IN THE SUPREME COURT OF ESWATINI

JUDGMENT

Case No. 10/2022

HELD AT MBABANE
In the matter between:

THE DIRECTOR OF PUBLIC PROSECUTIONS **Appellant**

and

FRANCES PIETER VAN RAVENSWAAY

WHELPTON **1st Respondent**

DANILLA WHELPTON **2nd Respondent**

Neutral Citation: The Director of Public Prosecutions vs Frances Pieter Van Ravenswaay Whelpton and One Another *(*10/2022) [2022] *SZSC 65* (16/12/2022*)*

Coram: **S.B. MAPHALALA JA;**

S.J.K MATSEBULA JA; AND

M.J. MANZINI

Heard: 24th November, 2022.

Delivered: 16th December, 2022.

SUMMARY : *Civil Appeal – Court a quo held the Prevention of Organised Crimes Act, 2018 (POCA) to be non-retroactive – Section 119 and section 238 of the Constitution discussed – POCA based on UN convention – Vienna Convention on the Law of Treaties applied.*

Held: POCA, *especially section 42 and 52, are retroactive in application.*

Held: *Appeal succeeds*

JUDGMENT

S.J.K. MATSEBULA – JA

The Appeal

[1] This is an appeal on a judgment of the High Court in which, as per Maphanga J, held that sections 42 and 52 of the Prevention of Organised Crimes Act,

2018 (hereinafter referred to as "POCA") should be construed as having a non-retrospective operation or effect at paragraph [72] of the judgment. And on paragraph [70] of the judgment His Lordship states in part-

> *"I think this section impels us to still declare the PART VIII provisions to have a prospective application."*

[2] The Director of Public Prosecutions has appealed against the judgment to this Court in the following terms-

> *"1. The Court a quo erred in Law in holding that the provisions of* ***sections 42 and 52*** *as well as Part VIII of the Prevention of Organised Crimes Act 20218 (POCA) are to be construed to operate in a non-retrospective (prospective) manner and in that regard section 119 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.*
>
> *2. The Court a quo erred in law in relying in the case of Carolus* ***(National Director of Public Prosecutions v Carolus & Others 2000 (1) SA 1127 (SCA),*** *in interpreting the provisions of section 42 and 52 of the Prevention of Organised Crimes Act of 2018 (Eswatini), as the Republic of South Africa's Prevention of Organised Crimes Act no, 121 of 1998 which that case was based on was at that time not worded and/or not the same as Eswatini's POCA".*
>
> *2.1 Alternatively, the Court a quo misdirected itself in finding that the reasoning and rationale adopted by the Court in the Carolus case is equally applicable in the instant case as the Republic of South Africa's*

POCA was not the same as the Eswatini POCA at the time of that judgment.

3. The Court a quo erred in law in dismissing the Forfeiture Application.

4. The Court a quo erred in law in ordering that Appellant pays the Respondent's costs as the Court clearly dismissed the Application on a point of Constitutional nature.

5. The Court a quo erred further in law in ordering the Appellant to pay Respondent's costs in the Ex parte Preservation Application.

The Parties

[3] The Appellant is the Director of Public Prosecutions and the Respondents are Frances Pieter Van Ravenswaay Whelpton and his former wife Danilla Whelpton whose bank accounts in various banks in Swaziland is preserved under section 42 of POCA and further sought to be forfeited to the State under sections 50 and 52 of POCA.

Background facts of the matter

[4] The background facts of this matter are common cause. The background as stated in paragraph 1 to 6 of the Respondents Heads of Argument is materially the same as that stated in paragraph 6 of the Founding Affidavit of Condonation Application of the Appellant and we prefer to reproduce the latter herein for completeness-

"6.1 I do humbly state that sometime in August 2019 the Applicant/Appellant received reports from two South African businessmen (doctors) that the respondents had allegedly swindled them of their monies in the Republic of South Africa and then laundered the proceeds of such criminal activity into various banks in Eswatini held in their respective names. The banks were Nedbank and Eswatini Bank.

6.2 Acting on this, the Applicant/Appellant preserved money per section 42 of the Prevention of Organised Crime Act 2018 (POCA), held by the Respondents in the various bank accounts in Eswatini banks. The first preservation order was issued by the Court a quo on the ***20th May 2020*** *against the 1st Respondent, while the second preservation order was granted against the 2nd Respondent on the* ***6th June 2020****. The second order also sought the joinder of the 2nd Respondent in the proceedings.*

6.3 The Respondents thereafter instituted a Rescission Application on the ***19th February 2021*** *wherein they sought to discharge the preservation orders. Such application was vigorously opposed by the Appellant. The said application was nonetheless superseded by a forfeiture application in terms of section 52 of the POCA that was instituted by the Appellant on the* ***26th March 2021****. Such application was opposed by the Respondents who raised a plethora of points in limine including that of retrospective.*

6.4 The Court a quo then heard both the rescission (by Respondents) and forfeiture (by Appellant) applications at the same time. The Court a quo in fact heard arguments on both the points in limine and merits

of the matter on the 7th and 8th September 2021. After hearing both applications, the Court a quo went to dismiss the forfeiture application based on a point of law of ***retrospective*** *raised by the Respondents in both the rescission application and the opposing papers with regard to the forfeiture application.*

6.5 The Court a quo held that the provisions of ***sections 42 and 52*** *as well as* ***Part VIII*** *of the* ***Prevention of Organised Crimes Act 2018 (POCA)*** *are to be construed to operate in a non-retrospective (prospective) manner and in that regard* ***section 119 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".*

The issues for determination

[5] The first ground of appeal which is stated as follows-

"The Court a quo erred in law in holding that the provisions of sections 42 and 52 as well as Part VIII of the Prevention of Organised Crimes Act 2018 (POCA) are to be construed to operate in a non-retrospective (prospective) manner and in that regard section 119 of the Constitution of Eswatini which prohibits the enactment by parliament of retractive legislation in the sense of adversely affecting the personal rights and liberties of a person is peremptory".

When this ground of appeal is read with paragraph 7 of the Respondent's Heads of Argument it provides a useful guide and direction which this Court

may adopt. The Respondents paragraph 7 of its Heads of Argument is partly crafted as follows-

> *"7. Based on the finding and order of the Court a quo, read with the original and amened Notices of Appeal, it is submitted that the only issue to be decided in this Appeal, is the question whether POCA operates retroactively, as the Court quo's order was based on a finding of "non-retrospective operation" of the relevant sections of POCA. The Respondents therefore submit that in the event of this Honourable Court finding that the relevant sections do operate retroactively and the appeal should therefore be upheld, the application should be referred back to the Court a quo as a Court of first instance, in order for the application to be considered on the merits and other points that were points that were raised in limine".*

[6] Both parties seem to agree that the judgment of the Court *a quo* is not built on a foundation that is not unassailable. Whether that is correct or not, this Court will embark on the examination of the applicable common law principles, international law principles on interpretation of international treaties and conventions and our prevailing statute law in point. The Prevention of Organised Crime Act, 2018 (POCA) is Convention or Treaty based Act modelled from the Parlemo Convention and the United Nations Convention against Transnational Organised Crime which was ratified by the Parliament of the Kingdom of Eswatini.

[7] Before embarking on the examination of these law principles and statutes as stated above it is apposite to reinstate the legal wisdom of OTA JA in *African Echo (pty) Ltd, Thulani Thwala and Mabandla Bhembe v Inkhosatana Gelane Simelane (48/2013) [2013] SZSC 71* (29 November 2013) at paragraph [34] and recognized in *Timothy Shongwe vs The Swazi Observer (pty) Ltd and Another (01/2022) [2022] SZSC-*

> *"[34] It is imperative that I point at this juncture the Bogoshi decision, just like all other decisions of South African Courts, are sorely of persuasive authority in the Kingdom. They are not binding on our Courts".*

Caution must be exercised therefore before relying on the South African decisions just as was necessary when the Court *a quo* followed the decision of *National Director of Public Prosecutions v Carolus and Others 2000 (1) SA 1127 (SCA).* The South African POCA was not worded the same as Eswatini POCA. Of note is that the South African POCA had to be amended soon after the Carolus decision to cater what has always been catered for in our Eswatini POCA, namely the retrospective or retroactive operation or effect of the Act including the prospectivity effect ***("at anytime before or after the commencement of this Act")***. Flowing from this realization, we fully support the submission by the Appellant that as a country we need and should as a matter of urgency and priority develop our own jurisprudence instead of relying heavily on South African judgments and jurisprudence even in cases where our legislation provide differently from that of South Africa. We should develop our jurisprudence especially taking into consideration our peculiar statutes, constitutional provisions and other issues touching of Swazi Law and Custom. Our jurisprudence should reflect our laws and who we are

and not what others are but us and what our Parliament has enacted as our laws. Enshrined in this thinking is an educated and well informed Parliament.

Principles applicable to interpretation of statutory provisions

[8] It is of great importance to reiterate the principles relating to interpretation of statutory provisions. Three cases containing these principles are cited in the case of ***Thandi L.Dlamini and two others vs Regina T. Dlamini and Another (60/2019) [2020] SZSC 9 (09/06/2020).***

At paragraph 49 Justice Ramodebedi is quoted citing ***Shongwe and Others v Maziya and Another (37/11) [2011] SZSC 31 (30 November 2011)*** stating –

> *"[13] As a matter of principle, the cardinal rule of construction is that words must be given their ordinary, literal and grammatical meaning. The Court will only depart from such meaning if it leads to "a result which is manifestly absurd, unjust, unreasonable, inconsistent with other provisions, or repugnant to the general object, tenor or policy of the statute."*

In the Botswana Court of Appeal in Richard Miles and Another v the South East District Council, Civil Appeal No, CACLB – 058 – 10 he as follows –

> *"[13] It is trite that the primary rule in the construction of staturory provisions is to ascertain the intention of the Legislature. It is also well settled that in carrying out that exercise the Courts should give the words used their ordinary and natural meaning, If in doing that the meaning of the words is plain and unambiguous they should be given that meaning unless it would lead to an absurdity or a result*

which having regard to the context and purpose of the legislation, the Legislature could not have intended."

At paragraph 15 (supra),MCB Maphalala J, as he then was, is quoted a having said –

> *" [17].The wording of section...is clear and unambiguous; hence, there is no need to resort to other forms of statutory interpretation such as the broad, liberal, generous or purposive interpretation. It is trite law that where the meaning in a statute is clear and unambiguous it has to be given its literal meaning unless such a meaning leads to an injustice, unreasonableness or absurdity...when interpreting a statutory provision regard must be to ascertain the intention of Parliament".*

The literal meaning of the bolded phrases hereunder:

> *" ...commission of an offence at* ***any time before or after the commencement*** *of this Act..." ; and*
>
> *"...whether that* ***conduct occurred before or after the commencement*** *of this Act...",*

is that **retroactivity** was intended in addition to **prospectivity** by the Legislature and such interpretation is within the objects of the Act and further such interpretation would not cause any absurdity or inconsistencyi. The purpose of the Act is to deprive criminals the use or enjoyment of ill-gotten property. It is to take away the proceeds of crime without a criminal conviction and confiscate same to the state.

Common law principles and section 52 of the CP&E Act.

[9] Looking at POCA holistically and understanding the nature and contents of the various parts of the Act will help to understand the import of the Act. Apart from section 3 (racketeering) and section 5 (gang related offences) of the Act, POCA is not a substantive Act but a procedural legislation. Apart from the two sections, it does not create any offences instead it recognizes offences that are already in existence and simply sets out procedures of how to deal with the spoils coming from those offences. It provides procedure for dealing with ill-gotten property (proceeds of crime) and instruments so used in the commission of the offence. Another way of understanding POCA is to appreciate section 52 of the Criminal Procedure and Evidence Act, 1938 (CP&E). Statutes are interrelated. POCA is, to a large extent, an amplification of section 52 of the CP&E, which quote as follows –

> *"Disposal of property seized*
>
> *"52 (1) If on the arrest of any person on a charge of an offence relating to property, the property in respect of which the offence is alleged to have been committed is found in his possession... the person making the arrest or (as the case may be) the person seizing or taking the thing shall deliver such property or thing, or cause it to be delivered to a Magistrate within such time as... is reasonable.*
>
> *(2)...*

(3) The Magistrate shall cause the property or thing so seized or taken to be detained in such custody as he may direct, taking reasonable care for its preservation until the conclusion of a summary trial or any investigation that may be held in respect of it.

(4)...

(5) (a) At the conclusion of a summary trial... the Magistrate shall...makes one of the following orders-

> *(i) that the property or thing be restored to the person whom it was seized if that person satisfies the Magistrate that he is the lawful owner...or that he is lawfully in possession of the property or thing;*
>
> *(ii) if that person fails to prove that he is the lawful owner or has lawful possession of the property or thing, that property or thing be restored to any other person who is lawfully entitled to it upon proof to the Court;*
>
> *(ii) if no person claims ownership or possession of the property or thing or if the person lawfully entitled to it cannot be traced or is unknown, that the property or thing be forfeited to the Crown.*

There is no doubt in our minds that POCA and especially section 42 and 52 is just an amplification of section 52 of the CP&E. If this conclusion is correct and section 52 of the CP&E has been and is still being applied by our Courts

on tainted property there is no reason why sections 42 and 52 of POCA with similar intent should not enjoy the same force of law. With or without POCA, property as described herein is open to seizure, preservation and confiscation under the current regime of our statute laws.

[10] The Schedule of offences to POCA lists about 38 offences, theft and fraud is amongst them. Theft at common law is a continuing crime. Section 119 of the Constitution prohibits the enactment of legislation by Parliament that has retroactive effect to legally entrenched rights and liberties but has no application to tainted rights or purported rights whether possessory or ownership rights. The Constitution as an embodiment of legal rights and obligations cannot be seen to protect ill-gotten property or property that is proceeds of crime but seeks to entrench lawful rights to lawful possessors and to lawful owners. For example, a person who steals another person's thing or property, or a thief in short, does not have any ownership rights on the stolen property. Section 119 of the Constitution protects rights lawfully obtained or lawfully entrenched. The question of retroactivity as provided by section 119 of the Constitution does not apply to proceeds of crime. Theft or fraud as a continuing crime is not protected by the provisions of section 119 of the Constitution.

Section 119 of the Constitution

[11] Before examining or analyzing section 119 of the Constitution, it would be fair and just for us to point out that our Constitution is not the sacred cow that we would have liked it to be. A constitution is not supreme law because of a clause in it that says it is a supreme law. It is the contents, not just one clause, that determine whether a law is supreme or not. By way of illustration, a

Constitution should not be subjected to or be bound by some other law, purportedly inferior to it. A classical example is found in section 156 of the Constitution and stipulates:

> " *Subject to the provisions of this Constitution or* ***any other law****, a Justice of a Superior Court may retire at any time... after the age of sixty-five...*" (meaning some other law may provide otherwise). There are two competing laws here.

The underlined phrase appears in several provisions of the Constitution such as sections 187, 193, 210, 252 etc. There is also section 271 which deals with the continuation of matters that were started or commenced before the commencement of the Constitution and subsection (2) thereof, states-

> *"This section shall have effect subject to the provisions of this Constitution* ***and to any other law made by Parliament***"

Our caution is that every provision of the Constitution must be thoroughly examined and not taken at face value to get the correct import of that provision. This caution will be more apparent below when we contrast section 119 and section 238 of the Constitution.

[12] Section 119 of the Constitution is crafted as follows-

> *"119. (1) Parliament or any other authority or person has no powers to pass any law-*
>
> *(a)...*

(b) which operates retroactively –

(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.

[13] On *retroactivity* – POCA has not, as pointed out in paragraph [8] and subject to that paragraph, created retroactively or retrospectively any new offences but has provided a new procedure of disposing proceeds of those offences which existed long before the enactment of POCA. The new procedure is modelled on section 52 of the CP&E. Section 52 is still in force but its limitation is that the procedure takes place at the Magistrates Court whilst section 42 and 52 gives jurisdiction to the High Court because of the magnitude of the amounts normally involved. Magistrate Court have a very limited jurisdiction.

[14] The second leg – "*imposes limitation on any person*". The prohibition relates to lawful movement, lawful dealings and other lawful interactions. The provision does protects for example, a thief or suspected thief, a rapist or a person who continues to maintaining a sexual relationship with a minor. Once it is found or proved that a defendant has a lawful title or right to deal or interact with whosoever, the limitation is removed.

[15] The third leg "*adversely affects the rights and liberties of any person*". The rights that must not be adversely affected are rights and liberties recognized

by law. In our example, for instance, a thief or suspected thief or molester of minors when called upon to account before a Court cannot lawfully claim his rights are being adversely affected. Rights not recognized by law are not protected because the law is not meant to protects what is unlawful.

[16] The fourth leg – "*imposes a burden, obligation or liability on any person*". Calling upon a person to account for his actions or possessions is not placing a burden on that person especially where there is law prohibiting the possession or interaction or dealing with the thing. POCA provides for an opport0unity to the defendant to prove his rights to the thing under section 54.

[17] For the foregoing reasons or interrogations it is our considered view that section 119 of the Constitution is not applicable to the case at hand and therefore to hold otherwise would be a misdirection. It does not help or assist the Respondents in their case. POCA does not infringe section 119 of the Constitution.

The Prevention Of Organised Crime Act, 2018 (POCA)

[18] At paragraphs 70 and 71 the Court *a quo* made the following conclusions of law-

> *"[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..."*

We have already discussed at large above about supremacy of the Constitution and care and caution that must be exercised and have further held that section 119 of the Constitution is not applicable to this case as the facts of case fall outside the stipulations or provisions of section 119.

At paragraph [71] His Lordship stated as follows-

> *"[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...."*

[19] Having already come to the conclusion that section 119 of the Constitution is not applicable to this case, the next enquiry would be: is POCA retroactive or non-retroactive. Is it prospective in character or not. To answer this question one has first to start at section 2 of POCA where terms used in the Act have been defined and bearing in such definitions (interpretation section) apply across the whole Act unless the context otherwise indicates. We shall pick only two phrases to illustrate our view because of their force of law, determinant nature to the Act and applicability to this case.

[20] The first is ***"instrumentality of an offence"*** which the Act says to-

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

The second is ***"unlawful activity"*** which again the Act says to-

"mean, any conduct which constitutes an offence or which contravenes any law whether that ***conduct occurred before or after the commencement of this Act*** *and whether that conduct occurred in Eswatini or elsewhere as long as that conduct constitutes an offence in Eswatini or contravenes any law of Eswatini".*

[21] The underlined words are a clear indication of retroactive application. There is no ambiguity. No double or multiple meaning. **Black's Law Dictionary, Tenth Edition at page 1511** defines retroactive as ***"(of a statute, ruling etc) extending in scope or effect to matters that occurred in the past – also termed retrospective"***.

Section 42 of POCA.

[22] Section 42 (2) uses both the terms defined under section 2 (interpretation section) (our paragraph 20 above) which we hold are indicative of a retroactive effect. This sub-section reads-

"42 (2) The High Court shall make an order referred to in subsection (1) without requiring that notice of the application be given to any other person or adducing of any further evidence from any other person if the application is supported by an affidavit indicating that the deponent has sufficient information that the property 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 the information shows on the face of it that there are reasonable grounds for that belief.

The only conclusion that can judiciously be drawn here is that the bolded words or phrases have both **retroactivity and prospectivity** as fully appears under sections 2 as well as used under sections 42 and 52 of the Act. The phrases, *instrumentality of an offence and unlawful activities* have been defined so as to encapsulate retroactivity by the use of the words "*at any time before...*" and prospectivity by the words " or *any time after the commencement...*"

[23] After the operation or application of section 42 the Act, section 43 requires the Director of Public Prosecutions to invite all known persons or all likely persons to have interest in the seized or preserved property to come forward make their claims known and defend same. This is in line with the principle of hearing the other side, *audi alteram partem* which decrees that no person shall be judged without a fair hearing in which each party is given the opportunity to respond to the evidence against them.

Section 52 of POCA

[24] The same phrases "instrumentality of an offence" and "unlawful activities are repeated under section 52. The same conclusion advanced by this Court for section 42 is applicable for section 52. In the result section 52 is both retroactive and prospective in application.

Sections 119 and 238 of the Constitution

[25] We need not quote section 119 here as it is quoted for our purposes under paragraph [11] above. We quote only section 238 which reads as follows for our purposes-

> *"The International agreements*
>
> *238. (1) The Government may execute or cause to be executed an international agreement in the name of the Crown.*
>
> *(2) An international agreement executed by or under the authority of the Government shall be subject to ratification and becomes binding on the government by –*
>
> *(a) an Act of Parliament; or*
>
> *(b) a resolution of at least two -thirds of the members of a joint sitting of the two chambers of Parliament". (Underlining ours)*

It is a fact that POCA is treaty based and crafted from the United Nations Convention against Transnational Organised Crime signed in Palermo, Italy in December 2000 where the international community demonstrated the political will to answer a global challenge with a global response - if crime crosses borders, so must law enforcement do likewise.

The Government of Eswatini has fully complied with section 238 of the Constitution, it ratified the convention and further passed an Act as in POCA. The country, according to the Constitution is therefore bound to all the

contents of the treaty except to those articles it excluded or reserved. Reservation is possible to a treaty provided the sought to be reserved articles are not the core articles of the Convention. We are not aware of any reservations made by the government or Parliament of Eswatini in this regard.

[26] Assuming there was a conflict, although we hold there is none, between section 119 and section 238, which section would this Court give more weight to. Our view is that section 238, ranks more supreme than section 119 for two reasons as stated in the next two paragraphs.

[27] Firstly, section 119 of the Constitution envisages local or municipal application or consumption of rights and obligation therein. Section 238 creates rights and obligations wider than those created by section 119. Section 238 binds the country to the international community for the greater good and those rights flow down to municipal law, to the citizens. It would be an absurdity for the country to be bound internationally by certain laws, obligations, norms, rights and yet municipally be not bound by the same to the citizens. If the rights and obligations cannot flow down and bind and be enjoyed by the citizen what would be the purpose of entering into an international treaty. Ratification of a treaty is an instrument of transferring the rights and obligations of a treaty to the citizen to claim and enjoy those rights and obligations. Related to this argument is the Vienna Convention on the Law of Treaties, 1969 which entered into force on 27 January 1980.

The Vienna Convention on The Law Of Treaties, 1969.

[28] Secondly, the ***Vienna Convention on the Law of Treaties, 1969*** is an international agreement or treaty regulating treaties between states. Known as the "treaty of treaties", it establishes comprehensive rules, procedures, and guidelines for how treaties are defined, drafted, amended, interpreted, and generally, operated. Article 27 of this treaty states-

> *"Article 27*
>
> *Internal law and observance of treaties*
>
> *A party may not invoke the provisions of its* ***internal law as justification for its failure to perform a treaty****. This rule is without prejudice to Article 46"*

And Article 46 is irrelevant for our purposes as it relates to provisions of internal law regarding competence to conclude treaties. Article 27 supports our reasoning that section 238 ranks higher than section 119 of the Constitution in their supremacy and that ratified contents of an international treaty enacted by our Parliament into law must be given effect to by the Courts and should enjoy preference over certain provisions of our statute law unless the contents indicate otherwise.

Conclusion.

[29] It is our conclusion that-

(a) Sections 42, 52 and Part VIII of POCA are retroactive (and prospective) hence in *casu* we hold them to be having a retroactive effect;

(b) POCA except for section 3 and 5, is a procedural legislation and not a substantive legislation creating offences. It lays down the procedure of dealing or disposing off proceeds of crime and instruments so used in committing those offences;

(c) Theft and fraud are continuing offences and fall to be dealt with under the provisions of POCA irrespective of the date they were committed;

(d) Section 119 of the Constitution is not applicable to sections 42, 52 and Part VIII of POCA;

(e) Section 119 and 238 of the Constitution should have been read together by the Court *a quo*;

(f) Section 119 and 238 of the Constitution and Article 27 of the Vienna Convention on the Law of Treaties, 1969 should have been read together.

(g) Having heard and considered arguments on the issue of costs, we are of the view that costs should not have been awarded against the Director of Public Prosecutions as the case had constitutional implications, was of great national, statutory and constitutional importance. The Director of Public Prosecutions cannot be faulted for implementing the provisions of POCA unless the Director of Public Prosecutions could be said was unprofessional, malicious, *injudicious*, went beyond or fell short of the POCA provisions in issuing the notices under sections 42 and 52 of POCA.

COURT ORDER

[30] In the result-

1. The Appeal succeeds.
2. The orders of the Court *a quo* are set aside.
3. The matter is referred back to the Court *a quo* for the determination of the case in the light of the fact that retroactivity was intended by the legislature when enacting POCA.
4. Each party pays its costs.

S.J.K. MATSEBULA

JUSTICE OF APPEAL

I agree

S.B. MAPHALALA

JUSTICE OF APPEAL

I agree

M.J. MANZINI

ACTING JUSTICE OF APPEAL

For the Appellant:	Advocate G.J Leppan
	(Instructed by M.S Dlamini, DPP'S Chambers)
For the Respondents:	M.M. W Van Zyl SC
	(Instructed by Howe Masuku Attorneys)