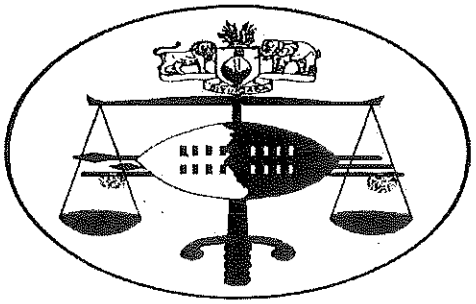

IN THE SUPREME COURT OF ESWATINI

HELD AT MBABANE **Case No. 10/2022**

In the matter between: -

FRANCES PIETER VAN RAVENSWAAY WHELPTON **First Applicant**
DANILLA WHELPTON **Second Applicant**

and

THE DIRECTOR OF PUBLIC PROSECUTIONS **Respondent**

In re:

THE DIRECTOR OF PUBLIC PROSECUTIONS **Appellant**

and

FRANCES PIETER VAN RAVENSWAAY WHELPTON **First Respondent**
DANILLA WHELPTON **Second Respondent**

Neutral Citation: ***Frances Pieter Van Ravenswaay Whelpton and Another v The Director of Public Prosecutions (10/2022) [2024] SZSC 63 (29 February 2024)***

CORAM: N.J HLOPE JA; M.D. MAMBA JA; J.M VAN DER WALT JA; J.M. CURRIE JA; L SIMELANE AJA

HEARD: 26 September 2023

DELIVERED: 29 February 2024

Summary

Application for review in terms of ***section 148(2)*** *of the* ***Constitution of the Kingdom of Eswatini, 2005*** *– obiter - essential allegations to be pleaded*

Application for review in terms of ***section 148(2)*** *of the* ***Constitution of the Kingdom of Eswatini, 2005*** *- appeal decision of Supreme Court that* ***section 119*** *of the Constitution is not applicable to* ***section 42, section 52*** *and* ***Part VIII of Prevention of Organised Crimes Act, 2018 (POCA)*** *and that said sections have retroactive and prospective effect – basic principles of applicable review proceedings revisited and held not to have*

been established – no error or exceptional circumstances established - application for review dismissed - no order as to costs in view of constitutional nature of issue before Court

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JUDGMENT

Cur adv Vult

(Postea: 29 February 2024)

VAN DER WALT, JA

INTRODUCTION

[1] This is an application for review in terms of **section 148(2)** of the **Constitution of the Kingdom of Eswatini, 2005** (hereinafter referred to as the "Constitution") in respect of the decision of this Court sitting in its appellate jurisdiction (hereinafter referred to as the "Appeal Court") that **section 119** of the Constitution is not applicable to **section 42, section 52** and Part VIII of Prevention of Organised Crimes

Act, 2018 (hereinafter referred to as "POCA") and that these provisions have retroactive (and prospective) effect.

[2] The segments of the POCA under consideration pertain to preservation of property orders and the making of forfeiture orders in respect of property that is ***"an instrumentality of an offence"*** or the ***"proceeds of unlawful activity."*** Relevant sections or extracts from sections with phrases particularly germane to the issue of retroactivity underlined, are:

2.1 Definitions in **section 2**:

> ""***instrumentality of an offence"*** *means 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."*
>
> ""***proceeds of unlawful activity"*** *means any property or any service, advantage, benefit or 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 representing property so derived and includes property which is mingled with property that is the proceeds of unlawful activity."*
>
> ""***unlawful activity"*** *means 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 constituted an offence in eSwatini or contravenes any law of eSwatini."

2.2 **Section 42**: "***Preservation of property orders***

"(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 the application be given to any other person or the adducing of any other 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 that information shows on the face of it that there are reasonable grounds for that belief."[1]

2.3 **Section 50**: *"**Application for forfeiture order***

(1) If a preservation of property order is in force the Director of Public Prosecutions may apply to the High Cour for an order forfeiting to the State all or any of the property that is subject to a preservation of property order. "[2]

[1] **Sub-sections (3)** and **(4)** omitted

[2] **Sub-sections (2)** to **(5)** omitted

2.4 Section 52: "***Making of forfeiture order***

(1) The High Court shall, subject to section 54, make the forfeiture order applied for under
section 60(1[3]) 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."[4]

[3] **Section 119** of the Constitution reads:

"Retroactive legislation

119. (1) Parliament or any other authority or person has no power to pass any law –
(a) to alter the decision or judgement of any court as between the parties to that decision or judgement; or
(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.

(2) The provisions of subsection (1) (b) shall not apply in the case of law enacted under sections 199, 200, 201, 202, 204 and 205 of this Constitution."[5]

[4] It is common cause *in casu* that the alleged unlawful conduct of the Applicants, in the form of alleged fraudulent activities, had occurred prior to the commencement date of the POCA.

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[3] There is no **section 60(1)**. **Section 60** consists of a single sentence provision under the heading ***"Offence may form the basis of multiple orders"***

[4] **Sub-sections (2)** to **(8)** omitted

[5] These sections deal with ***Withdrawals from Consolidated Fund or Public Fund***

[5] The preceding judicial history of the matter can be summarized as follows:

5.1 The Director of Public Prosecutions (the Respondent herein) approached the High Court for preservation and forfeiture orders in terms of the POCA. *Interim* preservation orders were granted *ex parte* and the proceedings culminated in the High Court holding that said sections are not retroactive, as a result of which the *interim* preservation orders were discharged and the application for a forfeiture order was refused, with costs.[6]

5.2 The Director of Public Prosecutions lodged an appeal and the appeal was upheld, the Appeal Court[7] holding as follows:

"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;

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[6] Reported as **The *Director of Public Prosecutions v Frances Pieter van Ravensway Whelpton and Another (901/2020)SZHC 102 [2020] (13th May 2022)***

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

(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 of 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."*

A SUBMISSIONS ON BEHALF OF THE PARTIES

[6] The parties appear to be *ad idem* as to the requirements for this type of review, which left for consideration only the question whether or not a review should be granted. Able and thought-provoking oral argument was presented by Mr M M W Van Zyl SC on the Applicants' behalf, and by Mr J J Leppan on behalf of the Director of Public Prosecutions and the Court is indebted to both Counsel for their assistance in this matter.

A.1 SUBMISSIONS ON BEHALF OF APPLICANTS

A.1.1 ALLEGED ERRORS

[7] It was contended firstly, that the reasoning of the Appeal Court was fundamentally flawed in respect of the Court's interpretation of said **section 119** and this challenge was addressed with reference to Paragraphs [10] and [11] of the judgment of the Appeal Court.

7.1 The wording of these paragraphs will be reproduced herein for ease of convenience:

> *"[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."

7.2 It is the Applicants' case that the approach in Paragraph [10] to the effect that **section 119** has no application to tainted rights or purported rights whether possessory or ownership rights, is legally flawed and may lead to absurdities in that, for instance, it is not permitted that a thief may be spoliated; and that a subsequent (innocent) owner of tainted property would be hit by the preservation provisions. Also, funds could become mixed with other moneys in a bank account ("*commixtio.*") The Appeal Court's interpretation to the

effect that the section only applies to legally entrenched rights and liabilities, it was submitted, is not substantiated by the clear wording of the section.

7.3 As regards Paragraph [11] and the statement: "*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 was contended that **section 119** is not made subject to any other law in the light of the stipulation in **section 2(1)** of the Constitution that the Constitution is the supreme law, and that any inconsistent law shall be void to the extent of that inconsistency. It was submitted that the interpretation afforded to **sections 42** and **52** of the POCA has the result that the Constitution is subordinate to the POCA provisions and therefore the passing of retroactive laws is permitted in that instance.

7.4 Further, **section 19** protects against deprivation of property and **section 21(2)(a)** contains a right to be presumed

innocent until found guilty. Also, a person cannot be charged or be held to be guilty of an offence on account of an act or omission that did not at the time of the act or omission constitute an offence.

[8] Reliance was also placed on the definition of "*pattern of criminal gang activity*" in the POCA, which requires at least one offence to have been committed after the commencement of the POCA, as indicative of non-retrospectivity.

[9] The Court was referred to two South African Constitutional Court judgments being **Mohunram and Another v National Director of Public Prosecutions and Another (Law Review Project as Amicus Curiae)** [8] and **Savoi and Others v National Director of Public Prosecutions and Another.** [9] These judgments came into being after the RSA POCA had been amended to limit retroactivity.

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[8] 2007 (2) SACR 145; 2007 (4) SA 222 (CC), 2007 (6) BCLR 575; [2007] ZACC 4
[9] 2014 (5) SA 317 (CC); 2014 (1) SACR 545; 2014 (5) BCLR 606; [2014] ZACC 5

[10] As for retrospectivity *per se*, it was stated in **National Director of Public Prosecutions v Basson**[10] *inter alia* that:

> "*[1] A statute is said to operate retrospectively if it creates legal consequences for conduct only after that conduct has occurred. The decisive question in the present appeal is whether s 18(1) of the Prevention of Organised Crime Act 121 of 1998 (prior to the amendment of the Act by the Prevention of Organised Crime Second Amendment Act 38 of 1999) operates with that effect. If it does, further questions would arise relating to its constitutional validity, but for the reasons that follow those questions need not concern us in this appeal,*"
>
> and
>
> "*[12] That principle is also recognised by the law of this country in which there is a strong presumption against the retrospective operation of a statute: generally, a statute will be construed as operating prospectively only unless the Legislature has clearly expressed a contrary intention (Genrec MEI (Pty) Ltd v Industrial Council for the Iron, Steel, Engineering, Metallurgical Industry and Others 1995 (1) SA 563 (A) at 572E - F). Moreover, a statute that purports to create an offence (which was not at least an offence in international law) or to prescribe a punishment, with retrospective effect, will conflict with ss 35(3)(l) and (n) respectively of the Constitution and might be invalid unless it can be justified in terms of s 36(1).*"

[11] It was also contended that the reliance of the Appeal Court on the Vienna Convention does not support a retroactive interpretation.

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[10] **2002 (1) SA 419 (SCA)**

A.1.2 EXEPTIONAL CIRCUMSTANCES

[12] The second leg of the Applicants' case was that the following constitute exceptional circumstances for purposes of review:

12.1 Delay in finalising the proceedings and potential further proceedings will most likely result in the Applicants being deprived of their funds for a further substantial period, materially prejudicing the Applicants and undoubtedly irreparable harm;

12.2 The facts that new legal precedent has been created and historically that the issue had been decided for the first time, constitute an exceptional circumstance in that all courts will be bound thereby and a miscarriage of justice can ensue as a result. There was no legal precedent regarding retroactive operation more specifically in conjunction with said **section 119**. In South Africa the provisions of the RSA POCA[11] are

[11] There is no South African Proceeds of Crime Act and it appears that the reference to RSA POCA is intended as reference to the **Prevention of Organised Crime Act, 1998** wherein the definition of *"instrumentality of an offence"* was amended in 1999 to provide for conduct

not in totality retroactive and there is a limited retroactive operation. It is of importance that legal certainty be obtained;

12.3 The instant application is not merely an attempt to reargue the appeal as very material legal principles are involved; and

12.4 As a citizen of Eswatini the First Applicant and Second Applicant have the right to equality under **section 20** and a right to fair and speedy hearing under **section 21(1)** of the Constitution.

A.2 SUBMISSIONS ON BEHALF OF RESPONDENT

[13] In a nutshell, it was contended by the Respondent that all the issues now raised were fully and properly ventilated in the Appeal Court and were taken into account by the Appeal Court in reaching the decision that it did and absent exceptional circumstances, simply amount to an attempt to re-

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before or after commencement of the Act; in its original Gazetted form there was no reference to any time window/s in the definition

argue the appeal on issues already considered and decided by the Appeal Court.

[14] These provisions of the POCA do not sin against **section 119** also because no new offences are created but rather, as held by the Appeal Court, this constitutes procedural legislation and not a substantive legislation creating offences; it lays down the procedure of dealing or disposing of proceeds of crime and instruments so used in committing certain offences.

[15] The purported exceptional circumstances relied upon by the Applicants were all known to the Appeal Court at the appeal hearing, or were obvious *sequelae* should the appeal have succeeded. They do not qualify as exceptional circumstances and nor do they, individually or collectively, provide any indication of a gross miscarriage of justice, nor any manifest injustice and hence no need arises to reconsider and/or correct same, with reference to ***Simon Vilane N.O. and Others v***

Lipney Investments (Pty) Ltd[12] and ***Esperanza Investments v Florence Falabo Benett N.O. And Others.*** [13]

[16] Simple disagreement with the judgment of the Appeal Court, is no reason to review it. Equally, because a judgement may possibly be subject to some criticism, it is also no reason to review it. In this regard this Court stated as follows in the ***Esperanza Investments*** matter:

> *"[49] There has been extreme caution against the exercise of the jurisdiction simple to give an opportunity for a second bite at a cherry. This is not what the review jurisdiction is for. In this regard Justice* ***M. J. Dlamini AJA*** *(as he then was) in the* ***President Street Properties case (supra) paragraph [22]*** *cited the Ghanaian constitutional review power of the Supreme Court of Ghana where* ***Wiredu JSC*** *observed in* ***Nyanemekye (No. 2) v Opuku [2002 55 GLR 567 at 570****:-*
> *'...the review jurisdiction of the Court, being special, will not and must not, be exercised merely because Counsel for the applicant refines his appellate statement of the case, or thinks-up more ingenious argument which he believes might have favoured the applicant had they been so presented in the appeal hearing. An opportunity for a second bite at the cherry is not the purpose for which the Court was given the powers of review* ***(Yebisi pg 43)****; and "Thus, the review jurisdiction is to be called in and in exceptional circumstances where justice, for which the Court exist, will be sacrificed if the decision is not reviewed* ***(Yebisi pg 45).****"*

[17] As regards protection of property, persuasive guidance can be found in the Seychelles Supreme Court case of **Hackl v**

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[12] ***(78/2013) [2014] SZSC 62 (3 December 2014)***, Paragraphs [6] and [7]
[13] ***(26 of 2021) [2022] SZSC 3 (28 March 2022)***

Financial Intelligence Unit[14] wherein the principle that Constitutions do not operate to protect property unlawfully obtained, was confirmed. A similar reasoning was adopted by the Irish High Court in **Gilligan vs Criminal Assets Bureau.**[15]

[18] As regards the issue of "*pattern of criminal gang activities,*" these relate to criminal charges and are included in parts II and III of the POCA. The issues before the Court concern relief under Part VIII and the pattern issue therefore is irrelevant.

[19] What are relevant to the conduct of the Applicants are the offences of fraud, theft and money laundering. Fraud and theft existed prior and are continuing offences. Money laundering offences were created by the Money Laundering (Prevention) Act of 2001, which predates the 2018 POCA. The POCA did not as regards the Applicants create any new

[14] **(2010) SLR 98;** Full citation **Hackl v Financial Intelligence Unit (fiu) & Anor (SCA 10 of 2011) [2012] SCCA 17 (31 August 2012)**
[15] **(1977) IEHC 106**

offences which did not exist at the time of the alleged conduct of the Applicants.

[20] It is the international trend to make such provisions retrospective and if the Kingdom does not, it may well become a *"legal dumping ground"* for such proceeds of crime. South Arica did not get it right with its Prevention of Organised Crime Act the first time and had to amend it in order to provide for retrospectivity.

[21] The referral by the Appeal Court of the matter back to the High Court for adjudication will enable the Applicants to argue their case and if successful, avoid further deprivation of funds. As such, the Applicants have an alternative remedy to explore and the finding of the Appeal Court has not closed the doors of the Court to the Applicants.

B ANALYSIS

[22] As pointed out by my brother Mamba JA during the course of hearing argument, if one were to compare the POCA with **section 119** of the Constitution, one might expect a prayer for a declaratory order holding the challenged POCA provisions to be unconstitutional and to be struck out accordingly. I may add to that the question also arises whether the High Court proceedings should not have been stayed and the constitutional issue been referred to a Full Bench in accordance with **section 151(2)(b)** of the Constitution. However, in view of the fact that the issue has been argued comprehensively before us, it is not necessary to deal with this aspect any further.

[23] What is before Court is an application in terms of **section 148(2)** of the Constitution which provides that: - "***The Supreme Court may review any decision made or given by it on such grounds and subject to such condition as may be prescribed by an Act of Parliament or rules of court.***" As at the time

that this matter was argued, there has been neither an Act of Parliament nor any *Rules* of Court and resort must be had to principles as crystalized through the cases. [16]

B.1 REQUIREMENTS

[24] There has been a steady accumulation of judgments in respect of this remedy. The judgment in ***President Street Properties (Pty) Ltd v Maxwell Uchechekwu and 4 Others***[17] is widely regarded as containing the *locus classicus:*

> "*27. It is true that a litigant should not ordinarily have a 'second bite at a cherry', in the sense of another opportunity of appeal or hearing at the court of last resort. The review jurisdiction must therefore be narrowly defined and be employed with due sensitivity if it is not to open a floodgate of reappraisal of cases otherwise res judicata. As much this review power is to be invoked in a rare and compelling or exceptional circumstances as ... it is not review in the ordinary sense.*"

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[16] *Postea* – **Rule 47(1)** of the new **Supreme Court Rules** promulgated after the hearing *in casu*, sets out permissible review grounds being:
"(a) exceptional circumstance exists which has resulted in a miscarriage of justice;
(b) the decision of the Court was influenced by fraud; or
*(c) the discovery of new and material matter or evidence which, after the exercise of due diligence, was not within the knowledge of the applicant or could not have been produced by the applicant at the **appeal**."*

[17] ***(11/2014) [2015] SZSC 11 (29th July, 2015), Paragraph 27***

This has been expanded on for instance in ***Siboniso Clement Dlamini v Walter P. Bennet, Thabiso G. Hlanze N.O.; Registrar of The High Court, First National Bank Swaziland Limited***[18] by the statement that:

> *"[32] The review jurisdiction of this Court under Section 148 (2) of the Constitution is an exceptional remedy to the well-known legal principles of functus officio and res judicata whose object is to ensure finality in litigation. This legal remedy does not allow for a second appeal to litigants whose appeals have been heard and determined. Being an exceptional remedy, the review is intended to prevent, ameliorate and correct a manifest and gross injustice to litigants in exceptional circumstances beyond the normal court processes."*

[25] The key words would be "***rare and compelling or exceptional circumstances"*** and ***"manifest and gross injustice."*** *Obiter:*

25.1 These phrases or like terminology would constitute essential allegations, to be pleaded and proved in an application of this kind.

25.2 To opine otherwise, would be to expect this Court to make a finding on something that had not been alleged, or for the

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[18] ***(45/2015) [2015] SZSC 21 (30th May, 2017), Paragraph 32***

Court to formulate a conclusion that should have been pleaded.

25.3 In the Founding Affidavit the Applicants state that they have been advised, *inter alia*, that for purposes of review it is required that the error "*has resulted in a miscarriage of justice*" and that the existence of exceptional circumstances must be proved by the Applicants. The phrase "*miscarriage of justice*" does not occur again anywhere in the affidavit or for that matter in the Heads of Argument, nor do the words "*gross*" or "*manifest*" appear in either.

25.4 In High Court action proceedings where a pleading lacks averments which are necessary to sustain an action, the other party may deliver an exception.[19] In motion proceedings such an objection usually is raised by way of a point *in limine*.

25.5 That being said, to refuse this application solely on the basis of lacking essential averments, more so where the respondent

[19] **Rule 23**

has not raised it, and without prior warning to practitioners, would be too harsh and I am not inclined to do so. However, it is trusted that practitioners will take due notice of the above observations for purposes of legal drafting in future applications.

B.2 AD ALLEGED ERRORS

[26] The starting point would be to determine whether the Appeal Court had erred and if it had, the secondary enquiry into exceptional circumstances and miscarriage of justice, would follow.

26.1 ***Criticism of the statement that 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:***

It was argued that this finding is erroneous in that it may lead to absurdities. This submission does not convince:

26.1.1 The one example was spoliation of a thief, to which the short answer is that it is trite that deprivation of possession by virtue of a court order is a defence to a spoliation application and a preservation is exactly that, i.e. a Court order and more in particular, an Order granted by a Judge of the High Court. In any event, our law is the Roman Dutch common law unless and insofar as same is inconsistent with statute and the Constitution.[20] If the POCA were to modify the common law spoliation position, that would legally be in order.

26.1.2 The facts that a subsequent (innocent) owner of tainted property may be hit by the preservation provisions or that funds would become mixed with other moneys in a bank account apply with equal force to offences committed **after** commencement of the POCA.

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[20] **Section 252(1)** of the Constitution: *"The Law of Swaziland*

252. (1) Subject to the provisions of this Constitution or any other written law, the principles and rules that formed, immediately before the 6th September, 1968 (Independence Day), the principles and rules of the Roman Dutch Common Law as applicable to Swaziland since 22nd February 1907 are confirmed and shall be applied and enforced as the common law of Swaziland except where and to the extent that those principles or rules are inconsistent with this Constitution or a statute."

26.1.3 The proverbial bottom line is that no person is of right entitled to the proceeds of crime and the Constitution does not change this.

26.2 ***Criticism of the statement "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" on the basis that the interpretation afforded to sections 42 and 52 has the result that the Constitution is subordinate to the POCA provisions and therefore the passing of retroactive laws is permitted:***

This should be read in proper context. The Appeal Court never held that the Constitution is inferior to any statute; it held that **section 119** is not applicable to **sections 42**, **52** and Part VIII of the POCA.

26.3 ***That the reliance on the Vienna Convention does not support a retroactive interpretation***:

This contention, which was advanced only in the Heads of Argument and which was not contained in the founding papers, appears to be a challenge directed against the finding of the Appeal Court that **sections 119** and **238** of

the Constitution and **Article 27** of the Vienna Convention on the Law of Treaties, 1969 should have been read together.[21] This contention, according to my notes, was not pursued before us and need not be dealt with any further.

26.4 ***Insufficient weight was attached to section 19 of the Constitution which protects against deprivation of property and section 21(2)(a), which contains a right to be presumed innocent until found guilty***:

As regards **section 19**, **section 19(2)(c)** stipulates as an exception the case where the taking of possession or the acquisition is made under a court order, which is what a preservation order is. The presumption of innocence pertains to a person actually charged with an offence: **section 19(2)** commences with ***"A person who is charged with a criminal offence shall be..."***

26.5 ***A person cannot be charged or be held to be guilty of an offence on account of an act or omission that did not at the time of the act or omission constitute an offence***:

[21] Sub-paragraph (f) of Paragraph [18] of Judgment

26.5.1 This undoubtably is a correct reflection of the law. However, *in casu* no one is being held accountable in respect of an offence that did not exist as an offence at the relevant time. Clearly, fraud and theft not only existed prior to the commencement of the POCA but also are continuing offences. Money laundering offences were created by the Money Laundering and Financing of Terrorism (Prevention) Act, 2001[22] which predates the POCA and the POCA did not as regards the Applicants' alleged conduct create any new offences which did not exist at the time of the alleged conduct of the Applicants.

26.5.2 The findings by the Appeal Court in these respects i.e. that fraud and theft are continuing offences; that the POCA, except for **section 3** and **5,** is a procedural legislation and not a substantive legislation creating offences but that it lays down the procedure of dealing or disposing of proceeds

[22] Part 2, sections 4 and 5; the **Money Laundering and Financing of Terrorism Act, 2011** repealed the 2001 Act i.e,, money laundering already had been an offence as far back as in 2001

of crime and instruments so used in committing those offences,[23] in my view also cannot be faulted.

26.6 ***The definition of "pattern of criminal gang activity" in the POCA requires at least one offence to have been committed after the commencement of the POCA:***

I am in agreement with the submissions on behalf of the Director of Public Prosecutions that these relate to criminal charges and are included in parts II and III of the POCA whereas the issue before the Court is relief under Part VIII.

[27] In the premises, it is my considered view that the Applicants failed to demonstrate any error on the part of the Appeal Court.

B.3 AD EXCPTIONAL CIRCUMSTANCES AND MISCARRIAGE OF JUSTICE

[28] The absence of errors would sound the end of the enquiry. Even if I were wrong in holding that the Appeal Court did not err, and for the reasons set out *infra*, the Applicants in any

[23] Paragraph [18], sub-paragraph (b)

event have failed to demonstrate any exceptional circumstances or miscarriage of justice in relation thereto. The circumstances alleged to be exceptional will be considered and pronounced on *seriatim*:

28.1 ***Delay in finalising the proceedings and potential further proceedings with attendant deprivation of funds resulting in material prejudice and irreparable harm:***

These are potential consequences of any delay in finalizing of any money related litigation and is not peculiar or exceptional to the POCA.

28.2 ***New legal precedent and fact that issue decided for the first time, constitutes an exceptional circumstance in that all courts will be bound thereby***:

To uphold this as an exceptional circumstance will be to lay down a precedent that any legal issue decided for the first time would automatically escalate the matter to a review as the next step, which would be untenable.

28.3 ***The "RSA POCA" is not totally retroactive***:

This may be so but the Kingdom is not bound by foreign legislation. Nor is it bound by foreign case law but the latter may be helpful and persuasive, including cases on the interpretation of similar provisions. As regards the definition of "*instrumentality of an offence*" the relevant South African provision expressly was amended to include conduct before and after commencement of the relevant Act, which is how the Eswatini equivalent reads.

28.4 ***Instant application not merely an attempt to reargue the appeal as very material legal principles involved***:

This appears to confirm the assertion by the Director of Public Prosecutions that all the issues had already been argued before the Appeal Court. The fact that *material legal principles* are involved, as is the case with new legal precedent, by itself does not and cannot suffice for an automatic blanket entry through the portals of review.

28.5 ***As a Swazi citizen the First Applicant and the Second Applicant has rights to equality under section 20 and to a fair and speedy hearing under section 21(1) of the Constitution further stressing the need for legal certainty***:

What has been stated in respect of new legal precedent applies *mutates mutandis*. Citizenship is irrelevant in the sense that "*any person*" enjoys these constitutional rights. [24]

[29] In the result, it is my considered view that the Applicants have failed to establish any exceptional circumstances, or any patent or gross miscarriage of justice.

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[24] The Applicants' reference to holding Swazi citizenship whilst maintaining residence in South Africa is puzzling. According to the High Court judgment the First Applicant describes himself as being "*... also a naturalised citizen who also holds citizenship of the Republic of South Africa where he maintains his residence.*" Dual citizenship to the best of my knowledge is not permitted in Eswatini and there is no acquisition of Swazi citizenship by way of "*neutralisation.*" The nearest form of acquisition would be way of registration, but only where the person concerned had been ordinarily and lawfully resident in Eswatini for at least twelve months immediately preceding the date of his application for registration and during the seven years immediately preceding the said period of twelve months, for periods amounting in the aggregate to not less than five years. Also, a successful applicant is expected to reside in Eswatini – **section 9(2)** of the **Swazi Citizenship Act, 1992**

C CONCLUSIONS AND ORDER

[30] Taking into account all the above facts and circumstances, the Applicants have failed to establish a case for review, for all the reasons aforestated. As for costs, this was a constitutional issue and it would be appropriate that each party bear their own costs. Accordingly, the following Order is made:

(1) The application for review is refused.

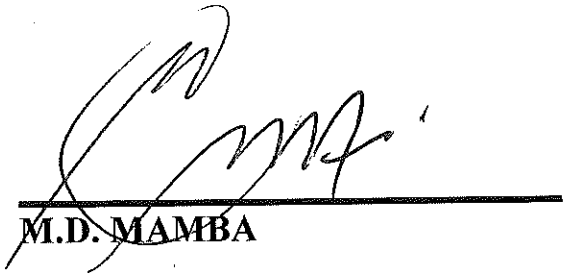
(2) No order as to costs.

J.M. VAN DER WALT
JUSTICE OF APPEAL

I agree

N.H. HLOPE

JUSTICE OF APPEAL



M.D. MAMBA

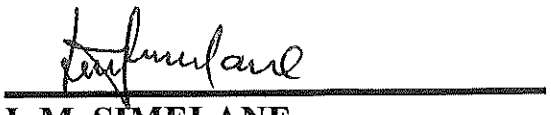
JUSTICE OF APPEAL

I agree

J.M. CURRIE

JUSTICE OF APPEAL

I agree



L.M. SIMELANE

ACTING JUSTICE OF APPEAL

For the Applicants: **Mr** M.M. W Van Zyl SC instructed by Howe Masuku Attorneys

For the Respondent: Mr G.J. Leppan instructed by the Director of Public Prosecutions