rights and liberties* of *a person is peremptory.

JUDGMENT

MAPHANGAJ

[1] In this matter a series of applications and a cross application have been brought in a course of proceedings initiated by the Director of Public Prosecutions (The Applicant) invoking procedures and measures under the Prevention of Organised Crime Act No. 88 of 2018 (POCA). In its progression the proceedings proceeded upon in two parts thus were bi-furcated in accordance with the mechanisms of the POCA Act. In the first part it was initiated for urgent interim relief in terms whereof certain preservation orders were sought and obtained *ex parte* for freezing of certain specified bank accounts of the Respondents and the subsequently in due course a further application seeking the forfeiture of the funds subject to the initial preservation

order. The matter then mutated into the several proceedings to which I advert on account of an intervening application by the respondents after service of the initial presevation orders and the notices in that regard on both respondents.

The Parties

The Applicant the Director of Public Prosecutions, has been represented throughout by Principal Crown Counsel Ms Elsie Matsebula in her capacity as the lead officer in the Asset Forfeiture Unit in the Department. She has deposed to the founding, replying and supplementary affidavits in both applications. The First Respondent against whom the proceedings were initially brought, is a retired professor of law (Professor Emeritus) of the University of South Africa UNISA and the Second Respondent who joinder was sought subsequently, is his recently divorced wife of many years standing.

[2] From the emerging common cause facts the first respondent is no stranger to this Kingdom and according to his own uncontroverted evidence is also a naturalised citizen who also holds citizenship of the Republic of South Africa where he maintains his residence. His professional and business ventures in the kingdom span several years in the course of which it emerges he has had extensive dealings with key government institutions and agencies as well as key heads and functionaries of those institutions.

It is necessary to lay out the background factual account and the sequential development of these proceedings in all its components. For ease of reference and to avoid confusion, I shall refer to the parties in the designations accorded to them in the initial application that ignited the process to date. In so doing I shall also retain the citation of the parties as they were in the original application. I then propose to deal with the preliminary issues foremost as well as locate the application by way of factual background. I shall also give a brief discourse on the

relevant provisions and procedures under the POCA Act which have been invoked and referred to in the remedial prayers sought and submissions made by the parties from this Court.

[3] As indicated in summary these proceedings were set off by an *ex parle* application brought under a certificate of urgency in terms of section 43 of POCA by the Director of Public Prosecutions against the first respondent on the 20th May 2020. The matter came before me and at the conclusion of which I granted the sought order subject to specific conditions for the due compliance and fulfilment of the statutory procedural requirements under the act for the service of the order together with notice of the application on the respondent. The orders were for the freezing, preservation and or interdiction the effect of which was to place certain specified cheque accounts held by the respondent at Eswatini Bank and similar accounts at Nedbank Swaziland Limited collectively totalling the sum of E1, 743,130. 94 beyond the reach operation and control of the respondent and thus preventing his access to the funds therein held. A subsequent similar application was brought with similar effect against the second Respondent on the 6th June 2020 partly seeking her joinder in the proceedings the substance whereof was relief for interdiction and preservation orders in regard to specified bank accounts held by her at Nedbank Swaziland Limited at the Mbabane Branch. The latter sums were in the order of E1, 142,215.48. Similar interim relief was granted likewise against the second respondent. Due to the complexity and series of proceedings in this matter I propose to set out the sequential timeline of the progression in greater detail in the following background.

Sequence of Proceedings and Ancillary Applications Leading to The Hearing

[4] The initial application for the preservation of the First Respondenta bank account was launched on 20th June 2020 followed shortly by an application for joinder of the 2nd Respondent and preservation order

affecting her bank account on the 6th June 2020. More specifically these applications were brought in terms of section 42 of the Prevention of Organised Crimes Act No.88 of 2018 ('POCA' or 'the Act) the effect of the orders being to interdict the operation of various bank accounts and effectively also block funds therein held by the First and Second Respondents with certain eSwatini banks being;

4.1 A Savings Account held at Eswatini Bank (eZulwini) Savings Account No. 77018404421 with funds in the sum of E122, 295.12;

4.2 A Call Account No. 77018404422also held at Eswatini Bank eZulwini) with the sum of E34 762. 37; and

4.3 A Nedbank Swaziland Ltd (Gables Branch) Savings Account No 200000160688 holding the sum E266, 667.82; in the name of the First Respondent of the one part; and another

4.4 Nedbank (Swaziland) Ltd (Mbabane Branch) Account designated No. 20000399818 with a balance of E1, 142,215.48 ostensibly also the name of the First Respondent[1].

[5] These successive preservation orders issued against the First and Second respectively were subject to specific conditions of service thereof on both respondents at their nominated physical address in Pretoria in the Republic of South Africa and publication in the Government Gazetter 'as soon as practicable after the grant of the said orders in accordance with section 43(1) of the Act. It is common cause that the OPP caused the orders to be executed and the accounts were frozen, thus preserving the funds held in the various accounts aforementioned.

[1] ***It appears that the reference to the first respondent in the founding affidavit of the applicant in the second application was inadvertent in so far as it appears the intended person under reference was the Second Respondent (see p212 Vo.1 of Book of Pleadings).***

(6] It is common cause that the run of events, on the 16th September 2020, (some four months after the grant by this Court of the said orders) the papers of applications and the relative preservation orders were subsequently served on the Respondents at their given common residential address. It is further common cause that subsequently the Respondents filed their notices to oppose the forfeiture proceedings and to that end filed answering affidavits settling out their grounds for contestation of the claims [2] . Part of the admitted facts include the admission that there was a considerable lag on the part of the OPP to publish the orders in the Government Gazette as required by the mandatory provisions of section 43 (1) (b) of the POCA after the issuing, execution service of the orders on the Respondents.

In the intervening period the Respondents on the 21st January 2021 filed an urgent application for the rescission of the Preservation Orders; in terms whereof they sought a discharge of the preservation orders on legal grounds including the Applicant's alleged delay in publishing the preservation orders in the Gazette. That application although it was enrolled to be heard on the 19th February 2021 and desptie the filing of a full set of affidavits in that regard it was not heard due to various reasons amongst which was were the emergency public health conditions. It was superceded in effect by a subsequent application by the Applicants in terms of Section 52 for forfeiture of the funds held under the preservation orders.

That may be however, I must say that much of the grounds for the discharge or rescission of the preservation orders was based on the legal points that I deal with in this judgment that have been raised in regard to the competence of the entire civl forfeiture proceedings that is concerned in the main application. These have been raised in limine and I intend to deal with in greater detail in the following opiniion. That much is the relevant backdrop.

[2] **1 must say that despite the commended effort to file comprehensive bundle of the record and documents I have not had sight of these answering affidavits.**

The Applications

[7] The Applicant's two successive applications ostensibly brought in terms of the civil forfeiture procudures led with founding affidavits deposed to by a senior crown counsel at the Directorate of Public Prosecutions, Ms Elsie Matsebula, in her capacity as the Head of the Asset Forfeiture Unit housed in the department. In it she makes scurrilous allegations primarily attributing criminal conduct on the first respondent the gist of which is that the said Respondent is alleged to have engaged in a course of bogus schemes promoted as lucrative investment ventures in the Kingdom. By these methods he is alleged to have defrauded and lured unsuspecting members of the public (both in the Kingdom and the Republic of South Africa) and thus fleeced them of substantial sums of money. The affidavit proceeds to chronicle a catalogue of various instances of the alleged fraud and false pretence schemes.

[8] From the founding papers, it is common cause that that much of the factual matter deposed to by Ms Matsebula is avowedly derived from certain informants identified as the victims of the alleged fraudulent schemes and to some extent also from one Investigating officer in the Royal Swaziland Police named as Superintendent Dube. Much of the material in the initial application attributes a certain Dr Francois Johannes Olivier (an alleged victim) as the source. He appended his own confirmatory affidavit wherein he makes and details the alleged instances of fraud by which monies were unlawfully procured from him by way of false pretences. Dube has also annexed his own confirmatory affidavits in support of these applications and any attribution of information credited to him that has been adduced.

[9] The theme of the alleged culpablility of the first respondent is continued and augmented in further affidavits annexed to Ms Matsebula's

founding affidavit in the subsequent application for forfeiture of the Respondents' funds initially attached in terms of the preservation orders. Further confirmatory and. supporting affidavits were filed by another alleged victim of the fraud one Dr Dvonack to Ms Matsebula's affidavit in the application for forfeiture - to this end these affidavits were tendered as subsequently unearthed evidence obtained after the grant of the preservation orders and to this extent are of a supplementary nature. There are various annexures in the form of correspondence and other documentary evidence running into large volumes of pages tendered to demostrate and lead a paper trail of the First Respondents activities and engagement with key Government and other state institutions whose. I do not propose to go into detail of these allegations save to note that these form the basis of the Applicants grounds in support of the applications and to provide a factual backdrop to this judgment. This is so in that the nature of the issues as I have explain turn on the points of law and procedural aspects raised in the Respondents *in limine* objections and application for the setting aside and discharge of the preservation orders on specified legal grounds.

The Respondents' Objections and Counterapplication

[1O] In their opposing papers the Respondents have raised a series of objections in the form of certain points of law which have in turn given rise to a raft of of critical legal issues to be determined and adjudicated upon foremost in this matter.

[11] There are of course further multiple points of law germane to the merits of the preservation and forfeiture proceedings turning on the application of the relevant sections of the POCA Act. To this I must add that I regard the intervening application for the discharge and or rescission of the initial preservation orders obtained by the Applicants against both respondents, as well as the issues and contentions for

relief attendant thereon as integral to the merits in the proceedings as a whole. Indeed the substantive technical objections arising from the interpretations of the relevant provisions of POCA equally apply to the preservation orders and forfeiture proceedings.

[12] It is common cause that a central feature on which the Applicants case is founded is that the Respondents's bank accoiunts and the funds held by them therein were either a) instrumentality of criminal activities; and orb) proceeds of crime. It is common cause that the events and factual circumstances contained in the alltegations made against the Respondens the applications all relate to a timeline terminating before the coming into effect of the Prevention of Organised Crime Act; whose date of commencement was the 2nd July 2018.

The Respondents' contention is that the relevant portions of the POCA Act relied on by the Applicants as basis for the civil forfeiture remedies under the Act by law do not operate retrospectively but only prospectively. On the point raised by the Respondents, the most uppermost, threshold issues turn on the following questions vying for immediate consideration as articulated in their heads of argument:

a) The Respondent's right to protection from deprivation of property under section 19 of the Constitution and permissible limitations to those rights under the said Constitution;

b) The interpretation of the provsions of POCA and whether the pervasive and adverse provisions thereof are susceptible to retrospective application regard being had to the principles and presumption against retrospective application of statutes; if so

c) Whether those provisions bearing retrospective operation can stand in the face of section 119 of the Constitution.

[13] The understanding on both sides was that these issues are threshold in that should I find merit in the applicants objections *(in /imine)* that should spell the end of and consequently be dispositive of the entire proceedings. I needed only to venture into the merits and substantive issues or aspects if a path through the *in limine* objections emerges. Before I deal with these it· is nessessary to locate them within the relevant statutory framework.

Relevant Provisions of the POCA Act

[14] I now turn to the relevant sections of the Act and to comment on the statutory framework in relation to these proceedings. The general purpose of the Act is the tackling organised crime and criminal activities. The Act is devided into several parts dealing with various aspects and mechanisms for the monitoring and interventions in pursuance of the broad mandate of the legislation. Amongst its prime objects is the prevention and mitigation of racketeering, money laundering and criminal gang activities or operations by means of forcing criminals to disgorge their ill-gotten gains. Within the broad reach of the Act is included drastic mechanisms and proceedures by which property that is tainted with criminal turpitude and on reasonable grounds is believed to be the instrumentality or means of criminal activity or derived as proceeds of crime may also be attached and declared forfeit to the State (the so-cal.led civil forfeiture provisions).

[15] Section 42 of the Act enables an application for the interdiction and preservation of certain property suspected to be proceeds and or instrumentality of criminal activity as follows:

> ***"(1) The Director of Public Prosecutions may apply to the High Court for a preservation of property order prohibiting any person, subject to such conditions***

and exceptions as may be specified in the order from dealing in any manner with any property.

(2) The High Court shall make an order referred to in subsection (1) without requiring that a notice of he application be given to any other person or the adducing of any other evidence from any other person if he application is supported by an affidavit indicating that the deponent has sufficient information that the properlty concerned is;

> ***(a) an instrumentality of an offence referred to in the schedule; or***
>
> ***(b) the proceeds of unlawful activities,***

And the Court is satisfied that, that information shows on the face of it that there are reasonable grounds for that belief"

[16] Another relavant provision lies in Section 50 and subsequent subsections providing for an application for the forfeiture of property premised on a 'reasonable belief that such property, again, was either an instrumentality or proceeds of criminal activity. Section 52 (2) prescribes the legal standard to be applied by the court in the exercise of its power to grant forfeiture on the following basis:

"(1) The High Court shall, subject to section 54, make the forfeiture order applied for under section 50(1) if the court finds on a balance of probabilities that the property concerned-

> ***(a)*** **is** ***an instrumentality of an offence referred to in the Schedule; or***
> ***(b)*** **is** ***the proceeds of unlawful activities"***

The term 'property' is defined in the Act as:

> ***" .....money or other movable, immovable, corporeal or inr;orporeal thing and includes any rights, priviledges, claims and securities and any interest in the property and all proceeds from the property"***

In the Act **"proceeds of unlawful activities"** means:

> ***"Proceeds of unlawful activities means any property or any*** **service,** ***advantage, benefit of reward that was derived, received or retained, directly or indirectly in Eswatini or elsewhere, at any time before or after the commencement of this Act, in connection with or as a result of any unlawful activity carried on by any person, and includes any property which*** **is** ***mingled with property that*** **is** ***proceeds of unlawful activity"***

The term **'unlawful activity"** is given the following definition:

> ***"Conduct which constitutes an offence or contravenes any law whether that conduct occurred before or after the commencement of this Act and whether that conduct constitutes an offence in eSwatini or contravenes any law"***

[17] The black letter rule of our open justice systmen is that nothing shall be done *inaudita altera parte* (without hearing or due notice to the other party). There are nonetheless exceptions to this cardinal principle which in exceptional circumstances permit drastic, robust 'hot pursuit' measures of the kind that enable *ex parte* proceedings and remedies

(i.e., without prior notice to the respondents or any parties who may be adversely affected by it). These include those English law remedies that have been adopted into our adjectival law such as the *Mareva* injuction and *Anton Piller* orders as examples of extraordinary remedies that permit for relief outside of the conventional rules of procedure. These measures have been woven into the law of civil procedure in this and other common-law heritage jurisdictions. In the common law these procedures being special interim-relief remedies are subject to certain cautionary safeguards enabling affected persons due process and redress in due course.

(18] Chapter VIII of the Prevention of Organised Crime Act of 2018 represents a prime example of legislative ex *parte* procedures that are a departure from the *audi alteram* principles. The safeguard or let for parties adversely affected by the orders granted under these procedures is that, although the section permits the bringing of an *ex parte* application for the grant of preservation orders (conceivably in camera and invariably without notice to the interested parties) the court has a discretion to make such orders 'subject to such conditions and exceptions' as it may specify in the order if satisfied that there is sufficient information to ground a reasonable apprehension that the property which is subject to the order is the 'instrumentality' of a crime or proceeds of criminal activity.

(19] In terms of 42(1)The court may make appropriate orders including directions as to service of the application and the court order on any named respondents in addition to the requirements of service and publication of the order by way of gazette prescribed in the subsection. As a matter of fact in the instant case the court made specific directives for service of the application papers and the preservation orders on the nominated respondents as well as the publication of the orders in the gazette.

[20] Pursuant to the service of the application and orders the respondents filed answering affidavits and a subsequent application in which they not only raised several objections opposing the proceedings and the grant of a forfeiture order, but also sought an interim relief in the form of what they termed a 'rescission or discharge' of the preservation orders obtained against them on certain specified grounds. Some of the grounds advanced have been articulated as a part of the *in limine* objections.

[21] The Director of Public Prosecutions filed its own answering affidavit to the intervening application by the respondent and·subsequently also filed an application for forfeiture in terms of Section 52 of POCA Act wherein an order declaring the blocked funds held in the various nominated accounts in the names of the respondents forfeit to the State. In that application a full set of affidavits was also filed and exchanged in due course and the matter falls for adjudication before me.

[22] It appears that the respondents relief in the 'rescission' application was ambigous and nuanced in that they termed the orders sought as 'rescission' or 'discharge' of the preservation orders. However from a reading of their papers as well as the heads of argument, is that is is clear from the nature of the opposition and the objections grounding the application for 'rescission' and discharge of the preservation orders, that the relief was anything but an application in terms of section 49 of POCA which provides a procedure for the rescission or variation of preservation orders under prescribed conditions and on grounds specified in that section - of this both Applicant's and Respondents Counsel made common cause. It appears that although captioned a rescission application it was no more than one for the setting aside and discharge of the preservation orders on certain procedural and constitutional grounds.

[23] From the Respondents papers it also became clear as at the time of the filing of what they term the 'answering affidavits' together with their founding affidavit to the application for the setting aside of the preseration of property orders, that the respondents were proceeding both in terms of section 43 (5) (i) in opposition of a forfeiture application yet to be filed but more specifically for interim relief discharging or setting aside the preservation orders granted by the Court in May and June 2020. From these circumstances certain procedural matters of pertinence arise.

Procedural Issues

[24] The first question that has arisen is whether the nature of the proceedings or objections brought by the respondent in respect of which the discharge of these preservation orders is sought are permissible and should be entertained by the Court; regard being had to the procedural process and remedies set out in section 43 and 49 of the Act. It was the Applicant's contention that once granted the only permissible basis for rescission of a preservation order granted under Section 42 of the Act is upon satisfying the conditions and following the provisions of section 49 of the Act.

Section 43 (3) states that:

> ***"Any person who has an interest in the property which is subject oto the preservation of property order may give written notice of intention to oppose the making of a forfeiture order or apply, in writing, for an order excluding the interest in the property concerned from the operation of the preservation of property order".***

[25] Further Section 49 sets out the scope, requirements and conditions for the variation or rescission of preservation orders granted by the High Court in the following words:

"Variation and rescission of orders

49. (1) When the High Court has made a preservation of property order it may vary or rescind the order if it is satisfied that-

(a) the order concerned -

(i) will deprive the applicant of the means to provide for reasonable living expenses and cause undue hardship to the applicant: and

(ii) that the hardship tha the applicant will suffer as a result of the order outweighs the risk that the property concerned may be destroyed, lost, damaged, concealed or transferred; or

(b) there is an ambiguity or a patent error in, or omission from, that order, but only to the extent of that ambiguity, error or omission"

[26] Given these limited prescribed grounds for rescission a further issue that arises is whether the procedural approach adopted by the respondents in their answering affidavits and the intervening

application for rescission of the preservation orders, is permissible outside of section 49.

[27] This is more so particularly in view of the provisions of section 49 (6) which reads as follows:

> ***"(6) A preservation of property order may not be varied or rescinded on any grounds other than* those *provided for in this section"***

Framed another way the question is: is it competent for the Court to order a discharge of the preservation order other than in terms of and upon the grounds in section 49 of the Act prior to the lodgment of an application for forfeiture?

[28] In ***DPP v Linda Magagu/a*** **(07/2020) [2020] SZSC 44 (22 December** 2020) the Supreme Court held that the procedure under section 42 of POCA does not permit the granting of an interim order and rule nisi proceedings. In the judgment the Court adopted and inclined towards a comparatively similar approach of the Namibian Supreme Court in ***Prosecutor- General v Uuyini*** **(SA 20/2023) [2018] [NASC] (02 July 2015)** applying a relatively similar statutory framework and similarly worded provisions of the Namibian POCA. Of particular interest presently is that our Supreme Court in effect held that no other grounds other than within the ambit of section 49 are permissible for a rescission or variation of a preservation order already granted and executed.

[29] This position presupposes that the objection in limine and grounds advanced by the Respondents in which they have persisted from their initial answering affidavit filed in terms of section 43, the application for setting aside the preservation orders and finally the forfeiture proceedings would not have been actionable outside the forfeiture

proceedings. That maybe on a strict textual application of the procedure within the four corners of the POCA Act.

[30] However I understand the respondents approach for the setting aside of the preservation orders and by extension the dismissal of the forfeiture application to be premised on a cross-cutting attack involving a restrictive interpretation of the POCA advocating a prospective as opposed to a retrospective operation of the POCA Act. In support of this position they rely on key consitutional protections to which I intend to refer momentarily. It is therefore not conceived as a rescission within the narrow framework of section 49 the statute. Instead it is founded ir1 part on an asserted non..retrospective application of Part VIII of the Act. That is the rub. That issue looms foremost for determination[3].

[31] In any event due to the peculiar circumstances and history of the proceedings since inception in 2020, the rescission application could not be heard although it is common cause it was enrolled for hearing in March 2021. One of the impediments and drivers of the. delay or lapse was the public health crisis and the disruptive public health conditions brought about by the Covid pandemic and the regulation protocols in its wake. These circumstances no doubt adversely affected the normal conduct of the business of the Courts.

[32] In the result in due course the OPP launched the forfeiture application which is also contested by the respondents for alleged non-compliance with the procedural provisions of the POCA Act. The respondents have filed answering affidavit resisting the forfeiture application wherein in part they persist on various grounds raised in their answering affidavit to the preservation proceedings as well as their intervening application for the settings aside or rescission of the preservation order issued by this court in the lead up to the forfeiture process. The inevitable result

[3] **These interpretative objections that also include constitutional considerations are precisely the sort of legal objections that may be legitimately raised by litigants in these matters. They are the sort of issues** that arose in the National Director of Public Prosecutions v GG Carolus and Others 2000 (1) SA 1127 (SCA).

is that both in terms of timing and sequence, the rescission application got overtaken by the evolving events on the ground. It would therefore be futile in my view to give precedence to the rescission application as it is now *fait accompli.* Nonetheless the point of non-retrospecive operation of the POCA partly raised iin that application remains. It is the cross-cutting issue concerned in the entire proceedings before me. In my view there is nothing in the Act or under the rules of procedure that prevents a party who is adversely affected by an interim preservation order from filing his legal objections to challenge either the procedural propriety/regularity or even the legal competence of civil forfeiture proceedings on constitutional and other grounds outside of the narrow parameters of section 49 of the Act. There is every reason why a litigant ought to be able to challenge the constitutionality or overbreadth of the very statutory provisiions that are invoked against his or her.

The Point on Retrospective application of the Act

[33] The issue around the point on retrospectivity of the relevant sections of the Act invoked by the OPP leads us to examine the nature and purport of the preservation and forfeiture provisions of the legislation. It is clear that these provisions entail an enquiry into two categories of property - namely that which is tainted on account of being an instrumentality of an offence or proceeds of unlawful activities. On this basis the enquiry allows preservation and forfeiture orders in respect of such properties. In ***Caro/us*** the Court held that a fundamental feature of this enquiry cannot be differentiated from the sort in respect of confiscation or seizure orders in provisions such as the procedures envisaged in ss12(3) and 19 (1) (similar to sections 8(3) and 25(1) of our POCA act). It will be recalled that these sections relate to confiscation of property and deal with procedures for restraining orders by the High Court interdicting persons from dealing with property which may be realised to satisfy confiscation orders, the seizure thereof and for the appointment of a *curator bonis* to be an interim caretaker of the

property pending the realisation of the property or a rescission of the restraint order. The Court in ***Carolus*** further held that the nature of these procedures do not differ in their essential effect of retrospectivity in that the Chapter 6 (PART VIII of our Act) processes for the preservation and forfeiture of tainted property also 'extends backwards because;

> ***"it is clear in the latter case that the enquiry extends backwards to the period preceding the coming into operation of the Proceeds Act. I say this because it is clear that, in order to decide whether property is tainted because it is linked to criminal activity,* so *that it is to be forfeited under an order made in terms of chapter* 6, *it will be necessary for the court to enquire into the question* as *to whether property is the proceeds of criminal activities, which necessarily involves an enquiry into the past, whether the property was derived, received or retained in connection with or* as *a result of any unlawful activity"***

[34] The principal argument advanced by Mr Leppan (who appeared for the Applicant) against the interpretation contended for by the Respondents is that the provisions of sections 42 and 52 were deliberately designed to be retrospective in application as inferred from the use of the words 'whether acquired before or after the commencement of the act' in the definitions of 'instrumentality of an offence' or 'proceeds of unlawful activities' in section 2 of the Act.

[35] This leads us to consider and determine whether on a proper consideration of the language used in the provisions this is sufficient to evince a clear intention by Parliament that these provisions were to be applied retrospectively or whether this is purely incidental. I say this because for the presumption against retrospectivity to be rebutted, an express or by necessary implication inferable contrary intent must

appear from the language of the statute. In other words although generally prospective it must be clear that those provisions pertaining to the forfeiture and preservation of property tainted with turpitude are to operate backwards or retrospectively and are intended to affect transactions completed before the commencement of the Act.

[36] In *Caro/us* the court had to juxtapose the provisions of Chapter 5 of the South African version of POCA in the sections 12 (1) and 19(3) with Chapter 6 enactments on the preservation and forfeiture of property by examining and contrasting the wording in those sections. A comparative analysis in our Act would lead to considering the language in sections 8(3) and 25 (1) on the one hand against that in the provisions of ss 42(2) and 52 (1) in our Act. The parallel features are that in the confiscation seizure and realisation of property provisions Parliament distinctly and expressly qualified the provisions to apply or operate retrospectively in regard to property acquired or retained **"whether before or after the commencement of this Act".**

[37] From all this it may be said that it is apparent that Parliament brings within the fold of these measures retrospective application of the sections in that in the determination of the jurisdictional facts the court would not be confined to or events that took place after the commencement of the act only but to consider unlawful activities that occurred before the commencement of the act in connection to the property. A glaring feature of both Sections 42 and 52 is that the Legislature eschews the use of this phrase in these procedures. There the language is starkly different. I am impelled to take the approach as the Court did in the Carolus case that this is one strong indication that Parliament did not intend the provisions of PART VIII and more specifically Sections 42 and 52 to operate retrospectively.

[38] The above approach aligns with the reasoning on the application of the presumption against the retrospectivity of enactments adopted by

House of Lords in ***L'Office Cherifien des Phosphates and another v Yamashita - Shinnihon Steamship*** **Co *Ltd:* [1994) 1 AC 486** expressed in that Courts opinion penned by Lord Mustill. There Lord Mustill with approval firstly prefaced his views with the following statement of the presumption attributed to Staughton LJ in another English case - ***Secretary of State for Social Security v Tunnicliffe*** **[1991] 2 All ER 712 (CA)** *(Cherifien)* at 724:

> ***"In my judgment the true principle is that Parliament is presumed not to have intended to alter the law applicable to past events and transactions in a manner which is unfair to those concerned in them, unless a contrary intention appears. It is not simply a question of classifying an enactment as retrospective or not retrospective. Rather it may well be a matter of degree - the greater the unfairness, the more it is to be expected that Parliament will make it clear if that is intended"***

[39] The learned judge at 525 F-H of the *Cherifien* case then made the following remarks from which pertinent guidance for the matter presently may be derived:

> ***"Precisely how the single question of fairness will be answered in respect of a particular statute will depend on the interaction of several factors, each of them capable of varying from case to case. Thus, the degree to which the statute has retrospective effect is not a constant. Nor is the value of the rights which the statute affects, or the extent to which that value is diminished or extinguished by the retrospective effect of the statute. Again, the unfairness of adversely affecting the rights, and hence the degree of unlikelihood that this is what Parliament intended, will vary from case to case. So also will the clarity of the language used by Parliament, and the light shed on it by consideration of the circumstances in which the legislation***

> ***was enacted. All these factors must be weighed together to provide a direct answer to the question whether the consequences of reading the statute with the suggested degree of retrospectivity are* so *unfair that the words used by Parliament cannot have been intended to mean what they might appear to say."***

[40] What can be said with certainty in the matter before us is that there is an identifiable unfairness that would result in a supposed retrospective operation of the preservation and forfeiture measures under ss 42 and 52 of the Act. This works against the interpretation advocated by Mr. Leppan in his argument in favour of a rebuttal of the presumption against retrospective operation of these provisions. The unfairness is this - it would permit conditions for the seizure, interdiction and forfeiture of property on a basis that otherwise did not exist before the enactment of these sections and the coming into force of the POCA Act. The perverse effect is that a cause of action that did not exist against interests of third parties that did not exist before the Act would arise with the result that recipients of such property would be burdened with adverse consequences that did not exist at a time before the enactments.

[41] As per the words of Farlam AJA in ***Carolus*** and on an analogous consideration of the relevant statutory provisions and the salutary reasoning in that case, so it is that in that matter as in this one:

> "..... ***the cumulative effect of the unfairness, the legal culture leaning against retrospectivity where there is unfairness, the fact that Parliament refrained from repeating the "whether before or after the commencement of this Act" phrase........leads*** **me** ***to the conclusion that on a proper interpretation of the Act chapter*** **6** ***was not intended to be retrospective"***

(42] I agree with and incline towards a similar conclusion with regard to the provisions of sections 42 and 52 of the Prevention of Organised Crime Act of eSwatini. The reasoning and rationale adopted by that Court is equally applicable in the instant case. These provisions can only bear prospective application.

(43] I am therefore persuaded that the preponderance of opinion is that had that been the intention of Parliament then it would be expressed in clear and unambiguous terms as it was in Sections 8 and 25 that such provisions are intended to also operate retrospectively to cover property acquired in connection or in the course of activities that occurred before the coming into operation of POCA. I am further fortified in this view and in the correctness of a restrictive interpretation of the relevant provisions of POCA under in light of the clear provisions of Section 119 of the Constitution of Swaziland. in the face of the imperative prescripts of that section, Parliament could not presume to intend a retrospective operation of these provisions.

Section 119 of the Constitution as ground for restrictive interpretation of POCA

(44] In support of the Respondents' case for a prospective interpretation of the invoked sections of the Act, I was referred chiefly to the decision in ***National Director of Public Prosecutions v Wouter Basson*** [4] ***(Basson).*** The *Basson* case was an appeal from a lower court on whether section 18 (1) of the South African POCA act was to be construed as operating operates with retrospective effect. Section 18 (which is worded similarly to section 23 of the Eswatini Act), is concerned with confiscation orders as is ss 12 (3) and 19(1) of that Act.

(45] Sections 12(3) and 18 (2) of the South African is directed at dealing with benefits from proceeds or property derived from unlawful activities

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provided that a person benefits from unlawful activities. The wording of section 12(3) is relevant in the instant matter in so far as it defines a person as 'benefiting' in reference to whether:

> "...... ***he or she has at any time, whether before or after the commencement of this Act, received or retained any proceeds of unlawful activities."***

[46] A similar phrasing or language recurrs in section 19 (1) which defines 'value of a defendant's proceeds of unlawful activities to mean:

> ***"the sum of values of the property, services, advantages, benefits or rewards received, retained or derived by him or her at any time whether before or after the commencement of this Act, in connection with the unlawful activity carried on by him or her or any other person"***

[47] The In that case Mr Justice Nugent AJA writing for the Court also adverted to the decision in Caro/us and in particular to Farlam AJA's dictum where, dealing with the question whether those provisions operated retrospectively relative to the then Chapter 6 provisions said:

> ***"It is clear from s12(3) and s19(1) of the Act, which are both contained in chap 5, that the provisions of Chap 5....are retrospective in the sense that, in determining the value of the proceeds of an accused person's unlawful activities, the Court is not confined to those activities which took place after the coming into operation of the Act"***

[48] have already made reference to the Caro/us judgment and the trenchant remarks on the comparative interpretation of the confiscation provisions on the one hand and distinction in the key wording of what was the Chapter 6 provisions under the 1998 Act prior to the coming into effect of the 1999 Act.

[49] It was pointed out to me regard being had to reasoning in the *Carolus* judgment leading to that Court's finding that Chapter 6 provisions operated prospectively that if should not be of assistance to the Respondent for the interpretation they seek. The reason is that since that decision and after the amendment of the South African Act the wording of the forfeiture and preservation order provisions is similar to ours by the incorporation of a broad definition of 'instrumentality of unlawful activities' and of 'proceeds of crime' to include reference to property acquired either before and after the commencement of either Act.

[50] From the *Basson* judgment it emerges that the wording of the amended South African Chapter 6 provisions to reflect a direct or express language similar to our sections 42 and 52 addresses the 'obliqueness' or vagueness of the ealier provisions. which has been cured by the amendments. It follows therefore that upon this reasoning the wording of our ss 42 and 52 in PART VIII is worded in a retrospective manner. But does this argument settle the matter of what reasonable interpretation should be given in light of the express language of the provision which indicates an intention to apply the sections retropsectively? I do not think so. There may be other indicators beyond the mere language employed in the statute especially on account of the omission to a direct insertion of express wording 'either before or after the commencement' of the act in the sections as Parliament did in the confiscation provisions of the Act. This leads us to the constitutional dimension and reliance by the Respondents to section 119 of the Constitution as a cardinal reference to the matter at hand.

Retrospective Provisions or Retroactive Statutes

[51] Regarding the constitutional provision invoked by the Respondents in support of their proposition on the prospective interpretation to be given to the POCA act, it is notable that section 119 does not use the word 'retrospective' in reference to legislation but 'retroactive'. For this reason consideration as to whether there is a material difference to the terms for the purposes presently.

[52] In the Caro/us case Farlam AJA writing for the court, renders an insightful, researched and comparative law analysis of the distinction in usage between the terms 'retrospective' and 'retroactive', which turns on degrees of retrospectivity concept. (See paragraph 33 to 37of that case and the cases referred to therein). This is important because of the sometimes-unintended ambiguity caused by an indiscriminate use of the terms retrospective or retroactive interchangeably. I touch upon this aspect because in the constitutional provision adverted to by Mr. Van Zyl in support of his argument in favor of upholding the presumption against retrospectivity of statutes; in reference to the provisions of Section 119 of the Constitution that I deal with in the latter part of this judgment.

[53] In, the essence of the distinction was identified as the one adopted by the South African Supreme Court in ***Transnet Limited v chairman, National Transport Commission*** **1999 (4) 1 (SCA)** to this effect:

> *'that legislation provides that from a past date, the new Jaw shall be deemed to have been in operation (a retroactive enactment also referred to* as *strong or true retrospectivity) On the other hand,* a *stc!tute may avowedly be prospective but whilst it may contain a provision which* has *an effect of interfering with or applicable to existing rights, in the* sense *that though operating 'forwards', it looks backwards in that it attaches new consequences for the future, to an event that took place before the statute* was *enacted".*

(See the case cited in *Carolus* as ***Benner v Canada (Secretary of State)*** **(1997) 42 CRR (2d) 1 SCC) at p17.)**

[54] The latter concept is termed retrospectivity in the weak sense versus retrospectivity in the strong sense of retroactivity). It is my view that although the Constitution uses the term 'retroactive legislation', it is quite clear that its intended ambit also embraces the notion of 'retrospectivity in the weak sense' by reference instances of the prejudicial consequences insofar as it refers to legislation "which operates retroactively" in that it operates "(i) to impose any limitations on any person; (ii) to adversely affect the personal rights and liberties of any person; or (iii) to impose a burden, obligation or liability on any person".

(55] The true test is the limitation impairment of existing rights by way of a law that seeks to operate backwards. In my view, the mischief targeted by s119 of the Constitution includes the adverse effects of provisions enacted to apply retrospectively even in the weak sense.

(56] In ***Cape Town municipality v F Robb & Co. Ltd*** **1966 (4) S A 345 (C),** Corbett J as the then was at paras 350 F to 351 D, referring to the sometimes indiscriminate and confusion in the use of the terms he remarked that:

> *"(T)he terms are often loosely used. And despite the logic of the distinction between the two terms, there is* a *tendency on the part of the courts and academics to merge the principles in their application to* a *particular statute. The presumptions against retroactive legislation and retrospective enactments or provisions are kindred concepts in that there exists* a *strong presumption that new legislation is not intended to be retroactive, as was highlighted by Ken/ridge AJ in* S *v Mhlungu 1995 (3) SA* 687 *(CC). This he said of retrospective legislation,*

"By retrospective legislation is meant legislation which invalidates what was previously valid or vice versa, i.e., which affects transactions completed before the new statutes came into operation. It is legislation which enacts that 'as at a *past date, the law shall be taken to have been that which it was not.'"*

[57] The provisions of Part VIII, including ss42 and 52 of the Act, are not retrospective in the strong sense that the statute, or the chapter operates overtly backwards. In S *v* ***Mhlungu*** the court also advanced to the presumption against reading legislation as being retrospective in the sense that, quote, while it takes effect only from his date of commencement, it impairs existing rights and obligations, for an example by "invalidating current contracts or impairing existing property rights" clause code. That is the pernicious effect that the presumption operates against.

[58] That is precisely the test that has been incorporated into s119 of the Constitution. In there lies the substance and object of the provision that the framers of the Constitution inserted in clear terms. It makes plain that an enactment which 'impairs a person's interest by imposing any limitation or that adversely affects the personal rights, and liberties of that person and or 'imposes a burden, obligation or liability on him or her' is prohibited. It embraces the retrospective application of an enactment in its operation. The key words in the section of the Constitution are 'law which operates".

[59] As to the differences in the test for or effect of retroactivity and retrospectivity of legislation this was eminently highlighted in ***Bareki N.O. and Another v Gencor*** **2006 (1) SA 432 (T)** as per De Villiers J in regard to retroactivity legislation is the 'invalidation of what was previously valid and vice versa or that of affecting transactions already completed before it came into operation enacts that as at a past date, the law shall be taken to be that which it is not. On the other hand for retrospectivity the *Bareki* test leads to this: that 'legislation whilst

overtly prospective imposes new results with regard to past events, and attaches new consequences for the future, to any event, which took place before the legislation was enacted, or creates a new obligation or imposes a new duty in regard to events already passed'. It becomes clear that despite the use of the title and terms 'retroactive legislation', 'operates retroactively' in conjunction with the tests set out in s119 (in reference to a taking away or impairment impairment of a vested right, acquired under existing laws on the one hand and be imposing a burden, obligation or liability on any person) that the import of that section is to embrace both retroactivity and retrospective operation of legislation with prejudicial or adverse effect.

[60] That is the essence of the of the wider ambit of the presumption against retrospectivity that Corbett CJ adverted to in ***National Iranian Tanker*** case at 438 H-J when he suggested that it is not objectionable to interchange the presumptions, concepts or terms from an outcomes point of view if they lead to the same mischief or result. I think that is the very object at the heart of Section 119 of the Constitution. It simply prohibits Parliament from passing any legislation that has the listed consequences save for those expressly falling within the listed exceptions.

[61] Ultimately the concern as per the court in *National Iranian Tanker* lies in the criteria listed in Section 119. Hence a statute is retrospective in its effect if it takes away or impairs a vested right acquired under existing laws, or creates a new obligation or imposing a new duty or attaching a new disability in regard to events already passed. This definition appears to me to merge two canons of interpretation i.e., the presumptions against retrospectivity on the one hand and against interference with vested rights. This is however, not a great of great moment as both cannons lead in the same direction **(See *Cape Town municipality v F Robb* & Co *Ltd supra at 350 F to 351 D).***

[62] Finally I must also touch on the Respondents submissions on the

comparative law considerations. In light of the comparative legislative developments I was referred to in South Africa I must acknowledge the correctness of Mr Leppard's proposition that the ratio in *Carolus* in South Africa has indeed been attenuated by the advent of the amendments to the POCA act in that country. Indeed that position has been affirmed in the Sasson judgment and beyond including in the recent case of ***Mohunram and Another v National Director* of *Public Prosecutions and Others* 2007 (6) BCLR 575 (CC).** There the Constitutional Court, citing the *Carolus* judgment with approval, held that since the amendment to the South African POCA, the civil forfeiture provisions in that act equally operated retrospectively by virtue of these amendments.

[63] Remarking on these aspects van Heerden AJ in his remarks made these important observations which should be instructive in the context of the question of the point in limine before me:

> ***"First, it is important to note that, subsequent to the judgment* of *the Cape High Court in National Director* of *Public Prosecutions v Carolus and Others, 20 in which Blignault J held that Chapter* 6 of *POCA (as it was then) was not retrospective in effect, the Act was amended by the Prevention* of *Organised Crime Second Amendment Act 38* of *1999, ("Act 38* of *1999")* "so *as to make it clear that the provisions* of *Chapters 3, 5 and* 6 *are applicable in respect* of *instrumentalities* of *offences and proceeds* of *unlawful activities where such offences or unlawful activities occurred before the commencement* of *the Act", that is, that these provisions do operate retrospectively. The definition* of *"instrumentality* of *an offence" in section 1(1)* of *POCA was substituted* so *as to mean:***
>
> > ***"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".***

The definition of "proceeds of unlawful activity" was also substituted to mean:

> "... ***any property or any service, advantage, benefit or reward which was derived, received or retained, directly or indirectly, in the Republic or elsewhere, at any time before or after the commencement of this Act, in connection with or as a result of any unlawful activity carried on by any person, and includes any property representing property so derived."***

The point of the amending legislation was driven home most pertinently by the insertion of a new section 1(5) into *POCA* ***in the following terms:***

> ***"Nothing in this Act or in any other law. shall be construed so as to exclude the ap p lication of any p rovision ofChap ter 5 or*** 6 ***on account of the fact that***
>
> ***(a) any offence or unlawful activity concerned occurred; or***
>
> ***(b) any p roceeds of unlawful activities were derived. received or retained. before the commencement of this Act."***

(My underscore emphasis)

[64] It is necessary to comment further on Mr. Leppan contention that the effect on the ambit of the relevant preservation and forfeiture provisions attendant on the definition of "proceeds of unlawful activity" and "instrumentality of an offence". in the post-Caro/us era in South Africa resulted in a situation analogous to the similarly worded provisions in

Part VIII of our act which import similar definitions of these phrases. The proposition is that these definition clauses have the effect of importing a manifest intent by Parliament that the civil forfeiture provisions operate retrospectively.

[66] This may seem technically correct, However, I think in the Eswatini context this argument is somewhat diluted by the fact, as I have pointed out, that the failure to write in a qualification in language similar to that used in the confiscation provisions by direct reference, eschews the insertion in express terms the words 'whether acquired before or after the commencement of the Act' in the relevant sections. The qualification is thus oblique. The intent of Parliament to extend a retrospective application to the sections is as a result not robust.·

In addition I consider the analogy drawn by Mr. Lipan with the position in the South African legislation further pales when considering the insertion of the Section 1(5) in that country's Act which was highlighted in the *Monhunram* case above. There is thus a material distinction between the comparative statutory regimes of the two countries. In South Africa there is nothing similar to s119 constitutional provision as
in Eswatini.

[67] These considerations taken together with the effect of s119 of the Constitution, which I deal with in detail in this judgment, further, weaken the analogy and in my view settle the point that the evolution of our law takes on a different complexion in light of the different constitutional conditions.

CONCLUSION

[68] In light of the foregoing I am inclined to agree with Mr. van Zyl's analysis and his contention that in a sense, s119 becomes more an even more emphatic support for his contended prospective interpretation of the relevant provisions of POCA. This is insofar as ii

entrenches the presumptions and prohibits the enactment of retroactive legislation as well as retrospective operation of legislation with the effect of impairing existing rights. The approach taken by the court in the *Carolus* case, leads us to the. conclusion that, in effect the dual mischief of adversely impairing or impacting on existing rights and the imposition of obligations are the adverse consequences on the rights of persons contemplated by the Constitution; which are consequences that but for the POCA Act did not exist. That is the very perverse effect or result of ostensibly retrospective provisions of Chapter Six of the POCA Act in South Africa the *Carolus* case referred to at the time of that judgment, which is similar to the effect of the provisions of ss42 and 52 of our act. A retrospective operation of those sections as well as an interpretation that leads to the result that creates the disablement set out in the section would therefore result in the very mischief contemplated in Section 119 (b) of the Constitution. It is an interpretation that offends against the presumptions, against retroactivity and retrospective operation of statutes; that would manifestly not be a 'constitution-compliant' interpretation. It would, in my view, be untenable. It would for the reasons I explore, be in conflict with the intent of s119 of the Eswatini Constitution. Consequently it would yield a result that is unlikely to have been intended by Parliament, especially as Parliament could not have intended to make laws contrary to the letter and spirit of s119 of the Constitution. Thus the non-retrospective operation of Chapter VIII is inevitably, the only constitution-compliant interpretation and one that accords with the contentions advanced by Mr. van Zyl on the point of law.

[69] In the end the question is whether the provisions relied on by the Applicant whose retrospective operation is sought adversely impair the personal rights and liberties of the Respondents? Absolutely. Would it result in disabling them as to their proprietary rights and interests? Most certainly without any doubt. If that was the intended effect by Parliament in inserting a retrospective definition of 'instrumentality of an offence under the Act" or 'proceeds of criminal

activity" would such a

construction offend against s119 of the Constitution? That, in my view, is beyond dispute.

[70] I think there lies a more formidable impediment to a retrospective interpretive approach. I think this section impels us to still declare the PART VIII provisions to have a prospective application. This approach turns on the doctrine of Constitutional supremacy and a compliant approach to statutory interpretation. A trite principle of statutory interpretion is that where a statutory provision may yield more than one reasonable construction, it is the construction that one that is constitution-compliant as opposed to one that would lead to the constitutional invalidity that should prevail; provided it is reasonable and does not result in incongruity or absurdity and unreasonableness.

[71] A retrospective construction of sections 42 and 52 would in my view clearly lead to constitutional inconsistency and would render the sections invalid on account of that inconsistency. It is a construction that would not be compatible with the Constitution and for that reason I am inclined to agree with the Applicant on the point and accordingly uphold it.

Disposition

[72] In the result I come to the conclusion and accordingly hold that the point on non-retrospective operation of Sections 42 and 52 of the Act succeeds and consequently:

It is accordingly ordered that:

1. That the orders issued on the 20th May 2020 and 5th June 2020 against the First and Second Respondents respectively are hereby discharged; and
2. The Applicants application for an order that the funds in the various designated accounts held by the respondents

be declared forfeit to the State fails and is hereby dismissed.

3. The Applicant is ordered to pay the Respondents costs of the application including the costs incurred by the Respondents in the Preservation Application; which costs shall include certified costs of Counsel in terms of Rule 68

MAPHANGAJ

JUDGE OF THE HIGH COURT

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