CASEBOOK ON

Money Laundering and Proceeds of Crime

DISRUPTING CRIMINAL ACTIVITIES THROUGH TAKING THE PROCEEDS FROM CRIME

ARINSA

ASSET RECOVERY INTER-AGENCY NETWORK SOUTHERN AFRICA

Casebook on Money Laundering and Proceeds of Crime

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FOREWORD

Criminal activity in Africa that benefits criminals financially is a burgeoning problem. Corruption, extractive industries, wildlife crime, illegal logging, and other criminal activities have contributed to illicit financial flows from Africa. Illicit Financial Flows from Africa are now estimated to be in the region of USD 50 billion per annum. Of that sum it is estimated that 40% of the Illicit Financial Flows are the result of criminal activity.

The Asset Recovery Inter-Agency Network for Southern Africa (ARINSA) was established in 2009 to provide a platform for the sharing of information on an informal basis between investigators and prosecutors. This information was intended to enable the proceeds of crime to be traced across jurisdictions. Since 2009 and the establishment of ARINSA, there has been a growing number of cases reported in the areas of asset forfeiture, money laundering and proceeds of crime in the Southern and Eastern African region. As a result of the increased number of cases, a body of jurisprudence has been developed reflecting the region's response to these problems of money laundering and proceeds of crime.

From the perspective of the United Nations, these actions of tracing, seizing, and forfeiting the proceeds of crime align with the Sustainable Development Goals. In particular SDG 16.4 which states:

> *"by 2030 significantly reduce illicit financial and arms flows, strengthen recovery and return of stolen assets, and combat all forms of organized crime"*

This casebook on proceeds of crime and money laundering draws on a broad sample of the judicial thinking in recent years within the region. Almost every country within in the region has contributed to this casebook, which demonstrates that the knowledge of money laundering and proceeds of crime has been spread across the region. More importantly, it shows that this knowledge has been implemented.

The purpose of the casebook is to provide practitioners, whether investigators, prosecutors or the judiciary, with guidance from decided cases from within the region.

The hard work of the main contributors to the casebook should be acknowledged. The president of ARINSA Mr. Biswalo Mganga, the Director of Public Prosecutions of the United Republic of Tanzania and Mr Mpho Letsoalo, who is the former president of ARINSA. They lent their unwavering support to this project, that is regarded as a flagship project.

Our thanks go to Ernest Mosate of the Director of Public Prosecutions in Botswana, who worked tirelessly in collating the cases. Our thanks also go to Alexander Mills, Associate Professor of Law at City, University of London, who drafted the case summaries in time for the launch at the 10th Anniversary celebrations of ARINSA in June 2019.

The casebook will hopefully provide the guidance needed to pursue ARINSA's unofficial motto of "Leaving the criminals with nowhere to hide".

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1 CIVIL FORFEITURE

1.1 PROPERTY PRESERVATION ORDERS / RESTRAINING ORDERS

Botswana

Director of Public Prosecutions v Khato Civils (Pty) Ltd and others [2016]

The Court's Decision

- A rule nisi was upheld, having been discharged by the High Court.
- The standard to be applied in restraint cases is lower than the balance of probabilities. The court must ask itself about the reasonable belief of the deponent.
- When a constitutional issue is not raised by the parties, the court should only raise such a matter when it is essential to do so. In such circumstances the parties must be given an opportunity to make submissions before a determination is made.

Judges: Lesetedi JA, Gaongalelwe JA, Rannowane AJA

Court/Jurisdiction	Case Reference & Citation
The Court of Appeal of Botswana, held at Gaborone	CLCGB-040-16 UCHGB-000266-16

Case Summary

A provisional restraining order was obtained under the Proceeds and Instruments of Crime Act Cap 08:03 (PICA), and a *rule nisi* issued. On the return date the learned Judge found that, although the investigator had reasonable belief warranting the grant of the *rule nisi*, the respondents had, on the balance of probabilities, explained the lawfulness of their conduct. The Judge also found that restraint sought amounted to a breach of the constitutionally entrenched right to property. The *rule nisi* was discharged and the DPP appealed. Three key issues arose:

(i) Whether constitutional arguments stood to be considered without such arguments being raised by any of the parties, or if raised by the court, the parties first having been given an opportunity to address the court on it;

(ii) Whether the court had misconceived the legal basis upon which the restraint application was brought; and

(iii) Whether the court had misconstrued the standard of proof required in applications of this nature.

The raising of constitutional arguments

The court's finding that the restraint sought amounted to a breach of the constitutionally entrenched right to property was never an issue raised by the parties and did not necessarily arise for determination from the papers. If such an issue must be determined, parties must be given an opportunity to comment. The court's holding in this regard therefore could not be allowed to stand. The Court of Appeal observed that "courts should be wary of being too quick to put to question the constitutionality of statutory law when such question is not before it. It is important to re-emphasise that the duty for the court is to resolve the concrete dispute before it and that the challenge of legislation on a constitutional basis arises as a ground of necessity not convenience" [34].

Had the court misconstrued the standard of proof to be applied?

The High Court had proceeded on the footing that it had to be satisfied on the balance of probabilities of the Appellant's version against that of the Respondents. The Court of Appeal found that the *Daisy Loo* case was binding on the High Court and therefore it was imperative that the High Court applied its approach. Applying the balance of probabilities was a material error which affected its finding.

The Court of Appeal went on to hold that "it also seems to have escaped the Court below that the matter was still at an investigative stage and that many of the explanations given by the Respondents were still to be bested when the time came for the Respondents to be charged with the offences foreshadowed in the Appellant's affidavits. The Court below could properly exercise its

discretion to discharge the *rule nisi* only if it found that the averments upon which the rule nisi had been granted turned out to be clearly discredited on the return day hearing which was not the case here".

The legal basis upon which restraint was sought

The High Court had not appreciated the relevant sections of PICA that governed the restraint application and therefore fell into error. It was not proper for the court to concentrate its focus simply on whether there was a reasonable belief that a specific offence had been committed. The appeal was therefore upheld and the *rule nisi* was confirmed.

Points to Note

- The Court of Appeal reiterated the point made in the *Daisy Loo* case that the legal burden at the restraint stage is far lower than the balance of probabilities. This reflects the fact that restraint is often sought during an ongoing investigation.
- The court engaged in extensive discussion about the purpose of the proceeds of crime legislation and how it fits into the international frameworks for tackling serious and organised crime [paras 37 – 40].
- The court discussed the test of reasonable belief and confirmed that the test of reasonableness "is an objective one. The court must look at the evidence which was in the possession of the investigating officer at the time when he reached his value judgement. That evidence and the circumstances must be looked at holistically by the court in determining whether there was material or evidence upon which a reasonable investigator having regard to this and exercising his mind accordingly would have entertained a belief that some crime has been committed of which the funds were proceeds therefrom" [65].

Director of Public Prosecutions v Bakang Seretse [2018]

The Court's Decision
• The interim restraint order was confirmed.

Judge: Radijeng J

Court/Jurisdiction	Case Reference & Citation
The High Court of Botswana, held at Gaborone	UCHGB-000370-17

Case Summary

In December 2017 an interim restraining order was obtained by the DPP pursuant to the Proceeds and Instruments of Crime Act (PICA). It was alleged that BWP230 million was disbursed from the National Petroleum Fund by the Fund Managers, Kgori Capital (Pty) Ltd to a company (Khulaco (Pty) Ltd) not concerned with the business of government and contrary to the Public Finance Management Act. It was averred that the management of the fund was in fact officially vested in Basis Point Capital (Pty) Ltd and one Kenneth Kerekang, without authority, appointed Kgori Capital to manage the fund.

The Respondent, having been served with the order, sought to oppose the confirmation of the order. The Respondent sought to have a higher standard applied to the evaluation of the evidence than is required in proceedings for a restraining order. It was suggested that "there must be elements of a crime established or the source of the funding and or actors in the trail of the funding be identified or charged". However, in accordance with the decision in *Khato Civils* (see above) and *Daisy Loo* decisions, at the restraint stage the court must only be satisfied that there might be a conviction and a confiscation order, and that the evidence in support might reasonably be believed.

Points to Note

- This case again emphasises the importance of the application of a lower standard of proof at the restraining order stage.
- The case is connected to the *Kgori Capital* and *Basis Point* decisions below.

Directorate of Public Prosecution v Kgori Capital (Pty) Ltd [2018] (Expenses)

The Court's Decision

- An application to release funds from restraint to meet business and legal expenses was dismissed. Clear and cogent evidence as to both need for and reasonableness of the request must be provided.

Judge: Nthomiwa Nthomiwa J.

Court/Jurisdiction	Case Reference & Citation
The High Court of Botswana, held at Lobatse	UCHGB-000065-18

Case Summary

With a view to an application for a civil penalty order being made, a restraining order was obtained on 14th March 2018. An application was made to vary the order to permit access to funds held with Stanbic Bank Botswana to cater for reasonable legal expenses and reasonable business expenses.

The Court noted that there are competing public interests, first between "ensuring that the prospect that retaining money that the DPP believes the applicant unlawfully appropriated is not undermined and/or comprised, and secondly, the Applicant's interest to be in a position not only to run is business but also to be in the best way possible engage attorneys". The question for the court will be whether sufficient information has been placed before it to enable it to properly evaluate the Applicant's case and to determine whether or not to exercise its discretion, and if so to what extent. The onus lies upon the applicant for a variation order "to demonstrate on its papers by way of evidence, its real needs, the reasonability thereof, absence of other means to meet the expenses concerned and the nature and hardship that is likely to be occasioned by the refusal to the variation [*Directorate of Public Prosecutions and Khato Civils Botswana (Pty) Ltd & others*]".

On the facts of the case, the Applicant did not satisfy the judge that there was not other property from which its business and legal expenses could be satisfied. Furthermore, in accordance with the *Khato Civils* case, legal fees ought to be supported by detailed fee notes with corresponding descriptions of services rendered from the legal advisors to justify the reasonableness of the amounts claimed. The Applicant failed to do so, instead "choosing to hide behind the fact that the fees were agreed. Whilst such fees could have been agreed, it is important that they should be reasonable. The court therefore dismissed the application.

Points to Note

- This case emphasises that restraining orders serve an important purpose, and that funds should only be released to meet expenses when there is clear and cogent evidence to support such a claim.

Basis Point (Pty) Ltd and Others v the Director of Public Prosecution (HC) [2019]

The Court's Decision
• The court rejected an application for a stay or rescission of a restraining order. There was no urgency demonstrated in making the application and it was fair and proper to for the DPP to have made an *ex parte* application in the first instance.

Judge: Motumise J.

Court/Jurisdiction	Case Reference & Citation
The High Court of Botswana, held at Gaborone	UAHGB-000377-18

Case Summary

The applicants sought a stay of a restraining order or for rescission in the alternative. The application was made on an urgent basis. Motor vehicles, machinery, buildings and other property had been restrained and placed under the control of a receiver pending institution and finalisation of proceedings for a Civil Forfeiture Order.

Urgency

The court found that urgency in making the application was not established. It was claimed that one Bakang Seretse (see case above) would be rendered homeless by the order. However, this was not new information and the alleged homelessness was held, in itself, to be insufficient to prove urgency.

It was further claimed that there would be disruption to the lives should properties be surrendered to the receiver. This was a bare allegation which did not demonstrate how they lives would actually be affected. Urgency was therefore not sustained on that point.

It was also alleged that the parties would be divested of assets without having been heard. The court held that PICA allows for restraint orders to be granted on an *ex parte* basis. There are then several options open to the parties to challenge or vary the restraint order. There is no prejudice in light of these rights and therefore urgency was not established on this point.

Stay

In terms of a stay, it was complained that the order had been obtained ex parte. However, there is "nothing untoward or improper" about it. "The procedure is stealthy because it is important to avoid the dissipation of asset before a restraining order can be obtained. In that event, the very advantage of surprise which the Applicants complain of was consciously crafted into PICA" [90].

It was also argued that the certain assets were subject to other court orders and the court was misled in not having been referred to those orders. The Court found that neither order in fact mentioned the relevant assets and therefore there would have been no difference to the grant of the restraining orders had they been disclosed. In all of the circumstances the application could not succeed.

Points to Note

- The Judge helpfully summarised the nature of restraining order applications, touching on *DPP v Archbald Mosojane.* The Judge also carefully explored the rationale behind *ex parte* applications.
- This case was subsequently appealed and a similar application for a stay or rescission made (see below).

Basis Point (Pty) Ltd and Others v the Director of Public Prosecution (CA) [2019]

The Court's Decision
An application brought to stay a restraining order on the basis of urgency cannot be justified on the basis of general inconvenience, hardship or exposure to indignity. These are inherent effects of the legislation. Clear and specific averments are required. A restraining order is an interlocutory order and so leave to appeal such an order is required. No appeal may be brought as of right.

Judge: Gaongale J.A.

Court/Jurisdiction	Case Reference & Citation
The Court of Appeal of Botswana, held at Gaborone	CACGB-011-19 UAHGB-000377-18

Case Summary

This appeal arises from the case immediately above. Having had the application rejected at the High Court, an appeal was filed against the restraining order without leave of the court and an urgent application was made for stay of the restraining order, or for rescission in the alternative.

Was urgency established?

It is necessary to establish the need for an urgent application for a stay, as opposed to the party making an application for variation or rescission which is listed in the usual way. The court found that inconvenience or hardship

suffered as a result of dispossession was not a ground upon which urgency could be established *per se*. The implementation of the provisions of PICA "would necessarily result in inconvenience, hardship and suffering of grave indignity". Furthermore, the fact that an application was made *ex parte* cannot be a basis for urgency. *Ex parte* applications are expressly provided for under the Act.

There must be "specific averments demonstrating that there are facts and circumstances which compel an applicant to proceed on urgency. Such facts and circumstances must show that the applicant would not get substantial redress at a hearing in due course". On the facts, only the Second Applicant made a relevant averment. He alleged that he was rendered homeless by the order. However, had a rented property in which it was likely that he could live. Furthermore, no evidence was provided about why he could not live in rented accommodation pending resolution of the case.

Can an appeal be brought against the restraining order as of right?

An appeal can only be brought as of right against final orders. A restraining order is an interlocutory order. This is reinforced by the fact that the order can be subject to variation or rescission. Leave therefore had to be sought before an appeal could be brought. The application for an appeal in this case was therefore irregular.

Points to Note:

- The Court of Appeal essentially endorsed the findings of the High Court, as set out separately above.
- In this case the Judge was very clear that the effects of a restraining order may be harsh, but that is inherent within the legislation and cannot itself be a determining factor in an application to stay or rescind an order.
- Specific averment of hardship is required, for example where a person will be rendered completely homeless with no possibility of accommodation elsewhere. In any event, the court should consider whether varying the restraining order may be a more appropriate route to take.

Seychelles

Hackl v Financial Intelligence Unit [2010]

The Court's Decision
• There is no breach of the right to a fair trial or the right to property by bringing interim or interlocutory proceedings pending a civil forfeiture application.

Judges: Egonda-Ntende CJ, Gaswaga, Burhan JJ

Court/Jurisdiction	Case Reference & Citation
Constitutional Court of Seychelles	Constitutional Case No 1 of 2009 [2010] SCCC 1

Case Summary

The petitioner challenged the constitutionality of the provisions for orders known as 'interim' and 'interlocutory' orders under the Proceeds of Crime (Civil Confiscation) Act 2008. These challenges were rejected.

The Right to Property

In finding that there is no unconstitutional infringement of the right to property, the court ruled that:

(i) "the right to property protected under the Constitution only extends to property lawfully acquired. It does not protect unlawfully acquired property. The restriction against disposal of specified property at the commencement of proceeding that will determine whether such property is the benefit of criminal conduct is necessary in order not to render those proceedings nugatory. If no restraint was imposed on the current holder of such property it could be possible to dispose of the property as soon as one got wind of the commencement of such proceedings."

(ii) Interim orders under are of temporary and limited duration, intended only to preserve property in question pending further proceedings between the parties when all the parties will be given an opportunity to press their cases before a final decision is made".

(iii) "Depriving people in receipt of ownership, control or possession of [property representing the proceeds of crime] is not unconstitutional… it is a legitimate restriction to the right to property. Civil forfeiture of illicitly gained property is one of the latest ways in which governments are fighting crime. I have no hesitation to find that fighting crime is a pressing social need. It is ultimately about the safety of the population".

Impermissible retrospectivity

The Court held that "POCA is not a penal statute. It does not possess the commonly known aspects of criminal legislation. No offence is created. No one is charged with an offence. No one is tried for an offence. Its thrust is to deprive ownership, possession and control of property derived from criminal conduct from those that hold that property at the time of initiating proceedings under the POCA. To that extent, it is not retrospective at all.

The right to a fair hearing.

First, the proceedings are civil and not criminal in nature. Second, although evidence may be adduced by affidavit, oral evidence may be adduced with permission of the court. Third, a restriction on obtaining further and better particulars, disclosure and discovery and a requirement to file an affidavit responding to the application within 21 days is intended to ensure a truthful and timely answer by the respondent. The ability to delay or drag out proceedings is curtailed with postponement of requests until after the respondent has disclosed the evidence on which he or she intends to rely. This restriction is intended to achieve a limited objective and simply reorders the procedure to be followed. 21 days is not an intrinsically inadequate period of time.

Points to Note

- In rejecting the constitutional challenges to interim orders, the court reviewed case law from Ireland (*Murphy and Gilligan v Criminal Assets Bureau [2001] IESC 82*) and South Africa (*Prophet v NDPP*), as well as noting that civil forfeiture exists in the UK and Australia. Therefore, Seychelles is not alone in this approach".

South Africa

NDPP and another v Yasien Mac Mohamed NO and others [2003]

The Court's Decision

- It is constitutionally and legally permissible and for an *ex parte* an application for a property preservation order to be made, and an appeal cannot be brought solely on the ground that an application was brought on an *ex parte* basis. Such applications do not infringe the right to a fair hearing.

Judges: Ackermann J (with whom Chaskalson CJ, Langa DCJ, Goldstone J, Madala J, Mokgoro J, Moseneke J, Ngcobo J, O'Regan J and Yacoob J concurred)

Court/Jurisdiction	Case Reference & Citation
Constitutional Court of South Africa	CCT 44/02 (3 April 2003)

Case Summary

This case arose following a declaration by the High Court that section 38 of the Prevention of Organised Crime Act is inconsistent with the constitution, in particular with the right to a fair hearing, pursuant to article 34. In civil recovery cases, s38 of POCA provides that the NDPP may, by way of an *ex parte* application apply to the High Court for an 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. If there are reasonable grounds to believe that the property concerned is an instrumentality of an offence referred to in Schedule 1 or is the proceeds of unlawful activities, the court is mandated to make the order.

There is no express provision to allow for the order to be made on an immediate and interim basis, along with a *rule nisi* calling upon all interested parties to appeal and show cause why the preservation of property and seizure order should not be made final. The High Court found that the absence of a *rule nisi* provision infringed the *audi alteram partem* rule, which is to the effect that a party should be given an opportunity of being heard in court before an order is made that might adversely affect such party's rights. The NDPP appealed.

(i) Is an ex parte application process objectionable it itself?

The Constitutional Court examined whether the provision permitting an *ex parte* application was, in itself, objectionable. It found that it was not. S38 sanctioned a particular initiating procedure to be employed. This express sanction provides an important safeguard in the preservation of assets, namely that an application by the National Director under section 38 can never be dismissed solely on the ground that it has been brought *ex parte*.

(ii) Does s38 preclude a rule nisi from being granted?

The Court found that it is incontrovertible that there is an inherent power of the court to grant a rule *nisi* together with an interim order pending its return day in order to prevent the harm that might result if notice were given. This power can be applied to new situations where necessary. It was accordingly not necessary for the legislature to have inserted the provisions relating to the rule *nisi* and an interim preservation order into the Act.

Furthermore, support for the proposition that the power to grant a *rule nisi* was intended to be implicit in s38 can be found from s44, which provides for the making of exceptions to a property preservation order under s38 for reasonable living and legal expenses. The only persons who can give information concerning such living and legal expenses are the persons affected by the preservation of property order. S44(2)(b) provides that a High Court shall not make provision for such expenses unless the affected person concerned has "disclosed under oath all his or her interests in the property and has submitted to that Court a sworn and full statement of all his or her assets and liabilities." From its clear wording the section contemplates that at the time of making a preservation order an investigation of all these matters

may take place. No provision is made for granting such relief at a stage *after* the making of the preservation of property order. The provisions are only compatible with a construction of section 38 which permits a *rule nisi* and an interim preservation order. Because s38 permits the grant of a *rule nisi* it is in accordance with the constitution.

(iii) Is an interim preservation order granted, ex parte, contrary to the constitution?

The court "assume[d], without deciding that…temporary deprivation, before the return day, constitutes a limitation of the section 34 fair hearing right. Such limitation is, however, amply justified…The limitation of the section 34 right enables the Act to function for the legitimate and most important purpose for which the Act was designed…and to reduce the risk of the dissipation of the proceeds and instrumentalities of organised crime. The limitation is as narrowly and appropriately tailored as it could be and is under the control of the High Court". S38 was therefore declared to be constitutionally valid.

Points to Note

- This case emphasises the legitimate public policy that is served by permitting *ex parte* applications for a preservation of property order.
- The right to a fair hearing is not infringed. The court could grant a *rule nisi* and there was scope to permit variations for reasonable expenses.

NDPP v Meir Elran [2013]

The Court's Decision

- In the absence of up to date disclosure of all assets and liabilities, the High Court has no power to grant reasonable living or legal expenses from assets that are subject to a Property Preservation Order.

Judges: Jafta J (Moseneke DCJ, Nkabinde J and Yacoob J concurring); Cameron J (Mogoeng CJ, Froneman J, Van der Westhuizen J (except for [90]) and Zondo J concurring).

Court/Jurisdiction	Case Reference & Citation
Constitutional Court of South Africa	CCT 56/12 [2013] ZACC 2

Case Summary

In 2006, the NDPP obtained a preservation order under POCA against the Respondent. The order was granted because there were reasonable grounds to believe that the property constituted the proceeds of illegal activity on his part. Three years later, the Respondent applied to the High Court for an order allowing him to fund his legal expenses from the property covered by the preservation order, pursuant to s44 of the Prevention of Organised Crime Act.

S44 permits the High Court to allow for payment of reasonable living and legal expenses to the extent that it considers fit from property preserved by order of the court. S44(2) states that a High Court shall not make provision for any expenses unless it is satisfied that:

(a) the person cannot meet the expenses concerned out of his or her property which is not subject to the preservation of property order; and

(b) the person has disclosed under oath all his or her interests in the property and has submitted to that Court a sworn and full statement of all his or her assets and liabilities."

In purported compliance with the second prerequisite, the respondent relied on affidavits from three years earlier and did not provide any detailed information about charity and loans that he claims to have been living off since that time. Nevertheless, the High Court found that the conditions were for the release of funds for legal expenses were met. The NDPP appealed the decision.

A majority of the Constitutional Court upheld the appeal. It held that by failing to disclose his current liabilities, the Respondent had not met what was a very clear precondition. It found that "no injustice or absurdity flows from this statutory scheme. The property is preserved only because there

are reasonable grounds for believing that it constitutes the proceeds of criminal activities. The very point of requiring disclosure is to make sure that the applicant cannot meet the expenses out of property not subject to the preservation order" [81]. In the absence of up to date disclosure the High Court had no discretion to make an order for legal expenses in his favour. The order of the High Court was therefore set aside.

Points to Note

- This case emphasizes that property is preserved under asset forfeiture legislation for good reason, namely the reasonable grounds for belief that the property is connected from crime. In light of its connection with criminality, such property should only be released to meet expenses if it is truly necessary to do so. Therefore, it is incumbent upon an applicant seeking the release of property to provide full and up to date evidence of their means.

Namibia

Lameck and another v The President of the Republic of Namibia and Others [2012]

The Court's Decision

- Civil forfeiture (both instrumentalities and proceeds of crime) is not a 'double punishment'. It is a civil remedy unrelated to the criminal prosecution and punishment of offenders.

Judges: Hoff J, Smuts J and Miller AJ

Court/Jurisdiction	Case Reference & Citation
The High Court of Namibia	A 54/2011

Case Summary

In adjudicating on a wide-ranging challenge to the constitutionality of the provisions of the Prevention of Organised Crime Act 29 of 2004 (POCA), the High Court found that civil forfeiture (both instrumentalities and proceeds

of crime) is not a 'double punishment'. It is a civil remedy unrelated to the criminal prosecution and punishment of offenders.

Points to Note

- Given the wide-ranging nature of the challenge to the constitutionality of POCA, this case is dealt with in multiple places in the Casebook.
- In its reasoning, the High Court endorsed the South African decision in *Prophet v NDPP*.

Shalli v The Attorney-General [2013]

The Court's Decision
• Civil property preservation and forfeiture orders granted without notice are not an unconstitutional infringement of the right to a fair hearing (including the presumption of innocence), the right to property and the right to dignity.

Judges: Smuts J and Geier J

Court/Jurisdiction	Case Reference & Citation
High Court of Namibia Main Division, Windhoek	POCA 9/2011 [2013] NAHCMD 5 (16 January 2013)

Case Summary

The applicant was General Martin Shalli. He was the former Chief of the Namibian Defence Force ("NDF") and Namibia's former High Commissioner to Zambia. In his capacity as Chief of the NDF, he was responsible for the implementation of an agreement in terms of which the Government of Namibia had purchased military equipment from a Chinese State-owned company. It was alleged that he had received bribes from that company of some U$700,000 which, so it was alleged, he placed in bank accounts in Zambia. It is alleged that this conduct was in contravention of both the Anti-Corruption Act and the Prevention of Organized Crime Act.

In seeking to challenge to property preservation order, the applicant contended that Part 6 of the Act (property preservation and forfeiture orders) was unconstitutional in that it infringed the presumption of innocence and the right to a fair hearing pursuant to Art 12 of the Constitution.

Presumption of innocence

In accordance with the finding in the case of *Lameck* (see above), asset forfeiture proceedings under Chapter 6 are a civil remedy unrelated to a criminal prosecution and punishment of offenders. As civil proceedings and given their nature, they do not engage Art 12 of the Constitution, in terms of the presumption of innocence.

Right to a fair hearing

It was contended that preservation orders infringed the right to a fair hearing because s51(2) of POCA mandated that such orders must be granted without notice to the owner of the property. The court held that whilst the use of the term "must" could be criticised, the right to a fair trial could be met by way of a rule *nisi,* which would afford a person affected the opportunity to be heard by the order. "The interim operation of the order would achieve its purpose whilst a rule *nisi* would afford the person affected by the order the opportunity to be heard in due course or as a matter of urgency if that person would want to anticipate the order". Even in the absence of a rule nisi, the order is subject to being set aside on application by a party affected by it. Therefore, there is no infringement of the Art 12 right to a fair trial.

Infringement of property rights

In accordance with the decision in the case of *Lamek*, the civil forfeiture regime does not violate the right to property because the constitution does not protect the ownership or possession of the proceeds of crime. Even if it were to infringe the right to property it would " be a proportionate response to the fundamental problem which it addresses, namely that no one should be allowed to benefit from their wrongdoing and that a remedy of this kind is justified to induce members of the public to act with vigilance in relation to goods they own or possess so as to inhibit crime. It thus serves a legitimate public purpose" [45].

The right to dignity

Because the proceedings are constitutionally permissible generally, any indignity from the forfeiture of the instrumentalities or proceeds of crime does not violate the constitution. It is, for example, akin to the exposure of anyone who is subject to lawful criminal proceedings.

Points to Note

- In its judgment the court discussed the overall purpose and statutory context of POCA [paras 8 – 9], gave a brief overview of the asset forfeiture regimes created by the Act [paras 10 – 11] and gave a more detailed account of the operation of Part 6 of the Act (property preservation and forfeiture orders) [paras 12 – 22].
- In determining the issue of the presumption of innocence, the court reviewed and followed decisions from South Africa, the European Court of Human Rights, Canada and the UK [paras 26 – 27]. Similarly, the court reviewed decisions from South Africa and the UK in determining the infringement of the right to property [paras 42 and 44].
- Whilst without notice applications are acceptable, the approach in *Shalli* was refined in the case of *Taapopi* (see below).

Shaululu v The Prosecutor-General [2014]

The Court's Decision

- *Ex parte* applications for preservation of property orders are not unconstitutional.
- The prima facie test for the grant of a preservation of property order was satisfied on the facts of the case.
- There was no good reason to condone late filing of opposition to any final forfeiture application, particularly in light of clear statutory time limits.

Judge: Parker AJ

Court/Jurisdiction	Case Reference & Citation
High Court of Namibia Main Division, Windhoek	POCA 2/2013 [2014] NAHCMD 222 (24 July 2014)

Case Summary

In this case the applicant sought to have a preservation of property order declared constitutionally invalid, or in the alternative set aside. In the event that neither application was successful, the applicant sought condonation of late filing of opposition to any final forfeiture order and requested leave to file affidavits in opposition to the final forfeiture order within five days.

Are ex parte proceedings an infringement of the right to a fair hearing?

It was contended that preservation of property orders infringed the right to a fair hearing because s51(2) of POCA mandated that such orders must be granted without notice to the owner of the property. Although this point had been argued unsuccessfully in *Shalli,* (above) the applicant sought to distinguish *Shalli* because in the present case there was no risk of dissipation through notice being given, because the applicant's property was in the hands of the police. The court held that on the facts there was a risk that property could be returned to the applicant at any time, and therefore there was a risk of dissipation. The argument was therefore "fallacious and self-serving". In any event, whether a legislative provision is constitutionally compliant should not depend upon the facts of a particular case. *Shalli* remained good law.

Should the order be set aside because the burden of proof was not satisfied?

The test to be applied at the preservation stage is whether the court is satisfied that there is evidence, which if accepted, will establish the Prosecutor-General's reasonable grounds for belief that property is a proceed or instrumentality of crime. There mere fact that evidence could be contradicted would not disentitle the Prosecutor-General to the grant of a preservation or property order. It is only when it is quite clear that the Prosecutor-General's belief is groundless or frivolous that the court will be disposed to refusing the preservation application. Where diverse facts could lead to the drawing of

different inferences the court should not pause to consider the weight and persuasiveness of each possible inference that can be drawn, but rather it should confine the extent of its enquiry to the question of whether one of the possible inferences to be drawn is in favour of the Prosecutor-General in order for the court to determine whether a *prima facie* case has been established. The court found that, on the facts, a prima facie case had been established.

Should condonation of late filing of opposition to the forfeiture order be granted?

The court found that the legislation was very clear as to time for making applications to the court. The applicant had failed to comply with those time limits and accordingly his application to condone late opposition to the order was rejected.

Points to Note

- The case reinforced the decision in *Shalli* (above) about the constitutionality of *ex parte* applications for preservation of property orders.
- The case also gave clear guidance as to the very limited extent to which the court must resolve issues in the case when determining whether *a prima facie* case has been established. This reflects the preliminary nature of a preservation of property order.

The Prosecutor-General v Taapopi [2015]

The Court's Decision
• Leave of the court must be granted to dispense with notice requirements before an e*x parte* application for a preservation of property order can be obtained.

Judge: Geier J

Court/Jurisdiction	Case Reference & Citation
The High Court of Namibia	POCA 08/2014 [2015] NAHCMD 134 (22 May 2015)

Case Summary

The Prosecutor-General sought confirmation of a provisional preservation of property order. The order had been granted on an urgent *ex parte* basis. s51(2) of the Prevention of Organised Crime Act 29 of 2004 (POCA), provides that orders may be made "without requiring that notice of the application be given to any other person".

Although an urgent *ex parte* application may have been in compliance with s51(2) of POCA, it was contended that the application was not in compliance with s91(1) and Regulation 7 of POCA. S91(1) provides, however, that every application under s51, amongst other sections, "must be made in the prescribed manner". Regulation 7 provides that notice of applications must be given at least 7 days prior to the application, unless leave to serve short notice is given by the court.

The Court held that, taken together, the provisions required that the starting point is that the Prosecutor-General must provide notice of an application for a preservation of property order. The Prosecutor-General may, however, apply for the notice requirement to either be dispensed with altogether or complied with in some lesser form. If the court accedes to the application to dispense with the notice requirement, the High Court must grant the order without requiring notice to be given. On the facts of the case, no application had been made for notice to be dispensed with and so the provisional order was discharged.

Points to Note

- This case "refines and clarifies the prescribed procedures that are to be followed in accordance with het Act. The so formulated approach, importantly, does not preclude the office of the Prosecutor-General to seek urgent *ex-parte* preservation of property orders, which may have to be sought in deserving cases, to achieve the preservation of the proceeds of unlawful activities of property which was instrumental in the commission of an offence. At the same time, it, importantly, also ensures the fair trial rights, enshrined in our Constitution and by the common law, are not infringed." [26]

- The decision in this case is therefore not in conflict with the decision in *Shalli* (above), but rather it gives further explanation as to the approach to be adopted with regards to *ex parte* applications.

The Prosecutor-General v Uuyoni [2015]

The Court's Decision
• *Ex parte* applications for preservation of property orders should be heard *in camera.*

Judges: Mainga JA, Chomba AJA and Hoff AJA.

Court/Jurisdiction	Case Reference & Citation
The High Court of Namibia	SA 20/2013 [2015] NASC (2 July 2015)

Case Summary

A provisional preservation of property order was discharged on the basis that notice had been given of the application and, because the application was heard in camera, it violated the principle that hearings should generally be held in open court.

The Supreme Court overturned the discharge of the order. The statutory provisions and the decisions in *Shalli* and *Lameck* (above) had been very clear that *ex parte* applications were permissible. Furthermore, s98 of POCA was clear that *ex parte* applications did not have been to dealt with in open court. Preservation of property orders are intended to prevent dissipation of assets, and therefore it is "imperative that proceedings…be held *in camera* to prevent the information and outcome of the application from being transmitted to the adverse party. In the world of technology we live in, it would be to defeat the purpose of s 51(2) to hear an application in terms of that section in an open court. Any person observing the proceedings, who knows the adverse party could easily inform the adverse party who in turn could remove the property provisionally ordered to be preserved."

It does not violate the right to a fair hearing because the order is a preservation measure. No rights in the property are finally determined and a clear opportunity is available at the final forfeiture hearing to challenge any assertions made about the property. At the preservation stage, an interested party has various options to challenge the order available, including the right to apply to vary or rescind the order, or to apply for reasonable living expenses and legal costs. In this case a rule nisi had been issued (although the court doubted that the practice developed by the High Court in this regard was necessary), and the respondent therefore had another opportunity to challenge the order.

Points to Note

- This case further clarifies the approach to be taken in hearing preservation of property applications. It emphasises that such orders are a temporary measure and do not finally determine any rights in property. Such orders serve a public policy objective which would be undermined if applications could not be made *ex parte* and *in camera.*

1.2 CIVIL FORFEITURE OF THE INSTRUMENTALITIES OF CRIME

South Africa

NDPP v RO Cook Properties (Pty) Ltd and others [2004]

The Court's Decision

- Although forfeiture, once exacted acts as a punishment, it has other statutory objectives. Forfeiture will be constitutionally permissible if it goes no further than is necessary to further those objectives.
- Property will be an instrumentality of an offence if it plays a reasonably direct role in the commission of the offence. In a real or substantial sense the property must facilitate or make possible the commission of the offence.

Judges: Mpati DP, Scott JA , Cameron JA , Nugent JA and Lewis JA

Court/Jurisdiction	Case Reference & Citation
Supreme Court of Appeal	260/03 , 666/02 and 111/03 2004 (2) SACR 208 (SCA)

Case Summary

The court was called upon to determine whether certain property be forfeited to the State under the civil forfeiture provisions of POCA 1998. The court held that the determination was a two-stage process. First, the court had to determine whether the property was an instrumentality of the offending. Second, if it was an instrumentality, the court had to go on to determine whether the property should be excluded from any forfeiture order.

(i) Determining whether property is an instrumentality

In assessing whether property amounts to an 'instrumentality', the link between the crime committed and the property must be reasonably direct, and the employment of the property must be functional to the commission of the crime. The property must play a reasonably direct role in the commission of the offence. In a real or substantial sense the property must facilitate or make possible the commission of the offence. As the term 'instrumentality' itself suggests, the property must be instrumental in, and not merely incidental to, the commission of the offence. Otherwise there is no rational connection between the deprivation of property and the objective of the Act. The deprivation will constitute merely an additional penalty in relation the crime.

The fact that a crime is committed at a certain location does not by itself entail that the venue is 'concerned in the commission' of the offence. Either in its nature or through the manner of its utilisation, the property must have been employed in some way to make possible or to facilitate the commission of the offence. Examples include:

(a) the cultivation of land for the production of drug crops;

(b) the appointment, arrangement, organisation, construction or furnishing of premises to enable or facilitate the commission of a crime;

(c) the fact that the particular attributes of the location are used as a lure or enticement to the victims upon whom the crime is perpetrated (such as a houseboat whose particular attractions were used to lure minors into falling prey to sexual offences).

(ii) Was the property an 'instrumentality' on the facts of the appeals?

In the first case (*RO Cook Properties (Pty)*), Kidnappings and assaults took place at the Cook Properties house. The evidence is solely that the victims were taken there and then detained and abused. The nature, location, attributes or appointment of the house itself played no distinctive role in the crimes, nor did any features of the house play a role in luring the victims there. It provided only the venue for the crimes. The court therefore concluded that the NDPP had not sufficiently discharged the burden to trigger the forfeiture provisions.

In the second case (*37 Gillespie Street)*, the NDPP alleged that drug and prostitution offences were committed on a property, which was operated as a hotel known as 'the Blenheim' at 37 Gillespie Street in the Point area of Durban. The hotel had been raided on a number of occasions and on each of the raids drugs were discovered and suspected offenders arrested. However, anyone could rent a room or rooms for any length of time. It was situated in an area where on the NDPP's own evidence drug offences are rife. Because of this (and possibly because of the rates offered), the hotel was likely to attract persons who may possess drugs. The mere fact that drug dealers may frequent the hotel did not make it 'a drug shop'. There was no evidence that the persons arrested in the various raids and searches were the same people. There was no suggestion that rooms were rented out or equipped for the purpose of drug dealing. Nor was there any evidence that the premises themselves were used to manufacture, package or distribute drugs, or that any part of the premises was adapted or equipped to facilitate drug dealing. The hotel was merely the place where drug offences were committed. It was an enterprise whose business it was to rent out rooms to the public. That it so happens that some, or even most, of the tenants were drug dealers is on the facts before us incidental to the offences alleged to have taken place on its premises. Once again, the court therefore concluded that the NDPP had not sufficiently discharged the burden to trigger the forfeiture provisions.

In the third case (*Seevnarayan*), funds were invested in false names as part of a fraud. The fraud was in the use of false names, rather than the investment of the money and therefore the money invested was not an instrumentality of the offence. A relation of indispensable causality between property and offence does not, by itself, constitute the measure of involvement necessary for making property an 'instrumentality' of the offence.

(iii) Excluding assets from forfeiture: observations on purpose and proportionality of civil forfeiture

The inter-related objectives of the forfeiture provisions include:

(a) removing incentives for crime;

(b) deterring persons from using or allowing their property to be used in crime;

(c) eliminating or incapacitating some of the means by which crime may be committed ('neutralising', as counsel put it, property that has been used and may again be used in crime);

(d) advancing the ends of justice by depriving those involved in crime of the property concerned.

Although at least (b) and (d) embody a palpably penal aspect, the statutory objectives transcend the merely penal. The pursuit of the statutory objectives cannot exceed what is constitutionally permissible. "Forfeitures that do not rationally advance the inter-related purposes of the civil forfeiture regime are unconstitutional. Deprivations going beyond those that remove incentives, deter the use of property in crime, eliminate or incapacitate the means by which crime may be committed and at the same time advance the ends of justice are, in our view, not contemplated by or permitted under the Act".

Points to Note

- This case makes important observations about the constitutionality of civil forfeiture provisions.
- The case also sets out clear guidance about when an asset might be treated as an instrumentality of an offence for the purposes of civil forfeiture.

NDPP v Engels [2004]

The Court's Decision

- The evidence in support of civil forfeiture applications need not be limited to the evidence relating to the offences directly connected to the arrest of a person. Further instances of alleged offending may lend weight to the prosecution authority's assertion that the assets are an instrumentality of offending and should not simply be excluded as irrelevant "similar fact" evidence.
- Whilst the prosecution authority had failed to definitively identify the offence underlying the offending, no relevant offence would have cause either party's case to be put any differently and so prejudice was occasioned on the facts of the case.
- The assets subject to the order were instrumentalities of illegal fishing activities and so were to be forfeited.

Judge: BM Griesel J.

Court/Jurisdiction	Case Reference & Citation
The High Court of South Africa (Cape of Good Hope Provincial Division)	2167/2003 (31 August 2004)

Case Summary

The Respondent was the owner and skipper of a fishing vessel. In January 2004, 96 abalone were found in a hidden compartment of his vessel. The vessel when being towed on a trailer attached to a Toyota Landcruiser when it was stopped by police. The Respondent did not have a permit for harvesting abalone and so he was arrested "on suspicion of being in possession and transportation of abalone". Whilst the trial was pending before the Cape Town magistrate's court, the NDPP applied for forfeiture of the fishing vessel, trailer and Toyota Landcruiser (along with some other property, including diving equipment) as instrumentalities of "*an* offence referred to in Schedule 1" of the Prevention of Organised Crime Act. In support of the forfeiture application, the NDPP relied upon the affidavit of a man whose role was to

transport the boat for the Respondent. His affidavit referred to the illegal harvesting of abalone taking place over the period of the whole year for which he had worked for the Respondent.

(i) Drawing an inference from repeated alleged acts of criminality

The Respondent contended that the application for forfeiture should be struck out because it sought to rely upon "similar fact" evidence going beyond the events that took place around the tie of the Respondent's arrest. The Court held that this argument was misconceived. The case for forfeiture was not dependent solely on the events that took place around the time of the arrest. Rather, "it is based on the allegation that the property in question is an instrumentality of an offence, as contemplated by the Act. In order to prove this point, the NDPP cannot be confined to an isolated incident of criminal conduct; on the contrary, the more such incidents that can be established, the more easily the inference may be drawn that the property in question is indeed an instrumentality of an offence" [13].

(ii) the substantive questions to be addressed

The court identified four questions to be addressed. First, on which offence(s) did the NDPP rely? Second, were those offence(s) referred to in Schedule 1 to the Act? Third, was the property sought to be forfeited an instrumentality of such offence(s), as contemplated by the Act? Fourth, if so, had the respondent established a defence to the application?

Question one: On which offences did the NDPP rely?

The NDPP had not been clear about precisely which offences were relied upon and had changed position on different occasions. Although there was a clear judicial statement in *NDPP v RO Cook Properties (Pty) Ltd* (above) that "the property owner must be told clearly what scheduled offence[s] the NDPP relies upon to establish forfeiture", in this instance the misdescription of the offences caused no prejudice to the Respondent. "*Prima facie* the actions of the crew of the boat in question, as described by the NDPP in the founding papers in the preservation application, cover a number of different offences under the MLRA and the regulations. The defence raised by the respondent does not relate to the substantive requirements of any specific offence; it is

simply an *alibi*. That defence, and hence the arguments presented on behalf of the respondent in support thereof, would not have been any different, were the offence relied on by the NDPP to be changed" [28]. Therefore, the NDPP could rely upon any offences disclosed by the evidence.

Question two: Were the offences within Schedule 1 of the Act?

After careful consideration of the offences, the Judge found that they did fall within the ambit of Schedule 1.

Question three: Was the property sought to be forfeited an instrumentality of such offence(s), as contemplated by the Act?

It was conceded that some smaller property, such as diving equipment, fell within the ambit of the term 'instrumentality'. However, it was argued that the boat, trailer and motor vehicle could not be classified as instrumentalities. The Court disagreed. It found that all three assets had played a "direct role in the commission of the offences and, in a real or substantial sense, facilitated or made possible the commission of such offences".

Question four: Had the respondent established a defence to the application?

The Respondent sought to invoke the "innocent owner" defence, namely that he had obtained the property legally and that he neither knew or had reasonable grounds to suspect that the property had been an instrumentality of an offence. The court rejected this assertion. There was uncontradicted evidence that the Respondent was on board the boat on the night before his arrest and that he must have known or participated in the illegal activities that night. Forfeiture was therefore ordered as sought.

Points to Note

- This case provides a good example of a clear and systematic approach to civil forfeiture proceedings.
- It also emphasises the importance of clear identification of the offence(s) alleged to have been committed. On the facts of the case it was fortunate that the nature of the charge would have made no material difference to the case and therefore no prejudice was occasioned.

- The case also emphasises that the evidence in support of civil forfeiture applications need not be limited to the evidence relating to the offences directly connected to the arrest of a person. Further instances of alleged offending may lend weight to the prosecution authority's assertion that the assets are an instrumentality of offending and should not be excluded as irrelevant "similar fact" evidence.

Prophet v NDPP [2005]

The Court's Decision
• Property that was integral to the manufacture of drugs was an instrumentality of offending. • It will only be appropriate to exclude property from a forfeiture order if any effect of the forfeiture would be "significantly disproportionate".

Judges: Mpati DP, Streicher, Mthiyane, Cloete and Ponnan JJA.

Court/Jurisdiction	Case Reference & Citation
Supreme Court of Appeal	502/04 [2006] 1 All SA 212 (SCA)

Case Summary

The issue on appeal was whether the Appellant's dwelling house in Cape Town be forfeited to the State as an instrumentality of drug offending.

(i) Was the property an instrumentality?

Building on *NDPP v RO Cook Properties (Pty) and others* (above), the court drew upon the United States case of *Chandler* (*36 F 3d 358 (1994)*) and held that the following factors are useful in measuring the strength and extent of the nexus between the property sought to be forfeited and the offence:

(a) Whether the use of the property in the offence was deliberate and planned or merely incidental and fortuitous;

(b) Whether the property was important to the success of the illegal activity;

(c) The time duration for which the property was illegally used and the spatial extent of its use;

(d) Whether its illegal use was an isolated event or had been repeated; and

(e) Whether the purpose of acquiring, maintaining or using the property was to carry out the offence.

No single factor no one factor is dispositive. A court must be able to conclude, after considering the totality of the circumstances, that the property was "a substantial and meaningful instrumentality" in the commission of the offence(s).

On the facts, the property, although used by the appellant as his home, was adapted and equipped (by the fitting of an extractor fan and other laboratory paraphernalia) to unlawfully manufacture drugs from chemical substances. Its use was deliberate and planned and important to the success of the illegal activities, which could not be conducted openly. So far as the spatial use of the house is concerned, almost the entire house was used either to store chemicals and equipment necessary for the manufacturing process or to manufacture scheduled substances and drugs, particularly methamphetamine.

(ii) Should the property be forfeited?

In weighing up proportionality, the court addressed the standard to be applied: "the introduction of the forfeiture procedures by the Act was brought about because of the realisation, by the Legislature, that there was rapid growth, both nationally and internationally, of organised criminal activity and the desire to combat these criminal activities by, *inter alia*, depriving those who use property for the commission of an offence of such property. The consequences may be harsh, but as Willis J said in *NDPP v Cole* forfeiture may play an important role in the prevention and punishment of drug offences. Courts should thus guard against the danger of frustrating the law-maker's purpose for introducing the forfeiture procedure in the Act. A mere sense of

disproportionality should not lead to a refusal of the order sought. To ensure that the purpose of the law is not undermined, a standard of "significant disproportionality" ought to be applied for a court to hold that a deprivation of property is "arbitrary" and thus unconstitutional, and consequently refuse to grant a forfeiture order" [37].

In the current case, forfeiture would not be disproportionate:

(a) drug trafficking and drug abuse are a scourge in any society and are viewed in a very serious light;

(b) Although the appellant will be deprived of his home if the forfeiture order is not set aside, "those will be the consequences of his own choice: to use his home in the commission of a very serious criminal transgression. And to conduct such criminal activities in a residential area I consider to be a factor in aggravation".

(c) Although unemployed, the appellant received income from a rental property every month. The forfeiture would therefore not render him destitute.

Points to Note

- This case builds upon *NDPP v RO Cook Properties (Pty) Ltd* (above) in providing further guidance about what might amount to an 'instrumentality' for the purposes of civil forfeiture proceedings.

- The case also provided some guidance about the degree of scrutiny to be applied to the issue of disproportionality. It is of note that in the case of *Kumanarth Mohunram and Shelgate Investments v NDPP [2007]* (below) Van Heerden AJ sitting in the Constitutional Court sought to move away from the notion of 'significant disproportionality'. However, the majority declined to rule on the point.

Kumanarth Mohunram and Shelgate Investments v NDPP (and others) [2007]

The Court's Decision

- Although the principal Act authorizing civil forfeiture is named the 'Prevention of Organised Crime Act', the ambit of the forfeiture provisions extends to all cases involving offences listed in the schedule to the Act, not just to those involving organized crime.
- When the offences do not have a clear connection with organized crime, the court must determine whether the exercise of the extraordinary forfeiture powers under POCA is necessary in weighing up the proportionality of any forfeiture.
- On the facts of the case, forfeiture would be disproportionate.

Judges: Van Heerden AJ (with whom Langa CJ, Majala CJ; Van Der Westhuizen J and Yacoob J concurred); Moseneke DCJ (with whom Mokgoro J and Nkabinde J concurred); Sachs J (with whom Kondile Aj and O'Regan J concurred).

Court/Jurisdiction	Case Reference & Citation
Constitutional Court of South Africa	CCT 19/06 [2007] ZACC 4

Case Summary

Mr Mohunram was in sole control of a company known as Shelgate Investments CC. He partitioned a building and ran a legitimate glass and aluminium business from one part. In the other part of the building he ran a casino, in contravention of the KwaZulu Natal Gambling Act, which required that such a casino be licensed. The Constitutional Court was called upon to determine the validity of an order that the building from which the court was run be forfeited.

(i) Was the property used as a casino an 'instrumentality' of the offending?

It was contended that the criminality in question was gaming without a valid licence, and that the property was not integral to the commission of the offence. The court rejected this submission.

First, the criminality in question related to the use of *premises* for gaming without a licence. Therefore the use of the property was integral to the commission of the offences. It was not possible to commit the offences without using the property. Using the language of *Cook Properties* (above), the property was "employed…to make possible or facilitate the commission of the offence".

Second, using the language adopted in the *Prophet* case, the property had been "appointed, arranged, organised, furnished and adapted or equipped to enable or facilitate the applicant's illegal activities". The property had been partitioned for use as a casino, the windows had been tinted, gambling machines had been installed and a cashier's booth had been constructed.

Third, the property was used to commit a series of offences over an extended period of time. In accordance with the case of *Engels* "the more such incidents that can be established, the more easily the inference may be drawn that the property in question is indeed an instrumentality of an offence.

It was also contended that property could only be an instrumentality of an offence if it was property that was inherently tainted by criminality and could not be used for any lawful purpose. The court rejected this submission. To hold otherwise would mean that any item of property that might notionally be used for lawful purposes would not be subject to forfeiture, even if it had in fact been used for unlawful purposes. This would give rise to "glaring absurdities" and would "totally undermine the purpose of the act".

(ii) Ambit of mandatory forfeiture of the instrumentalities of offences – organised crime or all cases?

Under s50 of the Prevention of Organised Crime Act 2001 ('POCA'), the instrumentalities of offences listed in Schedule 1 of the POCA *shall* be made subject to a forfeiture order. It was argued that whilst this includes 'any offence…dealing with gambling', POCA has a very specific purpose, namely to tackle organised crime. Therefore, the schedule 1 offence must be connected with organised criminality through racketeering, money laundering or criminal gang activities. It was contended that this was supported by the mandatory wording of s50. It was argued that proportionality of interference

with property rights through obligatory forfeiture could only be ensured if the offences were particularly harmful to society, as would be the case with organised crime offences.

The court rejected this submission. The forfeiture provisions of POCA must have an application beyond those offences 'created' by POCA in connection with organised crime because they apply to criminality that may have occurred prior to the commencement of the Act (s1(5) POCA). This conclusion had been supported by two other Supreme Court of Appeal decisions on POCA (*NDPP v RO Cook Properties (Pty) Ltd* (see above) and *NDPP v Van Staden and Others*. It was also supported by the amended preamble to POCA, which stated in clear terms that "no person should benefit from the fruits of unlawful activities", removing the previous reference to the "fruits of organised crime". No express challenge had been raised to the constitutionality of the amended wording of POCA, and so the court declined to rule on whether proportionality required that obligatory forfeiture be limited only to the most serious cases involving 'organised crime'.

(iii) What is the "standard of proportionality"?

In weighing up whether a forfeiture order would be proportionate, the majority held that, although POCA could extend to offences beyond those connected with organised crime, POCA's primary purpose was to tackle organised crime. The more remote the offence is to tackling organised crime, the more likely it is that the forfeiture of the instrumentality would be disproportionate. When ordinary crime is in issue the sharp question should be asked whether it is a crime that renders conventional criminal penalties inadequate". The court should consider:

(a) Is it a crime that requires extraordinary measures for its detection, prosecution and prevention?

(b) Is it a crime that warrants the extraordinary measures akin to those appropriate to organised crime as envisaged in POCA?

(c) Is it a crime that has some rational link, however tenuous, with racketeering, money laundering and criminal gang activities?

If the answer to those questions is no, this would be an important indication that forfeiture may be disproportionate.

(iv) Was forfeiture disproportionate in this case?

The majority found that forfeiture was disproportionate. First, no link had been shown between the offence that the instrumentality served and the purpose of POCA. Although the offence was serious, there was no connection to organised crime. The motive, instead, was personal greed. Second, the order would serve as an additional punishment, and may well affect innocent people who work in the business in the other part of the sub-divided premises. Third, forfeiture of the sub-divided property would be almost impossible.

(v) Interaction of POCA with other forfeiture powers.

The KZN Gambling Act, under which the defendant was convicted, provided for forfeiture of the assets immediately connected with the illegal gambling activities Such assets included (amongst other things) money, and gaming equipment. It was contended that, in light of these specific forfeiture provisions, POCA could not have been intended to apply to proceedings under the KZN Gambling Act. Moseneke DCJ declined to make a determination on the point. Van Heerden AJ rejected the submission. First, the provisions under the KZN Gambling Act were a criminal sanction, whereas proceedings under POCA are civil. Second, the KZN Gambling Act was concerned with forfeiture of the immediate means of the offence (for example casino chips), whereas in appropriate cases POCA has a much wider definition of 'instrumentality'. This can include property (such as a house or a property) which is shown to be involved in the commission of the offence. The two statutes serve different purposes and operate concurrently. In order to ensure the proportionality of such concurrent regimes, any civil forfeiture order under POCA must take account of any criminal forfeiture order already made.

Point to Note

- This case provides thorough guidance about when it may be disproportionate to order the forfeiture of an instrumentality of offending. Prosecutors should be alive to such considerations when determining whether it would be appropriate to pursue a forfeiture application.

Van der Burg v NDPP [2012]

The Court's Decision

- Property used for the illegal sale of liquor was ordered to be forfeited.
- The forfeiture was proportionate in light of repeated police action, which had had no effect, and the impact of the illegal sale of liquor on the area surrounding the property.
- A forfeiture of property would not necessarily result in eviction from the property, the two enquiries were different.
- The court must take the best interests of children into consideration when determining the proportionality of forfeiture.
- The best interests of children may also require further and separate consideration, for example child welfare and protection issues may arise.

Judges: Van der Westhuizen J (Mogoeng CJ, Yacoob ADCJ, Cameron J, Froneman J, Jafta J, Khampepe J, Maya AJ, Nkabinde J, Skweyiya J and Zondo AJ concurring).

Court/Jurisdiction	Case Reference & Citation
Constitutional Court of South Africa	CCT 75/11 [2012] ZACC 12

Case Summary

The Applicants were a married couple with four children, three of whom were minors. In 2000 the Applicants purchased a property in a residential area in Cape Town as a family home. Since its purchase it was used not also as a home but also extensively used as a 'shebeen' (an unlicensed liquor outlet). The main house, its bedrooms and passage were used to store liquor. Liquor was ordered from and served in the main house and a wooden structure attached to the side of the house was used as a service, sale and consumption area.

Neighbours had repeatedly complained about the effects of the shebeen on their children and neighbourhood. Drunken behaviour, including fighting, public urination and the use of vulgar and abusive language, was

commonplace. There had been more than 50 police actions on the property, including 18 arrests. The applicants had themselves been arrested. The police gave oral and written warnings to the applicants on numerous occasions to cease the unlawful selling of liquor. In addition to these arrests and warnings, the police have seized vast amounts of liquor from the premises, on various occasions. These police interventions have not stopped the criminal activity, in which the applicants seemed to persist "because of its profitability".

As a result of these unsuccessful efforts the NDPP brought an application before the High Court for forfeiture of the property as an instrumentality of the crime of selling liquor without a licence. A single Judge of the High Court granted the application, and an appeal to the Full Court was dismissed. The applicants sought leave to appeal to the Constitutional Court.

Proportionality

It was contended (amongst other things) that the forfeiture order was disproportionate. Three arguments were put forward. First, that the forfeiture provisions were used abusively or to "top up" the ordinary criminal law enforcement mechanisms , contrary to the rationale and objectives of POCA. Second, that forfeiture was a highly serious measure when compared with the criminality. Third, that possible homelessness of the applicants and their children and possible illegal conviction were all relevant to determining the proportionality of forfeiture.

(i) Abusive use of the forfeiture provisions?

POCA was not being used whimsically (or as a "top up") to punish the applicants for activities which the ordinary criminal law mechanisms were readily capable of curtailing. The evidence of all the arrests, admissions of guilt, seizures of liquor and preservation order did not show a failure to employ ordinary criminal law instruments, but rather that the continuation of the criminal conduct was more profitable, even with the sanctions imposed, than ceasing to engage in criminal conduct. In other words, "crime pays". The forfeiture was sought as a last resort to put an end to the criminality by removing the main instrument used in its commission. This is not an abuse of POCA or the criminal justice system and does not offend the Constitution.

(ii) Weighing up the seriousness of offending v seriousness of forfeiture.

The applicants had used the property for their business of crime for more than six years. Conventional law enforcement strategies including almost 60 instances of police action have failed to deter them. The forfeiture was aimed at crippling or terminating the criminal activity, not at achieving a punitive consequence. It is a good example of what forfeiture in POCA is aimed at achieving by targeting the instrumentality of crime. Whilst the offence was not the most serious, when compared to murder or rape, and whilst the consequences might not be the same as that of selling drugs, very significant harm was being caused by the applicants' conduct.

(iii) Possible homelessness and protection from eviction.

The applicants' bald allegation of homelessness was not borne out by the facts. The applicants had significant monthly income from other activities which were likely to be sufficient to lease another home while supporting their children. "In any event, the possibility of losing a home is certainly a consequence worth considering when one persistently uses it for a criminal business venture" [59].

Furthermore, in South Africa the forfeiture enquiry and enquiry in connection with the Protection from Illegal Eviction are two separate matters and should not be conflated. In the event that forfeiture is ordered, the court will consider carefully whether eviction is just and equitable in light of all relevant circumstances.

Protection of the best interests of the children.

Two matters of general application arose in the context of the best interests of the applicant's children. First, who should raise the interests of children who may be affected in forfeiture proceedings? Second, should a consideration of the interests of the children form part of the proportionality enquiry?

(i) Who must raise the children's interests?

It is expected that parents must invoke the interests of their children in proceedings like these and it is important that they do so. However, the

failure of parents to emphasise the interests of their children, or the possible manipulation of the children's situation to suit the objectives of parents, may not be held against the children. It is the duty of the court to consider the specific interests of the children. In this, officers of the court like the NDPP are expected to assist the court to the best of their ability with all relevant information at their disposal.

(ii) Does consideration of the interests of children form part of the proportionality enquiry?

Although the children's interests may adequately be resolved as part of an enquiry into proportionality, the children's interests may require specific and separate consideration. For example, there may have to be enquiry under the Children's Act in cases where there is significant potential interest between the interests of the children and those of their parents. A simple proportionality enquiry might suggest that children potentially being rendered homeless should result in non-forfeiture. However, those same children may still be subject to detriment by being raised in a property that would continue to be used as a shebeen, which "hardly seems like a proper home in which to raise children".

The court therefore ordered forfeiture of the property and ordered the NDPP to engage a designated social worker as contemplated by the Children's Act 38 of 2005 to undertake an investigation to determine whether the applicants' minor children are in need of care and protection and to recommend and take appropriate action, if necessary, in terms of that Act.

Points to Note

- This case makes important observations about the consideration of the interests of children in forfeiture cases. First, the court has a duty to consider the best interests of a child, even when not raised by the parents. Second, the best interests of the children will form part of the proportionality enquiry. Third, the interests of parents may clash with what is in the best interest of a child and therefore safeguarding the best interests of children may entail consideration of a child's interests separately from those of the parents.

- The case also emphasises that forfeiture of assets can have a deterrent effect in cases where traditional criminal law mechanisms have failed.

1.3 CIVIL FORFEITURE OF THE PROCEEDS OF CRIME

Botswana

Directorate of Public Prosecution v Kgori Capital (Pty) Ltd [2018] (Constitutionality)

The Court's Decision
• The DPP has the power to bring civil forfeiture and civil penalty applications because they are incidental to the DPP's functions in connection with tackling criminality.

Judge: Nthomiwa Nthomiwa J.

Court/Jurisdiction	Case Reference & Citation
The High Court of Botswana, held at Lobatse	UCHGB-000065-18

Case Summary

In March 2018 a restraining order was granted and an application was brought for a civil penalty order. The Respondent challenged the powers of the DPP to bring an application under the Proceeds and Instruments of Crime Act (PICA). The Respondents contended that this case differed from the case of *Nchindo*, in which the Court held that a restraining order pending a post-conviction confiscation or pecuniary penalty order was incidental to the DPP's functions in bringing criminal proceedings. It was argued that civil forfeiture or penalty applications are "autonomous, separate distinct and independent civil applications".

The court held that the DPP is the only authority that the constitution vests with the power to institute legal proceedings against criminal offenders. The powers are intended to ensure that any person who has benefited from

criminal activity pays a price by surrendering his or her ill-gotten gains to the state. “There is no other state entity that is more proximate than the DPP to bring the proceedings before the court”. The dispossession of people of the proceeds of crime was therefore found to be incidental to the powers bestowed on the DPP.

The DPP therefore had the power to bring civil applications for asset forfeiture under PICA.

Points to Note

- In this case the court extended the principle from the case of *Nchindo* and held that cases involving civil applications for crime-related asset forfeiture may be brought by the DPP.
- The court helpfully summed up the objectives of proceeds of crime legislation: “The objectives of PICA include depriving persons of property suspected to be the proceeds or instruments of crime. The said objective serves a crime control function. That is so because the commission of economic crimes is primarily motivated by the prospect of financial gain. Accordingly, taking away the financial gain will deter economic crimes. Some criminals view being imprisoned as an occupational risk worth taking so long as they keep their profits after serving their sentences. Confiscating the ill-gotten assets dissuades them from committing crime. That also reduces the impact of criminals being role models on impressionable youth as they cannot live the lavish lifestyle associated with criminal activities. Furthermore, by taking away the profits, one disturbs the funding for the commission of further crimes” [56].

DPP v Archbald Mosojane & Others [2018]

The Court's Decision

- Civil penalty and civil forfeiture orders were granted in connection with the activities of an alleged criminal syndicate, which comprised persons including officials of the Department of Lands.
- The DPP has jurisdiction to bring civil asset recovery proceedings.
- The Proceeds and Instruments of Crime Act applies retrospectively to offending that occurred prior to the commencement of the Act.
- Although in ordinary civil proceedings it is not possible to bring an action against property, it is permissible to do so in civil asset recovery proceedings.

Judge: Moroka J.

Court/Jurisdiction	Case Reference & Citation
The High Court of Botswana held at Francistown	MAHFT-000135-17 (21st November 2018)

Case Summary

The DPP applied for restraining orders pending civil penalty and/or forfeiture orders. The case arose in connection with an alleged criminal syndicate, which comprised persons including officials of the Department of Lands. The alleged aim of the syndicate was to sell land comprising residential and non-residential plots that belonged to the State for personal gain. The Proceeds and Instruments of Crime Act (PICA) came into force in 2015. The alleged acts of criminality occurred in the years 2007 to 2009.

Four employees of the Department of Lands used their positions to create a 'cloak of legitimacy' around their illegal scheme to sell State land in Francistown and Kasane. 30 properties were alleged to be the proceeds of crime, being sold illegally and involving the cheating of the government of revenue, abuse of office, corruption and fraud. The respondents in fact never disputed that the properties were the proceeds of crime. Instead, they raised a number of preliminary legal challenges.

Preliminary legal challenges

Does the DPP have locus standi to move civil applications?

The court found that DPP does have locus standi to move civil applications under PICA. "PICA is an instrument for fighting organised crime and other serious crimes. It is a criminal law based statute, which is enforced with mostly civil type actions… the applications are in pursuit of criminal investigations and possible prosecution. These fall within the realm of the DPP's mandate" [paras 56 & 58]. Furthermore, "the entity and authority charged with the enforcement of PICA is prescribed by the Act itself…There is no doubt at all… [that] it is the DPP". [para 57].

Does PICA apply to acts and omissions that occurred prior to its promulgation?

The legislature clearly intended PICA to apply irrespective of the date on which the substantive offending occurred. This is made plain by s74.

Is an application for a civil penalty order incompetent to the extent that it is brought against property and not the person?

In ordinary civil law property is not a legal person. It cannot sue or be sued in its own right. However, the law on combating the proceeds of crime has evolved, "rendering ordinary knowledge obsolete". The law specifically provides for *in rem* applications (against the thing). Such proceedings have long taken place in the USA and rest on the legal fiction that the property is guilty of an offence. Even though the proceedings are against property, PICA provides mechanisms for people who have an interest in these properties to challenge any forfeiture. Applications for forfeiture must be on notice to such interested parties, in compliance with "a sacred principle of our law, that no man should be condemned without being heard".

Was the application properly before the court given the requirement of s93 of the Deeds Act?

30 days' notice of proceedings is required to be given to the Registrar of deeds when an applicant seeks performance of any action by them. However, such notice period is not required in forfeiture cases. First, PICA prescribes a maximum period of 28 days between restraint and an application for

forfeiture. Waiting 30 days would lead to the 'absurdity' that this deadline would be missed. Second, the making of an order under PICA to deprive the defendant of their proceeds of crime does not require the Registrar of deeds to do anything. Only if the forfeiture application succeeds will it be necessary to for the Registrar of deeds to, for example, cancel deeds, cancel mortgages or transfer registration to the government.

Substantive determinations

Having considered preliminary matters, the court went on to consider whether the substantive tests for civil forfeiture orders and civil penalty orders were satisfied

Did the application meet the requirements for a civil penalty order?

On the facts of the case, the DPP had proved on the balance of probabilities that members of the syndicate had benefited financially from serious crime related activity. Accordingly, four members of the syndicate were ordered to pay, jointly and severally, the sum of BWP 1,928,199. One Chandapiwa Folwer was ordered to pay P20,000 and one Daniel Morupisi was ordered to pay BWP 107, 536.80.

Did the application meet the requirements for a civil forfeiture order?

In light of there being no challenge to the evidence and on the basis of the evidence the court found that the 30 properties represented the proceeds of crime. The court went on to consider the proportionality of the forfeiture of those properties and ordered that they be forfeit.

Points to Note

- The judgment in this case touches on the need for the Proceeds and Instruments of Crime Act 2014 (PICA), discussing how it marks a "paradigm shift" in dealing with proceeds of crime, and its place in the context of domestic criminal law and against Botswana's international obligations [paras 13 – 16].
- The judgment also provides a comprehensive overview of the different parts of the legislation [paras 17 – 39].

- The court gave an overview of the nature and purpose of a civil penalty order, and described how such orders may have harsh, but necessary consequences [paras 190 – 194]. A similar overview was provided in relation to civil forfeiture orders [paras 212 – 215]

- The court took a steer from the South Africran case law on civil forfeiture, and applied the proportionality test from the case of *Van Der Berg v NDPP.*

- The case's affirmation of the DPP's power to bring civil proceedings reflects the decision in *Lewis Goodwill Nchindo and others v The Attorney General of Botswana and the Director of Public Prosecutions of Botswana [2014]* and *Directorate of Public Prosecution v Kgori Capital (Pty) Ltd [2018].*

Namibia

The Prosecutor-General v Kanime [2013]

The Court's Decision
• The Respondent was barred from bringing an application for condonation of his failure to give written notice of his intention to oppose the making of a forfeiture order following numerous and unwarranted failures to comply with orders of the court.

Judge: Geier J

Court/Jurisdiction	Case Reference & Citation
High Court of Namibia Main Division, Windhoek	POCA 3/2012 [2013] NAHCMD 317 (24 September 2013)

Case Summary

S53 of the Prevention of Organized Crime Act No 29 of 2009 (POCA) provides that "any person who has an interest in property subject…may give notice of his or her intention to oppose the making of a forfeiture order" within a

specified 21-day period. In this case no notice of opposition had been filed within the 21-day period.

Pursuant to s60(1), the court had the power to condone the failure to make the application with that period and to grant leave for late filing of a notice of opposition. No application pursuant to s60(1) was made in advance of the forfeiture hearing, which was listed for 25th June 2013. Accordingly, the forfeiture hearing was postponed until 2nd July 2013. The 2nd July hearing was also postponed because the respondent had still taken no action. The respondent was directed, by case management order, to 'file such papers as he deems fit" by 16th July 2013. There was still material non-compliance with the order by 16th July 2013 and the matter was postponed until 23rd July 2013 for the respondent's legal representatives to show cause as to why no sanctions should be imposed. This was adjourned until September 2013, by which time there was still no application pursuant to s60(1) for condonation.

An explanation was ultimately provided, which indicated that the respondent was aware of the requirements to make an application for condonation as early as 18th June 2013. "No specific detail was provided as to what was really done and when". No lawful excuse had been shown for the defaults. The respondent had failed to take any meaningful steps to defend the forfeiture of property order and accordingly he was barred from bringing an application under s60(1) of POCA.

Points to Note

- This case provides a good example of apparent 'game playing' by parties to proceeds of crime actions who stand to lose assets. No real effort had ever been made to mount a substantive defence to the proceedings. Instead, multiple requests for postponements, which were wholly without foundation, were made.

New Africa Dimensions CC and others v the Prosecutor-General [2018]

The Court's Decision

- Forfeiture of sums in four bank accounts and of a motor vehicle as ordered by the High Court was upheld as representing the proceeds of large-scale fraud.
- Factual disputes in civil forfeiture proceedings must be resolved in accordance with principles applicable to such disputes in motion proceedings.
- A special costs order was appropriate in light of the unsupported allegations of improper conduct made by the appellants.

Judges: Shivute CJ, Mainga JA and Mokgoro AJA.

Court/Jurisdiction	Case Reference & Citation
The Supreme Court of Namibia	SA 22/2016

Case Summary

The appeal was against a judgment and order of the High Court, declaring certain property forfeited to the State under the Prevention of Organised Crime Act 29 of 2004 (POCA).

It had been alleged that the second and third appellants (Gerhard Shilongo and Eliaser Shikage) corruptly colluded with officials from the Ministry of Agriculture, Water and Forestry (the MAWF) to defraud the MAWF in relation to the procurement of goods relating to water supply. In September 2011 the Tender Board had awarded a term tender for supply of Lister engine to the MAWF for the period ending on 30 June 2012 to three companies. Whenever the MAWF required Lister engines, it had to source them from the successful tenderers. Despite this tender, the Deputy Director of Regional Support Services in the MAWF (a Mr Freyer) authorised the conclusion of an agreement between the MAWF and the first appellant (New Africa Dimensions CC), a company whose sole members were Gerhard Shilongo and Eliaser Shikage.

Gerhard Shilongo and Eliaser Shikage had been employed by the Office of the Prime Minister. Neither of them had been granted permission to perform remunerative work outside of the Public Service. 110 Lister engines were purchased from the first appellant at a cost of N$26 782,30 per engine excluding transport. Mr Freyer contended that he was in fact looking to purchase Lister engines that did not form part of the original tender.

Between February 2012 and June 2012, N$9 834 143,91 were made into New Africa Dimension's bank account. When the payments were made the goods had yet to be delivered. However, members of the MAWF certified that the goods had been delivered and certain officials in the MAWF also certified that equipment had not only been received, but that it had been taken charge of and was performing satisfactorily. Before money sourced from the MAWF was paid into New Africa Dimension's bank account, it had only N$300 in the account. Money was paid out of the New Africa Dimension account in the accounts of three companies:

(i) Kage Trading Enterprises CC, the sole member of which was Eliaser Shikage

(ii) Taleni Mult-Media Consulting CC, the sole member of which was Gerhard Shilongo; and

(iii) C Three Trading CC, the sole member of which was the Gerhard Shilongo.

A Volkswagen Golf GTI motor vehicle was also purchased from the New Africa Dimension account for N$320,000 and was registered in the name of Gerhard Shilongo.

The High Court found that, but for the fraudulent conduct that was also in breach of legal requirements in connection with tenders, New Africa Dimension would not have received the payments into its account. Accordingly the High Court ordered that the above assets be forfeit.

Approach to disputed facts

The appellants' contention that the court should apply the principles applicable to instances where different versions are given by witnesses in trial proceedings was rejected. Applications for forfeiture orders must be made

in writing and be supported by affidavit evidence, pursuant to Regulation 7 of the Prevention of Organised Crime Regulations. Factual disputes must therefore be resolved in accordance with principles applicable to disputes of fact in motion proceedings.

Were the requirements for a forfeiture order satisfied?

Taking all of the facts into consideration, a co-ordinated fraud perpetrated on the Government was the most "natural and plausible inference to be drawn". Although appellants contended that they had no knowledge of any irregularities within the MAWF, the crucial question in forfeiture applications is whether the *property* concerned is "the proceeds of unlawful activities. It matters not who was responsible for the unlawful activities" [38].

Whilst an "innocent owner" may have property excluded from a forfeiture order, no such relief was ultimately applied for, and in any event on the facts Mr Shilongo and Mr Shikage were clearly implicated in the unlawful activities.

Amount to be forfeited

The Court rejected the contention that the value of the items received in exchange for any illegal payments should be taken into consideration when calculating any sum to be forfeit. "The forfeiture order is directed at the proceeds of unlawful activities regardless of values of assets given or intended to be given in exchange".

The Court also rejected the suggestion that proportionality required that a lower sum be paid. Proportionality is accounted for through the power to exclude certain interests from the order. Such exclusions did not apply in this case.

Costs

During the case the appellants had made unsupported allegations of improper conduct on the part of the Prosecutor-General. The Supreme Court held that "the various epithets gratuitously used int the appellants' principal answering affidavit to cast aspersions on the PG and to ridicule her application such as 'malicious prosecution', 'dishonourable conduct', 'conspiracy', 'fraud', 'nonsense' or even 'foolishness' are not supported by any evidence. A special

costs order was therefore deserved. The Supreme Court also noted that "in future if similar conduct persists…courts will have to consider personal costs orders against legal practitioners".

Points to Note

- This case provides an example of large-scale fraud for financial gain, and the use of companies to perpetrate the fraud and launder its proceeds.
- The case also provides a clear warning to practitioners that 'game-playing' will not be permitted in asset forfeiture proceedings. Affidavits should be used to address the real issues in the case, rather than to cast unfounded aspersions upon prosecution authorities.

The Prosecutor-General v Standard Bank Namibia Limited [2019]

The Court's Decision

- Money to be forfeit to the state as the proceeds of fraud and money laundering (amongst other things) was subject to exclusion when the money was shown to be legally acquired for consideration and without knowledge or reasonable grounds to suspect that the property was the proceeds of unlawful activity.
- The court's function in such applications was not to determine the competing priorities of who the money should be paid to, but rather to order forfeiture or to exclude property from forfeiture.

Judge: Angula DJP

Court/Jurisdiction	Case Reference & Citation
High Court of Namibia Main Division, Windhoek	POCA 6/2017 [2019] NAHCMD 13 (1 February 2019)

Case Summary

The Prosecutor-General made an application for forfeiture of funds held in two accounts at Standard Bank Namibia. One account was a business account held in the name of Divundu Rainbow River Lodge CC, with a balance

of N$435,312.03. The second account was a personal account held in the name of a Mr de Waal, the sole member of the corporation which owned and operated the lodge. His account had a balance of N$149,987.72. It was alleged that the funds were the proceeds of money laundering, fraud and the contravention of certain statutory provisions.

In December 2016 Standard Bank received an alert about suspicious foreign credit card transactions that had been manually processed on one of its Point of Sale devices. Those transactions were made by two supposed 'travel agents' who made block accommodation bookings at the lodge between October 2016 and December 2016. It transpired that those transactions were fraudulent and not authorised by the legitimate card holders. A 'commission' payment was passed to the agents from the fraudulently obtained funds. Some of the money was transferred to Mr de Waal's personal account. When Mr de Waaal was informed of the fraudulent activity by the bank's forensic investigation unit, he went to a nearby police station and registered a criminal case.

Was the money the proceeds of crime?

The bank opposed the forfeiture application on the ground that the PG had failed to prove that the money in the account was the proceeds of unlawful activities.

The court rejected this submission. First, the bank had asked the PG for the preservation of property order. It could have simply reversed the activities if it had thought that they were legitimate funds. The bank's own fraud investigation unit had concluded that the activities that generated the money were unlawful. The bank had instituted proceedings against the Lodge and Mr de Waal to recoup its losses occasioned by the fraud. There was also clear evidence of money laundering. The so-called 'travel agents' had used the accommodation bookings to conceal the origin of the funds by creating the impression that the money had been legally acquired and causing the money to be distributed onwards.

The money was therefore the proceeds of unlawful activities and was ordered to be forfeited, subject to consideration of exclusions.

Should property be excluded from the Order?

Under s63(1) of the Prevention of Organized Crime Act, Act 29 of 2009 (POCA), a person may apply to exclude property from a forfeiture if that person proves, on the balance of probabilities, that the property was legally acquired for consideration, and that the person neither knew nor had grounds to suspect that the property in which the interest is the held is the proceeds of unlawful activities.

Exclusion of money from the lodge's account

The Lodge (and Mr de Waal's) primary submission was that any money paid into the accounts after 4th January 2017 ought to be excluded from the order. 4th January 2017 was the date for which balances were set out in the PG's founding affidavit for a property preservation order, which was granted on 21st April 2017. The court held that this argument loses sight of the definition of the proceeds of unlawful activities, which includes "property which is mingled with property that is the proceeds of unlawful activities". It therefore rejected the argument.

However, the Lodge was able to prove on the balance of probabilities that, between December 2016 and April 2017, N$112,139.91 was legally acquired for consideration. This comprised money for accommodation and services such as food.

Exclusion of money from Mr de Waal's account

Mr de Waal asked for exclusion from the forfeiture order of money obtained after the date on which the preservation order was granted. The PG and the court concurred. The court ruled that "the Court has no jurisdiction over money received into the account after the preservation order was granted". Accordingly, the Court found that N$59,054.88 "insofar as it may be necessary" was liable to exclusion from the operation of the order.

Mr de Waal also asked for exclusion of money paid into his personal account that was outside of the money traced from the fraudulent transactions. Mr de Waal contended that the sum was "his money" and therefore ought to be released to him. The court found that this bare assertion did not satisfy the

requirements of s63(1). It was therefore declared forfeited to the State as the proceeds of unlawful activities.

Exclusion of money in favour of the Bank

The bank contended that it had an interest in the money, because the bank had been required to reimburse legitimate card holders for the money that had been obtained by fraud. Its interest in the money in the account had been for consideration, namely the reimbursement that it had been required to make to the legitimate card holders. The PG and the court accepted these assertions.

The bank also contended that it neither knew nor had reasonable grounds to suspect that the money was the proceeds of unlawful activities. The PG disputed this, but the Court found in favour of the bank. The Court held that "logically, the bank would not have credited the lodge's accounts if it had known that the transactions were fraudulently made. Such credit would be to the bank's detriment. The Court found that it was "inconceivable" that the bank would have knowingly acted against its own interests. The money representing its interest was therefore excluded from the operation of the order.

Conflicting claims

The court found that its statutory function under POCA was to determine whether property is to be forfeited or excluded from an order. It had had no power or jurisdiction over who the property should be released to in whom the property vests when there are competing interests in the property.

Points to Note

- This case explored issues arising from claims arising to exclude assets from forfeiture orders. The court paid close attention to the statutory test.

South Africa

NDPP v Salie and another [2014]

The Court's Decision

- Property acquired or retained through the running of brothels was ordered to be forfeited to the State.

Judge: A Breitenbach AJ.

Court/Jurisdiction	Case Reference & Citation
The High Court of South Africa (Western Cape Division, Cape Town)	384/2012 (26 March 2014) [2014] 2 All SA 688 (WCC)

Case Summary

The Respondents were mother and daughter. The NDPP made an application for the forfeiture of property that was allegedly obtained by keeping a brothel and living off its earnings, contrary to the Sexual Offences Act 23 of 1957.

Involvement with criminality

Police had raided 3 premises run by the Respondents. The respondents admitted running the massage businesses since 2006. Although at first it was admitted that it was known that the massage parlours were being used for sexual services, this was later denied. The court found that the later denial was as a result of a realisation that the Respondents had made a "tactical blunder" in effectively admitting that they had been running three brothels and living off the proceeds. It found that the Respondents' later version of events was untenable.

Assets derived from criminality

One property, in Broad Road, Cape Town, was obtained in 2004. A Rav-4 motor vehicle was obtained in 2005. Although this was before the commencement of the massage business in 2006, substantial payments were made to service loans on those assets until 2009.

The second property, in Perth Road, Cape Town, was obtained in 2007 and monthly repayments were made on the mortgage until October 2010. The third property, in Cuckoo Street, Cape Town, was obtained in early 2010 and its mortgage paid each month.

The court found that there was no evidence that, from 2006 onwards, neither of the respondents had any income from legitimate sources with which to service the loans they had taken to acquire the three premises and a motor vehicle, and consequently the money they used to make the necessary repayments emanated from the three brothel businesses. As such, the properties were the proceeds of unlawful activities.

Proportionality

The court applied the considerations in *Shaik* in assessing proportionality. In addition, the court considered the use to which the property was put. In considering all of the circumstances:

(a) The offending in this case was serious, with potential imprisonment for three years. However, there was an absence of aggravating factors and a range of notable mitigating factors. The brothels were "established, tidy and well-run places with no violent abuse of the prostitutes, no pimps, no compulsion, no trafficking in persons for sexual purposes no child prostitution, no drugs on the premises and no connection with other crimes. Care was taken to protect the women against sexually transmitted diseases". There was no evidence of public nuisance

(b) The offending was in close proximity to the types of organised criminality that POCA was intended to tackle. The Respondents were arguably conducting an enterprise through a pattern of racketeering activity, as defined in POCA.

(c) Although none of the property was derived directly from the commission of the offences, all of it comprised assets which the respondents were able to retain – ie keep from being sold to satisfy their debts to the financial institutions from which they had borrowed to acquire the assets – using money which they had made from

the commission of the offences. There was, therefore, a relatively close connection between the property and the commission of the offences.

(d) The total value of the respondents' interest in the property (R954 077) was less than the proven brothel income (R1 605 055,50) and the proven total brothel income is a significant percentage (58%) of the total value of the property (R2 763 900). As a result, this was not a where the forfeiture to the State of the whole of the property would be disproportionate when viewed in monetary terms

(e) Before the property was placed under the control of the *curator bonis* all of it was being used by or for the benefit of the respondents.

Having weighed up these factors, the court ordered forfeiture of all of the relevant property.

Points to Note

- This case is a good example of the application of criteria in the determination of whether it is proportionate to order forfeiture of assets. Although the criteria were largely derived from a case involving a post-conviction confiscation or 'pecuniary penalty' case (*Shaik [2008] ZACC 7*), those principles are equally applicable here.

2. OTHER CIVIL ACTIONS TO RECOVER OF THE PROCEEDS OF CRIME

2.1 UNEXPLAINED WEALTH ORDERS

Kenya

Kenya Anti-Corruption Commission v James Mawthethe Mulewa and Another [2017]

The Court's Decision

- Kshs. 11,000,000 representing the value of immovable properties and Kshs. 63,683,794 representing bank deposits were unexplained wealth that should be forfeited to the Government.

Judge: E.K.O. Ogola

Court/Jurisdiction	Case Reference & Citation
High Court of Kenya Mombasa	Civil Suit No. 93 of 2011

Case Summary

Between 2008 and 2010 the first Defendant was the managing director of the Kenya Ports Authority. His employment was terminated due to alleged irregularities in the recruitment of staff, involvement in corrupt practices in the management and award of tenders, and mismanagement of the authority's funds. During his employment he earned a gross salary of Kshs. 1,050,000. However, during that time he made deposits of Kshs 41,290,000 in cash and Kshs. 24,601,274 in cheques into various bank accounts (excluding his salary). He also acquired properties in his name and in the name of his son.

The first Defendant denied that the funds were illegitimate, claiming that he had been involved in the real estate business and had acquired some fo the properties from as early as 1984 and also that he was involved in other small and medium sized enterprises. He staetd that he is the beneficiary of his late

father's estate, which includes a ranch that is over 300 acres. He further stated that the daily deposits made into his accounts were from the sale of cattle at his family ranch. The court found that:

(i) With regards to the bank deposits, the respondent failed to respond to the statutory notice sent to him in, requiring him to account for the deposits. The effect of this failure was that the court had no option but to believe the evidence tendered by the Plaintiff and to treat the total of Kshs. 63,683,794 as unexplained wealth.

(ii) The first Defendant had provided detailed evidence about the acquisition of certain properties and so the court was in no doubt that they had been acquired legitimately. However, no explanation was offered with regards to certain other properties and therefore the value of the properties (Kshs 11,000,000) was treated as unexplained wealth.

The Court therefore ordered that these sums be paid to the Government of Kenya.

Kenya Anti-Corruption Commission v Stanely Mombo Amuti [2017]

The Court's Decision
• Kshs 41,208,000/- ordered to be forfeited, representing money for no legitimate explanation had been provided.

Judge: L.A. Achode

Court/Jurisdiction	Case Reference & Citation
High Court of Kenya at Nairobi (Anti-Corruption and Economic Crimes Division)	ACEC Misc. No 5 of 2016 (formerly HCCS No. 448 of 2008) (23rd November 2017)

Case Summary

Under s 55 of the the Anti-Corruption and Economic Crime Act 2003, if the High Court is satisfied on the balance of probabilities that a defendant has 'unexplained assets', the defendant must then satisfy the court that the assets

were acquired otherwise than as a result of corrupt conduct. 'Unexplained assets' are defined as assets of a person:

(a) Acquired at or around the time the person was reasonably suspected of corruption or economic crime; and

(b) Whose value is disproportionate to his known sources of income at or around that time and for which there is no satisfactory explanation.

The defendant was a long serving civil servant who had worked in various ministries and departments for over 25 years. In July 2008 the Anti-Corruption Commission ('ACC') wrote to the defendant informing him that his various assets located in different parts of Kenya were estimated to be worth millions of shillings and were disproportionate to his salary. His declaration forms had indicated that his salary was his only source of income

He was asked to account for cash, cheque deposits and account balances, as well as assets including landed properties and motor vehicles, acquired between 1992 and 2008.

The defendant contended that he had earned money through working in public and private institutions in senior capacities for 25 years. He had invested in properties, which he disposed of from tie to time. He had also been nominated by his family members to manage the estate of his late father, and that of his late brother. Those estates were sold and he was entrusted in investing the proceeds and providing for his brother's children. He asserted that the ACC had manipulated records and figures from his bank accounts and used them to destroy his career and reputation in the name of fighting corruption.

The court examined carefully whether the ACC had satisfied the burden of proving that the defendant had 'unexplained assets', and if so, whether the defendant could show on the balance of probabilities that the asset was obtained by conduct other than corruption.

(i) As to properties, the parties agreed that the defendant had satisfactorily explained the source of funding for some of the properties. The ACC had not satisfied the burden of showing that the remaining properties could not have been purchased from legitimate income.

(ii) As to vehicles, some vehicles were purchased prior to the period under investigation, and therefore fell outside of the suit. There was insufficient evidence produced to trace funding to particular cars. It was therefore unclear whether the assets would have fallen within the ambit of 'unexplained assets'.

(iii) As to balances in bank accounts, the court could not be satisfied about the amount deposited in the accounts. There was a dispute between the parties, which needed to be resolved by a person with professional and technical accounting knowledge, such as a forensic auditor or bank official.

Therefore, the Court did not include these assets as assets to be forfeit as having derived from unexplained wealth. The court went on to consider other assets:

(i) As to advances from friends and family, the defendant produced no evidence (documentary or witness evidence) in this regard. In particular, Kshs 9,500,000 was said to have been advanced by a Samuel Gitonga, who did not give evidence.

(ii) As to payments for professional accounting services rendered by the defendant, he contended that he had earned Kshs 15.5 million from a Sudanese national. No evidence was produced in support. The judge found that "he would have to have served a very large corporate body for a considerable time or work to earn such an amount". The name of the company or person was not provided, nor were details about the actual services provided or the fee notes raised. It was unclear why the said fees were "paid in tranches of Kshs 100,000/= via ATM over a period of days".

(iii) As to deposits from community funds, the defendant told the court that he had collected Kshs 1 million through fund raising for the purposes of electricity installation on behalf of his community in his village. The judge noted that "one would expect there would some sort of committee to oversee such a noble idea or that even the area chief or sub-chief would lend credence to such assertion…however…not a single witness testified in support of the said project…he did not supply

any documentation from Kenya Power and Lighting Corporation for such a project".

(iv) Funds from sale of property. Deposits by two individuals amounted to some Kshs 10,900,000/=. The defendant contended that this money represented funds from the sale of property. The court rejected this assertion. The two individuals were awarded corporate tenders by the corporation for which the Defendant worked as Finance Manager. No transaction documents were produced to support the proposition that the funds were derived from the sale of property, nor was oral evidence given.

(v) As to Kshs 4,308,000 seized from the Defendant's property, whilst the defendant explained the intended use of the money, he did not explain the source.

The court therefore found that these sums were of a value that was disproportionate to the defendant's known income and for which there was no satisfactory explanation. Accordingly, those sums (totalling Kshs 41,208,000/-) were ordered to be forfeited.

Points to Note

- This case demonstrates some of the difficulties that arise in satisfying the burden of proving that there assets are disproportionate to income, or that there is no satisfactory explanation for the assets.
- It is important, wherever possible, to trace money into a particular asset to demonstrate that the asset is derived from unexplained wealth, rather than from legitimate income.
- The professional expertise of a person conducting a tracing or forensic accounting exercise must be established to the satisfaction of the court, otherwise there is a high likelihood that a defendant will be afforded the benefit of the doubt.
- In ordering the forfeiture of assets, the court focussed on the lack of audit trail or other supporting evidence produced by the defendant

to support his case. Prosecutors should always be alive to this and be ready to use the absence of evidence, which as a matter of common sense should have been available, to support the case for forfeiture based on unexplained wealth.

2.2 CIVIL ACTIONS TO RECOVER LAND

Kenya

Kipsigoi Investments Ltd v Kenya Anti-Corruption Commission [2013]

The Court's Decision
• The decision to strike out a defence to an action to cancel title to property obtained illegally and by fraudulent conduct was upheld.

Judge: Karanja, Ouko and Gatembu, JJ.A

Court/Jurisdiction	Case Reference & Citation
Court of Appeal at Eldoret	Civil Appeal No. 288 of 2010 (15th May 2013)

Case Summary

The Respondents brought proceedings against the Appellant for the cancellation of the Appellant's title to property. The High Court struck out the Appellant's defence and entered judgment in favour of the Respondents. The Appellant appealed against the High Court's decision. The Respondent's case was predicated on the grounds that:

(i) The property was government land that had been reserved for public utility as open space and was not available for alienation;

(ii) The Appellant acquired the property unlawfully and fraudulently through abuse of office by a Joseph Arap Letting, who was the Permanent Secretary in the Office of the President, Secretary to the Cabinet and Head of Public Service.

(iii) In 1987, the Commissioner of Lands (the 1st defendant in the High Court) had granted a lease for commercial purposes over the property, purportedly by order of the President of the Republic of Kenya.

(iv) The transfer was illegal and fraudulent because the Commissioner of Lands:

(a) purported to exercise powers that he did not possess;

(b) purported to allocate land that was not available for alienation;

(c) failed to have regard to planning legislation and public interest in alienating such property.

The Court of Appeal upheld the decision of the High Court. There was uncontested material before the High Court that, as early as 1974, the land had been planned as "public open space". It was allocated to the County Council of Wareng for offices. As land that had been allotted the land was alienated and the subsequent purported allocation by the Commissioner of Lands was therefore irregular.

Points to Note

- This case is a good example of efforts to take the proceeds long after illegality by government officials, demonstrating that those who profit from crime will have nowhere to hide, even long into the future.

Kenya Anti-Corruption Commission v Sammy Silas Komen Mwaita (and another) [2016]

The Court's Decision

- Registration of land was rendered null and void when title to the land was obtained pursuant to a corrupt agreement between the purported owner and his brother, the Commissioner for Lands.

Judge: Maureen A. Odero

Court/Jurisdiction	Case Reference & Citation
High Court of Kenya at Nakuru	Civil Suit No. 43 of 2008 (7th April 2016)

Case Summary

The first defendant and second defendants were brothers. The second defendant applied to the Commissioner for Lands for allocation to him of a plot of what he contended was land being used as a temporary camp site. This was, in itself, a fraudulent statement. There were clearly permanent government houses on the land at the time.

The first defendant allocated the land to his brother. However, the allocation was fraudulently backdated to appear as if the allocation had been done by the first defendant's predecessor. No written authority had been obtained from the President to alienate the land had been granted and no valuation of the land had been carried out.

Furthermore, the suit land was public land, and had been reserved to the Survey Department in 1957 and 1963. Once land had been reserved for a particular purpose, it was not available for alienation.

The court held that: "the 1st defendant abused his office in order to benefit his brother of land which was not available for alienation. He breached the trust bestowed upon him by Kenyans by alienating public land…due process was not followed in the alienation of the suit land. Even if the 2nd defendant was the first registered owner, the said registration is irregular. The 2nd defendant participated in fraud." The allocation was declared null and void, registration of the land was cancelled and the defendants were permanently enjoined from interfering with possession of the land.

Points to Note

- This case builds upon the decision in *Kipsirgoi Investments Ltd v Kenya Anti-Corruption Commission [2013]* (above), again emphasising how effective civil suits can be in depriving a person of illegally obtained land.

- Of particular note is its reinforcement that such actions can be brought long after any fraud or corruption occurred. The Court stated in terms that "in cases such as this, more often than not, it takes a long period before the illegal acts are discovered and it would be against public interest if the Government's hands were tied in the recovery of public property."

Chemey Investment Ltd v Attorney General (and others) [2018]

The Court's Decision
• Land was obtained through fraud and other illegality and therefore the appellants had been properly divested of title to and possession of the land.

Judge: Makhandia, Gatembu and M'Inoti, JJ.A

Court/Jurisdiction	Case Reference & Citation
The Court of Appeal at Nairobi	Civil Appeal No 349 of 2012 (26th January 2018)

Case Summary

Prior to May 1995 the property in question was government property. Public buildings on the land served as stores for primary school books and milk, and municipality offices for departments responsible for Value Added Tax, manpower and employment. Between 1995 and 1998 the property was subject to a quick succession of transfers that saw it change hands from the Government to the private sector, before ultimately being registered in the name of the Appellant in May 1998. Shops were developed on the land at a cost of Kshs 3,000,000, which were rented out to the public. However, in March 2003 the Government, contending that the purported allotment, and eventual sale and transfer of the property to the appellant was fraudulent, illegal, null and void, repossessed the property and put the Usain Gishu District Hospital in possession, where it operates to date.

In January 2005 the appellant took an out an originating summons against the Attorney General and the Permanent Secretary for Health, seeking

declarations that it was the lawfully registered proprietor of the property, that its eviction therefrom was unconstitutional, null and void and an order restoring it into possession.

The KACC was jointed as an interested party in 2008. It was contended (amongst other things) that the property was alienated Government land that was not available for allocation, that its allotment to private persons was illegal, null and void, that the suit property was grossly undervalued to the prejudice of the public, that the transactions leading to the registration of the appellant as proprietor were tainted by undue influence and fraud and that the transactions were a sham intended to give the appellant the semblance of an innocent purchase for value.

The High Court found that the evidence disclosed fraud and illegality in the acquisition of the property and that the appellant was under active investigation by the KACC. The court therefore declined to issue the declarations sought. An appeal was against that decision was rejected by the Court of Appeal for the following reasons:

(i) mere registration as proprietor will not grant indefeasible title. The law had long established that sanctity of title was not "intended to be a vehicle for fraud and illegalities or an avenue for unjust enrichment at public expense".

(ii) The land was sold as a hurried and manipulated exercise. This was not efficiency but speed intended to benefit "well-heeled and connected individuals, bureaucratically and politically". Prescribed procedures were "ignored with impunity, leading toa complete sidestepping of the Permanent Secretary and the Treasury".

(iii) The buildings were "sold for a song" at Kshs. 696,000. The land had a value of Kshs. 17,700,000.

(iv) Barely three days after the registration of the property, the allottees purported to sell and transfer it. It was sold for just Kshs 300,000. Whilst consideration for a sale need not be adequate, "no rational person pursues such a business model and the only explanation for the transactipn was that it was a shell transaction to conceal the

illegal nature of the acquisition of the suit property and to introduce a smokescreen of a third party innocent purchaser".

(v) Some of the people behind the firms which were allotted the property were the same people behind the enterprise to which the property was ultimately transferred. Furthermore, the same postal address was used. This cannot be a mere coincidence. "The property was being transferred between the same players to create a false halo of *bona fide* purchasers for value without notice."

Points to Note:

- This case provides a good example of how those who engage in criminality will seek to use sham transactions and front companies in an effort to retain their proceeds of crime.

Kenya Anti-Corruption Commission v Online Enterprises Ltd (and others) [2019]

The Court's Decision
• Leases of land were obtained as a result of fraudulent conduct on behalf of the Commissioner of Lands and were therefore null and void *ab initio.*

Judge: M.A. Odeny

Court/Jurisdiction	Case Reference & Citation
Environment and Land Court at Kisumu	ELC No. 708 of 2015 (25th January 2019)

Case Summary

The court granted a declaration that the issuance of a lease by the Commissioner of Lands (the fifth defendant) was null and void *ab initio,* and that subsequent transfers and leases were therefore also null and void. The land in question had been reserved to the Kenyan Railways Corporation in 1935 and so was not available for alienation. The Commissioner of Lands had no power to alienate the land. The Commissioner's power was only exercisable in limited circumstances (for example for educational, charitable and sports purposes). In those circumstances, whether or not the defendants

were innocent purchasers for value without notice was irrelevant. Good title could never have passed to the defendants, whose remedy lay 'at the doorstep of the person who purportedly sold them the land which they did not have title to'. The court found that "the defendants irregularly, fraudulently and unprocedurally registered the land in their names and same should not be allowed to stand".

Points to Note

- This is another example of an effective use of civil powers to ensure that there is no benefit from the illegal sale of land rights. In particular, it emphasises that supposedly good title cannot be gained by invoking 'rights' of a bona fide without notice victim where the initial vendor had no right to sell the land in the first place.

2.3 CIVIL ACTIONS FOR FRAUD

Kenya

Ethics & Anti-Corruption Commission v David Onsare Rogito and Others [2017]

The Court's Decision
• Corruption through fraudulent local government activity established. Judgment entered against the first and third defendants, jointly and severally, in the sum of Kshs 7,224,612.70 plus costs and interest.

Judge: Hedwig I. Ong'udi

Court/Jurisdiction	Case Reference & Citation
High Court of Kenya at Nairobi (Anti-Corruption and Economic Crimes Division)	ACEC No. 10 of 2016 (formerly HCCC No. 170 of 2006) (3rd October 2017)

Case Summary

The first three defendants were all employees of Nyando County Council. The first defendant was the County Clerk, the second defendant was the County

Treasurer and the third defendant was the Clerk to the Council. The fourth defendant was an officer of the Treasury, with whom it was alleged that the Nyando County Council officials were "in cahoots".

In November 2004 Nyando County Council received Kshs 9,250,002/= from the Local Authority Transfer Fund. The LTAF disbursed money in accordance with set processes and paid into approved accounts. Nyando County Council had a bank account opened in accordance with this process at the KCB. However, this payment was into an account held at the Co-operative (Co-op) Bank. The payment appeared to be out of the normal sequence of payments and in an irregular sum of money. The instruction letter to transfer the money had been forged.

Investigations into the Co-op account revealed that it had been opened in August 2003 by the then County Treasurer (a prosecution witness) and Clerk to the Council (the second defendant) with the intention that it be used for LTAF funds. A set process for the use of bank accounts for LTAF funding was prescribed. It required notification to the LTAF Secretariat. No notification was ever received that the account was the be used for the LTAF funds and by May 2004, when the account had a nil balance, the Council resolved that the co-op account be closed.

In May 2004 the first defendant was made a signatory to the account. And in 19 October 2004 the forged instruction letter had been written. It had the fourth defendant's name written on its reverse. On 1 November 2004 the deposit of Kshs 9,250,002/= was received and withdrawals were made by the signatories to the account. These included Kshs 3,656,000/= on 2 November 2004, Kshs 2,800,000 /= on 10 November 2004 and Kshs 750,000/= on 16 November 2004. There was no evidence as to how this money had been used, save to one example of a tradesman who was paid in cash by the 2nd defendant in the presence of the 1st defendant on 2 November 2004.

The Ethics and Anti-Corruption Commission brought an action in fraud against the defendants. With regards to each defendant:

(i) The first defendant contended that the payment from the LTAF and the operation of the co-op account was entirely legitimate.

(ii) The second defendant could not be traced and took no part in the proceedings.

(iii) The third defendant failed to file a defence and so default judgment was entered.

(iv) The fourth defendant denied any knowledge of the letter and stated that he did not know who had written his name on the back.

The Court therefore only had to determine the case in connection with the first and fourth defendants. The Court found that:

(i) Proper procedures had not been followed in relation to the operation of the Co-op account. It was therefore unlawfully used as an account for the receipt and distribution of LATF funds.

(ii) The deposit of Kshs 9,250,002/= into the Co-op account was clearly unlawful because it had only been procured as a result of fraudulent conduct.

(iii) There was no evidence that the withdrawals from that deposit had been properly utilised. There was no audit trail as required under the terms associated with LATF funds. In fact, the money had been withdrawn very quickly. This suggested that money would not have been available, for example, to pay staff salaries at the Council.

(iv) The case against the first defendant was proved.

(v) The evidence linking the fourth defendant to the fraudulent activity only went as far as mere suspicion. This was insufficient to prove fraud.

Judgment was entered against the first and third defendants, jointly and severally, in the sum of Kshs 7,224,612.70 plus costs and interest.

Points to Note

- This case is a good example of civil proceedings for fraud being used effectively to tackle corruption in local government, which had been facilitated at a national level.
- The case emphasises the need for thorough and effective investigation of such criminality in order to ensure that the case meets the relevant burden of proof.

3. POST-CONVICTION 'CONFISCATION' OR 'PECUNIARY PENALTY' ORDERS

3.1 RESTRAINT OF ASSETS

Botswana

Director of Public Prosecution v Daisy Loo (Pty) Ltd and others [2009]

The Court's Decision

- An appeal against the refusal to grant a restraining order was upheld.
- The court must ensure that is applies the legal burden of reasonable grounds for belief.
- In evaluating whether the legal burden has been met at the restraint stage of proceedings, the court is not required to evaluate the credibility of the evidence.

Judge: Tebbutt JP, Moore JA, Lord Coulsfield JA.

Court/Jurisdiction	Case Reference & Citation
The Court of Appeal Botswana, held at Lobatse	CLCLB-067-08; MCHLB-000163-07 [2009] 1 BLR 24

Case Summary

In November 2007 an application for a restraining order was made in connection with an alleged fraudulently obtained contract, the benefit from which was said to be BWP21,434,434.46. On 30th July 2008 the application was dismissed with costs. The DPP successfully appealed against the decision. On appeal the Court of Appeal had to determine:

(i) Whether the officer whose affidavit was filed in support of the application had reasonable belief that the offences charged had been

committed by the respondents and that any or all of the respondents had received the proceeds arising from the commission of the offences;

(ii) whether there was reasonable cause to believe that the respondents had benefited from the proceeds of the offences charged; and

(iii) whether the judge had correctly exercised her discretion not to grant a restraining order.

Reasonable cause to believe that D has benefited from the proceeds of a serious crime

The test is not beyond reasonable doubt or the balance of probabilities. The standard of proof is a low one. The first instance judge had fallen into error in applying a lower standard of proof by requiring something more than mere reasonable cause for belief.

Furthermore, in assessing whether the standard of proof had been met, the judge had also fallen into error by finding that *credible* evidence was required. The court is not in a position to resolve conflicts and contradictions put forward by the applicant. Provided that there is evidence which could reasonably be accepted to justify the applicant's belief, in spite of the existence of contradictory evidence, the conditions for granting an order may be held to be satisfied. The court is not called upon to decide the veracity of the evidence. It need only ask whether that evidence might reasonably be believed. On the facts, the court found that the test had been met.

Exercise of discretion not to grant a restraining order

The Court of Appeal directed its mind to whether the Judge was entitled to treat her view of the strength of the evidence as a relevant factor in exercising her discretion, in spite of the statutory test having been already met. The Court of Appeal held that "once the court has determined that the primary test of reasonably cause to believe has been satisfied, it must be careful not to water down the primary test by purporting to exercise a discretion basing itself on the same information but applying a different test". The Judge therefore fell into error by exercising her discretion on this basis.

Points to Note

- In this case the court emphasised that the threshold for a restraining order is a low one, and that at what may be an early stage in proceedings the court must not be drawn into a forensic assessment of the evidence. The court is only required to examine whether the office had reasonable grounds to form their belief.

- The court also considered how judges should approach the potential charge to be brought against a person. It observed that "the applicant must put forward a charge, or a statement or draft of a charge, identifying the serious offence which forms the basis for an application. The court must ensure that it identifies some serious criminal conduct. However, it may not be appropriate to criticise unduly the precise terms in which the conduct is set out. If it is clear that serious criminal conduct is identified which could be the subject of a properly framed charge, the court may still grant the appropriate order" [36].

Lewis Goodwill Nchindo and others v The Attorney General of Botswana and the Director of Public Prosecutions of Botswana [2014]

The Court's Decision

- Restraining order applications may be brought by the DPP, even though they are civil in nature.
- Proceedings for a restraining order do not infringe the right to a fair trial and the right not to be compelled to give evidence at trial.

Judges: McNally AJP, Ramodibedi JA, Foxcroft JA, Howie JA, Lord Abernethy JA

Court/Jurisdiction	Case Reference & Citation
The Court of Appeal of Botswana, held at Lobatse	CACLB-056-09 MAHLB-000522-09

Case Summary

The appellants had been charged with a number of offences of a dishonest and fraudulent nature in relation to the acquisition of two plots of land in

Gaborone. The trial had not taken place but an application for a restraining order had been made by the DPP in respect of the plots of land. The appellants sought a number of orders, including a declaration that the DPP bringing a civil action for restraint was constitutionally invalid and that restraining orders infringed the rights to a fair trial, including the right not to be compelled to give evidence at trial.

Are the powers of the DPP to bring restraining order applications inconsistent with the constitution and therefore invalid?

The DPP's powers were prescribed by s51A of the Constitution, and related to the institution, undertaking and discontinuance of criminal proceedings. A restraining order is a civil matter and is not part of the criminal proceedings themselves. It was therefore contended that the DPP did not have the power to institute civil restraining order applications.

The court held that s15(2) of the Interpretation Act was clear that when an enactment confers a power or a duty in relation to an act or thing, all such other powers as are reasonably necessary to enable that act or thing to be done or are incidental to that act or thing, are deemed to be given.

The court found that whist the power to apply for a restraining order is not a power reasonably necessary to enable a criminal prosecution, it is incidental to a criminal prosecution. Therefore, the argument that the DPP did not have the power to institute restraining order proceedings was rejected.

The right not be compelled to give evidence at trial.

The appellants contended that in replying to the DPP's application for a restraining order they would force a person to disclose, amongst other things, their "intended strategy and approach, the reasons why they contend that the evidence of the DPP's witnesses is wrong or unreliable or should be disbelieved; the evidence which they intend to lead; the names of witnesses they propose to call; and the gist of what any rebutting evidence will be".

The Court found that S10(7) of the constitution guarantees the right not to be compelled to give evidence at trial. However, the court found that the provision of the constitution was very clear and no gloss was to be placed

on the wording. Proceedings for a restraining order are not part of a criminal trial.

Infringement of the right to a fair trial

The court held that if a person was required to respond in the way suggested by the appellants, then there would be an infringement of the right to a fair trial. However, the appellants were not required to answer the application in the way that was suggested. Whether, and if so to what extent, the appellants respond is "a matter of choice for them. "The appellants have a choice as to whether to answer the application at all. Bearing in mind the low standard of proof required, the appellants will have to judge whether there is any real prospects of success in their opposing the application. On the other hand, if they consider that despite the length of the supporting documentation, the application has no prospect of satisfying the low standard of proof they can decide to rely on the court coming to the same conclusion and dismissing the application". The Court described the choice available to legal practitioners as the "kind to be made day in day out", and that "they may involve hard choices, but they are nevertheless choices. The fact that the appellants are required to make these choices does not in any way mean…that they are forced into a position where their rights to silence and to a fair trial are infringed".

Points to Note

- The court discussed the purpose of a restraining order, namely to "to preserve the property in question so that in the event of a conviction it is still available so that any confiscation order may be given effect. If benefits or rewards from crime have been dissipated and are beyond recall by the time of a confiscation order is made following a conviction, the purpose of the Act would be defeated".

- The court also reviewed and endorsed South African case law on requiring responses to applications [para 60].

- The issue of the right of the DPP to bring civil proceedings has been affirmed in Botswana by the case of *DPP v Archbald Mosojane & Others [2018] and Directorate of Public Prosecution v Kgori Capital (Pty) Ltd [2018].*

eSwatini

Anti-Corruption Commission v Chief Benjamin Aghalieaku Arinze and 6 Others [2018]

The Court's Decision
• In light of clear red flags for money laundering a rule nisi was confirmed in connection with a restraint order.

Judge: Mabuza PJ

Court/Jurisdiction	Case Reference & Citation
The High Court held at Mbabane	Case No 1710/2017 [2018] SZHC 89 (8 May 2018)

Case Summary

This was an opposed application for confirmation of a *rule nisi*. The applicant effectively sought a restraint order over money apparently belonging to Aghalieaku Airways (Pty) Ltd pending an application for a possible post-conviction forfeiture order under s57 of the Money Laundering and Financing of Terrorism (Prevention) Act 5/2016.

The money in question was suspected to relate to unlawful activity or money laundering offence. The Central Bank of Swaziland received an application from Nedbank to approve remittance of US$40,000 to Panama on behalf of Aghalieaku Airways (Pty) Ltd to Panama, apparently being a deposit towards the lease of a plane. As per their procedure, company registration documents were requested. These revealed a number of 'red flags':

(i) The company account was funded through cash deposited over the counter within a period of 3 days. This was in Rand and Emalangeni, indicating that funds may have been physically brought into the country as opposed to using formal banking systems for remittance.

(ii) Cash deposit fees for the transactions totalled E14,452.23, which was outside of the expected liabilities that a business would wish to incur (when compared, for example, with electronic transfers)

(iii) The destination of the funds was Panama City, recently published as a suspected destination for the illicit flow of funds.

(iv) Advance payments in the Exchange Control field are commonly used for illicit flow of funds requiring thorough probing in cases where there is reason to suspect irregularities.

(v) A cash withdrawal of E250,000 was made, which did not make sense because there was now insufficient funds in the account to make the proposed transaction.

(vi) A false declaration was made on a deposit slip as to the identity of a depositor.

The Court held that in this case the source of the money still remained undisclosed. There were therefore reasonable grounds for believing that the money was being laundered and that its source was related to an unlawful activity "needing it to be cleaned or washed as the case may be". The restraint order was therefore confirmed.

Points to Note

- This case provides an excellent example of money laundering 'red flags' that were taken into account when determining that there was a good case for restraining assets.

South Africa

NDPP v Kyriacou [2003]

The Court's Decision

- Whilst mere assertion will be insufficient to satisfy a court that a restraint order should be confirmed, evidence reaching the threshold of "reasonable grounds for belief" will suffice. The ordinary standards of proof applicable to motion proceedings do not apply in restraint cases, by virtue of clear statutory provisions.
- Where presumptions as to 'benefit' apply, the mere fact that a defendant has been ordered to repay the proceeds of their direct criminality does not mean that a confiscation order is unlikely.

Judges: Howie P, Brand JA, Nugent JA, Southwood AJA, Mlambo AJA

Court/Jurisdiction	Case Reference & Citation
The Supreme Court of Appeal of South Africa	308/2002 [2004] (1) SA 379 (SCA)

Case Summary

In September 2001 Kyriacou was convicted on 102 counts of receiving stolen goods. The value of the preoprty was R4,5 million. In October 2001 the High Court granted a provisional restraint order, pursuant to s26 of the Prevention of Organised Crime Act 121 of 1998. This was set aside on the return date on the basis that:

(i) The benefit that had been obtained had already been forfeited as a result of an order following the criminal trial for the return of property to the rightful owners. The judge therefore found that "it was highly unlikely that a confiscation order will be made".

(ii) The discretion to grant a restraint order is to be used sparingly and only in the clearest of cases and where the considerations in favour substantially outweigh the considerations against". A restraint order

should therefore not be granted "if the truth cannot be established from the papers".

The NDPP appealed against the decision. The appeal was upheld and the provisional restraint order was confirmed. In rejecting the findings of the High Court, the Supreme Court of Appeal found that:

(i) Jurisdiction to make a confiscation order is triggered by the satisfaction of statutory conditions. In this case the defendant had satisfied the statutory conditions by having benefited from criminality. This is so regardless of whether the property was ultimately returned.

(ii) Having satisfied the basic jurisdictional threshold, in certain cases a court is permitted to apply presumptions pursuant to s22 of the Act. This extends the notion of benefit beyond the offences for which the defendant was convicted to consideration of property held over a period of up to 7 years prior to conviction. In the present case the assumptions may extend the benefit beyond property returned in the course of the confiscation enquiry. The mere fact that the benefit from the conduct for which the defendant had been convicted had been ordered to be returned was irrelevant.

(iii) The statutory test in s25(1)(a) is one of reasonable grounds for belief. Whilst mere assertion will not suffice, the appellant is not required to satisfy standards that might be applicable in ordinary motion proceedings.

Points to Note

- This case emphasises the importance of judge's focussing on the clear wording of the statutory provisions governing restraint orders. Restraint orders are not final orders and the standard of proof to be applied is therefore lower.
- The case also emphasises the need for a court to consider whether any presumptions may apply, which may extend benefit beyond the conduct for which a defendant was convicted.

NDPP v Van Staden & others [2012]

The Court's Decision

- There had been no breach of the duty to act with upmost good faith in applying for a restraint order.
- Restraint of assets is intended to preserve property with a view to making a confiscation order. It is not an arbitrary and permanent deprivation of a defendant's rights to property.

Judges: Lewis, Malan, Wallis, Pillay JJA and Mbha AJA.

Court/Jurisdiction	Case Reference & Citation
The Supreme Court of Appeal of South Africa	730/2011 [2012] ZASCA 171

Case Summary

During 2008 the South African Revenue Service investigated the VAT returns of Van Staden's business entities and suspected that they were fraudulent. The assistance of the NPA was then sought. On 27 November 2008 a search and seizure operation was conducted at one of the offices from which the various Van Staden businesses were conducted. During the course of the search one of Van Staden's employees, a Mr de Vries, indicated that he was willing to talk to him about the reasons for the investigation.

De Vries provided oral information and volunteered to make a sworn statement. He was advised to consult an attorney first. The NDPP brought an *ex parte* application, in camera, in the Western Cape High Court for a restraint order in terms of s 26(1) of the Prevention of Organized Crime Act 121 of 1998. The facts were placed before the High Court in the founding affidavits, and the oral evidence of de Vries was relied upon. On 12 December 2008 the High Court granted the provisional restraint order and a rule nisi calling on them to show cause why the orders should not be made final.

De Vries consulted two lawyers and finally provided a sworn affidavit on 8 September 2009.

The High Court discharged the order against Van Staden principally because in the *ex parte* application the NDPP had not acted with the 'utmost good faith' in that it relied on the information provided only orally by De Vries, and had failed to obtain the De Vries affidavit as soon as possible after the grant of the provisional restraint order. Bignault J stated that:

'It is generally recognised that applications of this nature under POCA [the Act] are draconian in effect. This is vividly illustrated by the facts of the present case. As a result of one single order granted *ex parte* Mr van Staden was deprived of all his assets and his businesses which went into liquidation. His family life was seriously affected. He is now dependent on food and charity from friends for the most basic food and clothes. It is therefore self-evident that the NDPP must act in such a matter with scrupulous fairness to a defendant. See *National Director of Public Prosecutions v Mohamed NO* 2003 (4) SA 1 (CC).'

The Court of Appeal rejected Bignault J's observations:

(i) "Although the effect of an order may be harsh, it is not generally accepted to be draconian. The defendant is not deprived of his property arbitrarily. He is simply restrained from dissipating what are alleged to be the proceeds of unlawful activities until such time as he has been convicted and a court is persuaded that such proceeds should be confiscated".

(ii) The suggestion that Van Staden had been reduced to penury was not "substantiated in the papers. His complaints related largely to the way in which the court-appointed curator of his assets was conducting his business affairs. And he was entitled to apply for living expenses, as indeed he did".

(iii) Whilst there is a duty to act in the upmost good faith when bringing ex parte applications, this duty had been adhered to. All relevant information available had been disclosed to the court.

The Court of Appeal went on to consider whether the restraint order should be upheld. It found that there were reasonable grounds for believing that there will be a conviction and an ensuing confiscation order. The NDPP had shown on the papers that VAT fraud was committed by at least three companies of which Van Staden is a director and also the chief executive officer; that he must have had personal knowledge of the fraud because of his direct control; and that there is direct evidence showing his personal involvement in the fraud. The appeal was therefore upheld.

Points to Note

- Authorities must act with upmost good faith in bringing an *ex parte* application, and therefore must make the fullest and frankest disclosure possible at the time of the application. Careful consideration should therefore be given to the content of any application for restraint.
- This case emphasises that restraint orders are not final orders that permanently deprive a person of property. Rather, they act to preserve the status quo pending a conviction and confiscation order being made. Restraint orders are therefore not inherently draconian.
- The case further emphasises that the court should look carefully at assertions that a person is being adversely affected by a restraint order, and be aware that mechanisms exist to release funds from restraint to meet reasonable expenses that can ameliorate any such adverse effects. This reduces the need to discharge a restraint order in full.

Tanzania

The Attorney General v Mugesi Anthony and others [2011]

The Court's Decision

- The DPP has the power to institute proceedings for a restraint order.
- On the facts, the property sought to be restrained was not a tainted instrumentality of offending and it would not be proportionate to restrain the innocent owner from dealing with it.

Judges: Rutakangwa JA, Oriyo JA and Kaijage JA.

Court/Jurisdiction	Case Reference & Citation
The Court of Appeal of Tanzania at Mwanza	Criminal Appeal No 220 of 2011

Case Summary

In April 2011 a motor vehicle was stopped. It contained 25 bags of cannabis sativa weighing 283 kilograms. The driver and passenger were charged with illicit trafficking in narcotic drugs. Whilst they were awaiting trial, an application was made for a restraint order in connection with the motor vehicle and its trailer, pursuant to s38(1) of the Proceeds of Crime Act, Cap 256 R.E. 2002. The application was dismissed with costs. The court held (amongst other things) that:

(i) The Proceeds of Crime Act did not seem to provide *locus standi* to the DPP in dealing with restraint applications both pre and post charging, with s38(1) referring to an application by the Attorney-General.

(ii) The owner of the car was an innocent third party and the vehicle and trailer should therefore be returned to him.

Power of the DPP to bring applications under POCA

The Court held that in view of clear provisions of the Constitution, there was "no doubt in our minds that the officers of the Attorney General and the Director of Public Prosecutions are by law enjoined to cooperate and work together in the performance, control and prosecutions in all criminal matters in Tanzania". Therefore, the DPP did have *locus* to bring a restraint application.

Should the vehicle and trailer be restrained or returned to the 'innocent owner'?

However, the court held that the appeal would nevertheless fail on the facts. It was contended on behalf of the Attorney-General that the vehicle and trailer were a tainted instrumentality of crime. Having engaged in a comprehensive review of case law, and statutory provisions (including the South African decision in *NDPP v RO Cook Properties*), the Court concluded that the car and trailer were not an instrumentality of the offending, but merely incidental

to it. Although there were special sealed chambers in the car, it was argued that these were not intended for carrying drugs, but for liquid mine-blasting chemicals. None of the drugs were found in such chambers. They merely happened to be transported in the car.

It was also contended on behalf of the Attorney-General that as long as the property was conveying illicit drugs, the defence of 'innocent owner' could not apply. The court rejected this, noting the UK Supreme Court decision in *R v Waya [2012] UKSC 51* and the European Court of Human Rights decision in *John v Germany (2006) 42 EHRR 1084* about the need for any interference with property rights to be proportionate. The court held that "it was never the intention of Parliament nor is it in the 'general interest' of our society, that the provisions of the Proceeds of Crime Act, be applied indiscriminately to innocent property owners in all cases". The court found that the "strict" approach advocated "would lead to grave injustice in respect of innocent third parties, than to the attainment of the just and legitimate objectives of the Acts, and the reasonable expectations of the community of deterring the offender and protecting the innocent, at all costs".

Points to Note

- This case provides an analysis of the objectives of the legislation and its place in the international frameworks for removing the proceeds of crime [p.41].
- In articulating the need to act proportionality, the court cited the Merchant of Venice, Act IV Sc.1 L. 196: "and earthly power doth show likest God's when mercy seasons justice" [p.46].

The Attorney General v Muharami Mohamed Abdalla @ Chonji and other [2017]

The Court's Decision

- Mere assertion that a property is connected to crime, without saying more, will be insufficient for a court to determine that a restraint order is satisfied.

Judges: Dyansobera J

Court/Jurisdiction	Case Reference & Citation
The High Court of Tanzania at Dar Es Salaam	Criminal Application No 220 of 2011

Case Summary

In assessing whether property should be subject to restraint as property that is 'tainted' through its connection to crime, the court examined the "strength and extent of the relationship between the property sought to be restrained, the offence alleged and the extent of the involvement of property in the offence".

The 1st defendant was "caught red handed" at a property south to be restrained. Drugs and equipment for drying, storing and distribution were seized from it. There were three weighing machines, a stove, a gas pot, a cooking pot and US $24,000 Tshs. 900,000/= and €50. Drawing on *Prophet v NDPP* (South Africa), the house was clearly an instrumentality of drug trafficking. The property played a reasonably direct role in the commission of drug trafficking by facilitating or making possible the commission of the offence.

A Toyota Verossa and a number of other properties were alleged to have been derived from the illegal drug business. However, no evidence beyond this assertion was adduced. "The court cannot rely on such a broad and unsupported statement in the affidavit to find reasonable grounds for the belief [of the deponent]. It is vital that the judge is given the material on which to reach the conclusion himself that there are reasonable grounds for the belief".

Points to Note

- This case emphasises that restraint powers will only be exercised by the court if clear and cogent evidence is provided from which the court can be satisfied that the legal test is fulfilled. Mere assertion in an affidavit that property is linked to crime without saying more, will not suffice.

- The court considered the purpose of the legislation and concluded that "the primary purpose of the Proceeds of Crime Act is, I think, not to punish the defendant, rather it is aimed at ensuring that no person benefits from his wrongdoing. The secondary ones are to promote general crime deterrence and to prevent, by deprivation, people of ill-gotten gains".

3.2 'CONFISCATION ORDERS' OR 'PECUNIARY PENALTY ORDERS'

Namibia

Lameck and another v The President of the Republic of Namibia and Others [2012]

The Court's Decision
• Whilst post-conviction confiscation may have punitive effects, it is not a punishment.
• confiscation orders do not have impermissible retrospective effect.

Judges: Hoff J, Smuts J and Miller AJ

Court/Jurisdiction	Case Reference & Citation
The High Court of Namibia	A 54/2011

Case Summary

Post-conviction asset forfeiture as a retrospective provision of law

The confiscation regime does not increase any penalty in respect of any crime committed prior to when POCA came into force. The regime is only triggered by conviction for an offence that occurred after POCA came into operation. It is therefore not retrospective. Although the court may be permitted in certain circumstances to examine benefits derived from crime prior to POCA coming into force, it is only as a result of the conviction for the post-POCA offence having been committed.

Post-conviction forfeiture as a penalty

It was alleged that asset forfeiture under Part 5 was an additional sanction. In accordance with the South African decision in *Schabir Shaik and others v the State* and *NDPP v Phillips [2002] (4) SA 60 (W),* the purpose of asset forfeiture is not to punish, although it may have punitive effects by ensuring that criminals cannot benefit from the fruits of their crimes. This accords with its nature as a civil judgment.

Points to Note

- This case is good example of a court declaring that post-conviction asset forfeiture is not a punishment.
- In the case challenges were also made to the constitutionality of civil forfeiture proceedings and substantive money laundering offences. This case therefore appears in more than one place in this Casebook.

South Africa

NDPP v Johann Niemoller [2005]

The Court's Decision

- A court should not refuse to hold a confiscation enquiry on the ground that a defendant has not benefited from unlawful activity. This is the very matter that such an enquiry is intended to determine.
- Mere receipt of assets is sufficient to satisfy the legislative definition of benefit. Therefore, seizure of assets by police after receipt is irrelevant to the question of benefit.
- A confiscation enquiry is civil in nature and so the right to silence does not apply.

Judges: S Snyders, M Jajbhay, JJ.

Court/Jurisdiction	Case Reference & Citation
The High Court of South Africa (Witwatersrand Local Division)	560/04 (25 November 2005)

Case Summary

The Respondent was convicted in a Regional Court of purchasing unpolished diamonds without having been a licensee or having held a relevant permit, contrary to s20 of the Diamonds Act 56 of 1986. The Respondent was caught after entering into an arrangement with an undercover police officer for unpolished diamonds. The Respondent handed R85,000 in cash and a cheque for R550,000 to the police officer. The police officer handed over diamonds, which were put in the Respondent's briefcase. When he was about to leave, the Respondent was arrested by colleagues of the police officer.

The Regional Court dismissed an application to hold a confiscation enquiry on the basis that:

(a) The Respondent had not derived a benefit that would justify an enquiry; and

(b) An enquiry would violate the Respondent's rights under s35 of the Constitution.

(i) The respondent had not derived a benefit that would justify an enquiry.

The Court found that the discretion that the court had not to hold an enquiry into confiscation was an act of prudence on the part of the legislature, which could not foresee every circumstance in which such an enquiry may not be just. For example, it was suggested in argument before the court that it may not be appropriate to proceed where the defendant has no estate at all or is terminally ill. However, to refuse an enquiry into whether the defendant *may* have derived a benefit on the basis that he had not derived a benefit "put the cart before the horse" and denied the NDPP of the opportunity to explore the very issue upon which the judge was purporting to make a determination.

The Magistrate had concluded, on the facts, that there was no benefit because of the seizure following the police trap. However, the High Court found that s12(3) of POCA defined benefit as the receipt or retention of any proceeds of unlawful activities. The respondent had received the unpaid diamonds, and had therefore received the proceeds of unlawful activities within the meaning of the Act. Furthermore, the enquiry may have revealed many other facts. The

court speculated, by way of illustration, that the Respondent may well have already received part of a purchase price for the selling on of the diamonds that he was receiving.

(ii) Violation of the Respondent's rights under Art 35 of the Constitution.

It appeared to the High Court that the primary consideration of the learned Magistrate had been that the right to remain silent in criminal proceedings would be infringed in the enquiry because the Respondent would feel compelled participate. During the criminal trial the Respondent had remained silent.

The High Court ruled that any such concern was misplaced. First, the confiscation enquiry takes place after the conclusion of the proceedings in which the Respondent's criminal liability was to be determined. Second, such enquiries were civil in nature. The High Court therefore upheld the appeal and remitted the matter for an enquiry into benefit.

Points to Note

- This case emphasises that the issue of benefit should not be prejudged at the stage of application for a confiscation enquiry. If it is alleged that a person has benefited from crime, that should be tested in argument at an enquiry. Otherwise, the application itself is likely to become such an enquiry through 'the back door'.
- The case is also clear that benefit is not linked to retention of assets. Therefore seized goods (whether by undercover officers or, for example, by customs officials) may feature in a calculation of benefit.
- The case is further notes the civil nature of confiscation enquiries, even though they result from criminal proceedings.

Schabir Shaik and others v the State [2008]

The Court's Decision

- The purposes of the post-conviction confiscation regime are to remove the proceeds of crime, deterrence and prevention.
- Although a confiscation order may have punitive effects, its primary purpose is not to punish.
- In assessing a person's benefit from unlawful activity, the court should examine gross and not net profit.
- In assessing the amount of that benefit that should be repaid the court should consider all of the circumstances of the case, including how closely linked the offending is to organized crime and how directly linked assets are to the criminality.

Judges: O'Regan ADCJ (with whom Langa CJ, Jafta AJ, Kroon AJ, Madala J, Mokgoro J, Nkabinde J, Skweyiya J, Van der Westhuizen J and Yacoob J concurred).

Court/Jurisdiction	Case Reference & Citation
Constitutional Court of South Africa	CCT 86/06 [2008] ZACC 7

Case Summary

This case arose following the conviction of the three appellants for corruption. A confiscation order was made at the High Court in Durban in January 2006 requiring the appellants to pay the state the value of benefit which the High Court held to constitute the proceeds of crime. It is that order which formed the basis of this appeal. The court made observations on three matters of general importance:

(i) The purpose of post-conviction confiscation

The primary purpose of a confiscation order is to deprive a convicted person of ill-gotten gains (see *NDPP v Rebuzzi [2001] ZASCA 127; 2002 (2) SA 1 (SCA)* at para 19). From this primary purpose, two secondary purposes flow:

(i) General deterrence: to ensure that people are deterred in general from joining the ranks of criminals by the realisation that they will be prevented from enjoying the proceeds of the crimes they may commit.

(ii) Prevention: the scheme seeks to remove from the hands of criminals the financial wherewithal to commit further crimes.

The court considered case law from the UK that suggested that one of the purposes of confiscation was to punish offenders (*R v Smith (David) [2002] 1 All ER 366; R v Rezvi [2002] 1 All ER 801*). The court found that "it may well be" that criminal confiscation "might at times have a punitive effect", but the primary purpose of the South African legislation is not to punish [57].

(ii) The calculation of benefit – gross or net profits?

Benefit from crime is defined in s12(3) of POCA as the receipt or retention of *any* proceeds of unlawful activities. Proceeds of unlawful activities is, in turn, widely defined in s1 as:

> *"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 anyunlawful activity carried on by any person, and includes any property representing property so derived"*

This broad definition of benefit proceeds of crime is not limited to the net proceeds from offending. To adopt a narrow interpretation of benefit does not fit with the clear statutory language.

(iii) How should the court approach the discretion as to the amount to be repaid?

Having calculated the benefit from crime, the court is given discretion, under s18(2) as to the amount that a criminal must repay. This is a separate exercise from the calculation of benefit. In determining the amount, the court held that the following factors should be taken into consideration:

(i) All of the circumstances of the criminal activity concerned.

(ii) The wide definition of "proceeds of unlawful activities" means that property direct and indirectly associated with criminality has the potential to be confiscated. The court should therefore examine the link between the property and the criminality. In most circumstances it will be entirely appropriate that all direct profits of crimes of which the defendant has been convicted be confiscated. However, the more removed the derivation of the property from the commission of the offence, the less likely it may be that it will be appropriate to order the full confiscation of the property. In saying that, a court must take care to remember that often criminals do seek to disguise the profits of their crime. One of the purposes of the broad definition of "proceeds of unlawful activities" is to ensure that wily criminals do not evade the purposes of the Act by a clever restructuring of their affairs.

(iii) The closer the crimes or criminal activity concerned to the ambit of organised crime, the more likely it will be that the appropriate amount will constitute all the proceeds of the unlawful activities. The reason for this is that the larger the value of the confiscation order, the greater the deterrent effect of such an order. The Act clearly seeks to impose its greatest deterrent effect in the area of organised crime; and so where organised crime is involved, the purpose of general deterrence will often be best achieved by a maximum confiscation order, although of course that will always be subject to a full consideration of all the relevant circumstances.

Points to Note

- This case was the first occasion on which the Constitutional Court considered the purposes of the confiscation regime, which are clearly articulated in the judgment.
- The court ruled that, in light of the wording of the statute, benefit should be calculated with reference to gross and not net profit. The

rationale for this can arguably be extended beyond the wording of the statute. It should not be permissible for a defendant to 'offset' their criminal benefit through spending money. For example, a drug dealer will have expenses as part of their drug dealing operation. Similarly, a person may have led a luxury lifestyle in perpetuating a fraud, through the renting of luxury offices or hotel suites. It cannot be just for these expenses to be offset in calculating how much a person has unlawfully obtained from crime.

- The court found that the calculation of the amount to be repaid will depend upon the circumstances in each case. This reflects the general need for proportionality and ensuring that any order is not an excess punishment.

3.3 OTHER POST-CONVICTION ASSET FORFEITURE ORDERS

Malawi

The Republic v Caroline Savala [2017]

The Court's Decision
• Restitution could not be ordered in the circumstances because no assets had been found in the respondent's possession upon arrest.

Judge: Mwale J.

Court/Jurisdiction	Case Reference & Citation
The High Court of Malawi, Lilongwe District Registry	Criminal Case No 28 of 2013

In July 2015 the respondent was convicted of theft and money laundering. The amount of money stolen and subsequently laundered was MK84,963,341.14 of which the respondent admitted to having benefited MK4,298,167.06.

Sentence in the matter was pronounced on 27th June 2016 and the judgment gave the State liberty to commence proceedings for a confiscation order if they were so inclined. The State subsequently filed an application under Section 48 of the Money Laundering Act on 18th October 2016, sought orders

that tainted property in this case be confiscated to the Government and that a pecuniary penalty order be made to recover stolen property from Caroline Savala.

This application was in fact time barred under the Money Laundering Act, which required that such applications be made within a year of conviction. The Judge observed that "having charged the respondent with an offence under the Money Laundering Act, the State should have been prepared for the possibility of a conviction and for all eventualities subsequent to a conviction under that Act. Such preparation would have enabled them to prepare in advance to make an application for the recovery which under the said Act would have had to be made soon after conviction".

The State therefore applied for an order of restitution. However, such an order is an order to restore to a person a sum of money out of money found in the offender's possession on apprehension. In the present application, there was no property in the respondent's possession at the time of arrest. There was therefore nothing capable of a straightforward summary restitution process.

Points to Note

- This case emphasises the importance of anticipating asset forfeiture proceedings in advance of a conviction and of taking steps to put such an application in motion upon conviction.

Tanzania

Republic v Abdalla and others [1971]

The Court's Decision

- It was an appropriate exercise of the magistrate's discretion to impose forfeiture orders.
- In making a forfeiture order, it is preferable for a judge to state why they have made the order.

Judges: Sir William Duffus, P., Lutta and Mustafa JJ.A

Court/Jurisdiction	Case Reference & Citation
The Court of Appeal at Dar Es Salaam	Criminal Appeal No 112 of 1971

Case Summary

The respondents were convicted on their guilty pleas of transporting rice without a permit. Each was called upon by the magistrate to show cause why an order for forfeiture of the rice should not be made and each offered no reason. The forfeiture orders were made, but were subsequently set aside by the High Court, which ruled that forfeiture was "grossly excessive for a statutory offence involving no moral turpitude". The Director of Public Prosecutions appealed against the decision.

The Court of Appeal found that the laws were "fully considered and brought into force by the government for the national prosperity and general good of all the people. In these five cases the facts show that [the respondents] have, in fact completely disregarded the law and have made no attempt to explain their acts and really put forward no plea in mitigation. The grater the amount of produce involved, the graeter the attempt to evade the law. In each of these cases a considerable amount of produce was involved and in four of the cases, the offence took place at night when the transport was forbidden". The order of forfeiture had only been made after the district magistrate had considered all of the facts before him.

Points to Note

- This case emphasises that forfeiture provisions may serve an important purpose, particularly when tackling issues that impact upon the public good.
- The court also noted that "we think it would be preferable for the court not only to show that it is considering whether to make the order for forfeiture, but also why it made the order, but this is not a fatal defect".

The Director of Public Prosecutions v Mikula Mandungu [1989]

The Court's Decision
• The Respondent was not an innocent owner and it was not just and equitable to return his forfeited lorry to him.

Judges: L.N. Makame JA, R.H. Kisanga JA, L.M. Mfalila JA.

Court/Jurisdiction	Case Reference & Citation
The Court of Appeal of Tanzania	Criminal Appeal No 47 of 1989

Case Summary

The respondent was the owner of a motor lorry. The driver of the lorry had been arrested whilst ferrying a large quantity of elephant tusks in the lorry and an order for forfeiture was made under the Wildlife Conservation Act 1974. In response, the respondent lodged an application for the lorry to be restored to him.

The full Economic Court found that heard the respondent's application and came to the unanimous conclusion that the respondent had innocently hired is vehicle to a third party who had decided to use the vehicle for illegal purposes. IN the circumstances the court ruled that it was just and equitable that the lorry be restored to him. The DPP appealed.

The Court of Appeal found that the "story" had been "surprisingly bought by the Economic Court". The fact that the respondent had taken no action about his lorry when it was impounded but waited until the case was finalised and forfeiture ordered some 7 months later to take any action. This was not the action of an innocent owner and a seasoned international businessman. There were secret chambers in the lorry, which suggested that the lorry had been adapted specifically to carry unlawful goods.

"The respondent cannot be allowed to tamper with the wealth of this country and get away with it easily by telling very unlikely lies. If the courts become so gullible as the Economic Court appears to have been, it will make it very easy

for lorry owners to try their luck by just sending their drivers on missions. It is too bad if they are caught and imprisoned, but they got their lorries back to start the evil trade all over again after hiring new drivers".

Points to Note

- This case emphasises the importance of the court scrutinising applications from 'innocent owners' with a critical eye.

Zambia

The People v Ross Ernest Moore and another [2010]

The Court's Decision
• Conviction and forfeiture order restored.

Judges: Mambilma A/CJ., Silomba and Chibomba JJS

Court/Jurisdiction	Case Reference & Citation
The Supreme Court of Zambia holden at Lusaka (Civil Jurisidction)	SCZ Judgment No 1 of 2010 Appeal No 85 of 2009

Case Summary

The Respondents had been charge with one count of unlawful possession of 121 kgs of gold, valued at K11.6billion. The Respondents were convicted and successfully appealed against the conviction and subsequent forfeiture order. The prosecution appealed to the Supreme Court.

The Supreme Court found that the evidence against the Respondents was clear and compelling. It commended the officers from the Anti-money laundering unit of the Zambia Drug Enforcement Commission, but also commented that the case exposed the "shoddy work of Zambia Revenue Authority officers…we find it odd that they were contended with the weight and value of gold shown

on [the customs form] without inspecting the item. The diligences they were expected to exhibit in the performance of their duties was missing. We are inclined to adopt this line of thinking because crime has become sophisticated and it would not be safe to rely only on computer generated information without being practical in approach. The ZRA officers who testified seemed to give the impression that Customs work was very simple and that it was a matter of checking the computer and stamping the documents presented when this was not the case".

The Supreme Court also found that the law was very clear and required those who mined gold to hold a separate licence for dealing with that gold.

Furthermore, the Court noted that when a conviction is quashed a judge should hear submissions about the release of exhibits rather than simply release them. If the State is going to appeal, the judge may impose such conditions as it thinks fit. In this case, "if the DPP was not alert enough or if through inadvertence there was no application to stay the judgment, the consequences would have been too ghastly to imagine. The gold would have vanished and the State would have been made to lose a colossal amount of money".

Having overturned the appeal and restored the forfeiture order, the Supreme Court made a "wish that the relevant wings of Government will take a keen interest in what we have observed as we feel that corruption may have been the underlying cause for the strange behaviour of the officers[of the ZRA]".

Points to Note:

- This case provides a good example of why it is so important that revenue officials act with diligence in performing their functions. Customs work is not a 'tick box' exercise and mere acceptance of what is written on a customs form will not suffice.

- The Supreme Court's observation that corruption may have been at the root of the poor customs enquiries sheds light on the importance of bona fides in customs work and on the need for careful scrutiny of the actions of government employees at all levels.

James Sikapende v The People [2017]

The Court's Decision
• Forfeiture of a truck used to transport an unlawfully possessed biological resource was upheld.

Judges: Chisanga JP, Makungu, Kondolo SC, JJA.

Court/Jurisdiction	Case Reference & Citation
The Court of Appeal holden at Kabwe (Criminal Jurisdiction)	Appeal No 09/2018

Case Summary

This case involved an appeal arising from a conviction for unlawful possession of biological resources, namely a Mukula Tree, valued at K22,015.23 in a motor vehicle without lawful authority or excuse. The Respondent applied for the truck used in the transportation of the Mutual to be forfeited to the State. This was refused because the section of the Environmental Management Act was couched in discretionary terms. For that reason alone, he ordered that the truck and tent be restored to the Appellant. The Respondent appealed that ruling to the High Court, which reversed the decision and ordered that the truck be forfeited. The Appellant sought to appeal this decision.

The Court of Appeal held that although the statutory provision states that the court "may" order forfeiture, judicial discretion does not exist in vacuum, but must be sensitive to the particular legislation which provides the latitude and circumstances surrounding a particular case. "It is never to be exercised whimsically and must be reasoned and judicious". The purpose of the section was clear, namely to "ensure forfeiture to the State of vehicles, vessels etc whose owners have allowed them to be used in the commission of offences under the Act". Taken together with the other subsections of the provision, the discretion empowered the release of items to third parties, *other than the convicted person,* who satisfy the court that the seized item belongs to them, that they were not privy to the commission of the offence and had no knowledge that the item was to be used for that purpose.

The magistrate appeared to be under the impression that he had unfettered discretion without regard to these relevant considerations and the decision bore “the hallmarks of discretion exercised capriciously”. The order of the High Court that the truck be forfeited was therefore correct.

4. OTHER MEASURES FOR RESTRAINT AND SEIZURE OF ASSETS DURING CRIMINAL INVESTIGATION

Kenya

Ethics & Anti-Corruption Commission v Catherine Nkirote Maingi and others [2017]

The Court's Decision

- A prohibition on the use of assets will not be lifted merely because a person has not yet been charged with a criminal offence. The court must consider whether the investigation is proceeding diligently.
- Such a prohibition may nevertheless be varied to allow sufficient access to funds to prevent undue hardship, such as a default on bills.

Judge: L.A. Achode

Court/Jurisdiction	Case Reference & Citation
High Court of Kenya at Nairobi (Anti-Corruption and Economic Crimes Division)	Miscellaneous Application No. 43 of 2016 (4th October 2017)

Case Summary

S56 of the Anti-Corruption and Economic Crimes Act provides that:

(i) Upon an application by the [Ethics and Anti-Corruption] Commission, the High Court may make an order prohibiting the transfer or disposal or other dealing with property if it is satisfied that there are reasonable grounds to suspect that the property was acquired as a result of corrupt conduct. […]

(ii) An order under this section shall have effect for six months and may be extended by the court on the application of the commission.

The Respondents were suspected to be involved with a corrupt tendering process and on 16 December 2016 an order was made pursuant to s56(1), prohibiting any dealing with funds in five accounts that they held, as well any dealing with a parcel of land.

In June 2017 the Applicants applied to extend the orders. The Respondents cross-applied to discharge of the orders on the basis that:

(i) There was no justification for the orders to be extended because no charges had been brought during the previous six months;

(ii) The Respondents businesses had 'ground to a halt' as a result of orders over bank accounts;

(iii) The Respondents had been subjected to overwhelming debt and had been unable to pay their debts in good time, putting them at risk of being rendered bankrupt.

The 2nd Respondent had another business which generated profit and was not subject to investigation. It was therefore contended that, in the event that the court was not inclined to discharge the order in its entirety, the court should instead limit the prohibition in connection with the 2nd Respondent's account to the funds connected with the investigation. The Court held that:

(i) Although no charges had been brought, significant progress had been made in what was a complex investigation. The purpose of the investigation was to establish whether due process was followed in awarding the tender and ultimately to hold the respondents to account if such due process was not followed. This purpose would be defeated if the extension of the preservation order was not granted. Therefore, the court was satisfied that it was in the interests of justice for the prohibitions to continue.

(ii) Under s89(1) of the Proceeds of Crime and Anti-Money Laundering Act the Court had the power to vary or rescind orders prohibiting the use of property to provide for reasonable expenses if the operation of the order would cause undue hardship and that such hardship outweighs the risk that the property may be destroyed, damaged, concealed or transferred.

(iii) In the circumstances, the court would vary the extent of the prohibition on dealing with funds in the 2nd Respondent's account, ringfencing the funds alleged to be connected with the investigation and permitting use of other funds.

Points to Note

- This case demonstrates that when orders restraining the use of assets are obtained prior to charge, it is important to ensure that the investigation continues diligently and as expeditiously as is reasonable. Such an order infringes a person's rights to enjoyment of property, and if the infringement is not reasonable, the court will be minded to discharge the order.

- This case also shows the risks involved in restraining assets. The purpose of prohibiting dealing with assets is to preserve value pending any final asset forfeiture hearing. However, if a person is unable to draw reasonable expenses to meet bills, they will default and could end up incurring greater loss when companies take action to remedy the default and recoup their money.

- The risks involved in restraining assets also extend to businesses. Prohibiting dealing with funds connected with a legitimate business could alarm creditors or incur loss. Careful thought must therefore be given before prohibiting dealing with business funds and the extent to which such funds should be restrained. Clearly, if the company is wholly illegitimate, such concerns have no place.

Zambia

Anti-Corruption Commission v Tedworth Properties Inc [2016]

The Court's Decision
• Property seized by the Anti-Corruption Commission was correctly seized.

Judges: Mambilima CJ; Kaoma and Kajmanga JJS

Court/Jurisdiction	Case Reference & Citation
The Supreme Court of Zambia holden at Lusaka (Civil Jurisidction)	Selected Judgment No 49 of 2016 Appeal No 209/2012

Case Summary

The Respondent, Tedworth Properties Inc, was a company that had been incorporated in Panama. It registered in Zambia on 6th September 2000. However, Tedworth Properties had acquired three properties in Zambia prior its registration, contrary to clear laws that a foreign company cannot own land in Zambia unless it is registered as an investor. The questionable circumstances in which the properties were acquired was therefore investigated by the Anti-Corruption Commission.

Under the Corrupt Practices (Disposal of Recovered Property) Regulations 1986 property may be seized by the State if it is subject of, and had been recovered during, an investigation into a corruption offence suspected to have been committed. The Anti-Corruption Commission served a notice on the Respondent that the three properties were to be seized by the State if not claimed within three months from the publication of a notice in the Government Gazette.

The trial Judge found that the seizure of the property was unlawful because there were no criminal investigations against the Respondent relating to the properties in dispute. This was rejected by the Supreme Court. “A cursory study of the evidence establishes that the Respondent was under investigation in connection with the alleged suspicious circumstances in which it had acquired the properties”. The observed that the trial Judge appeared to have had expected the Anti-Corruption Commission to prove something more than the mere fact that they had received a complaint and the Respondent and they had instituted investigations into the complaint. However, “what needed to be shown at that stage was simply that there were investigations against the Respondent in connection with the disputed properties” [p37].

The Supreme Court also held that the Regulations required a person claiming the property once property had come into possession in the Anti-Corruption Commission had to appear before the Anti-Corruption Commission to claim the property, rather than make a claim to the courts. “The purpose of the regulations is to ensure that people who acquire property in suspicious ways answer tot eh Appellant. The claim does not literally mean that the disputed owner would simply go and collect the properties upon adequately providing proof of their identity. If the disputed owner makes a claim for the property and they are cleared, the property would be handed over to them and the matter would end there. If the Appellant finds that the properties were acquired through suspected criminal means, it would proceed to either conduct further investigations or institute criminal proceedings against the purported owner” [p41].

Points to Note

- In this case the Supreme Court made clear that properties subject to corruption investigations may be seized whilst an investigation is ongoing. This is not only a way of sending out a strong message that corruption will not be tolerated, but also serves a strong investigatory function by requiring a person claiming the property to answer to the Anti-Corruption Commission.

5. MONEY LAUNDERING

Malawi

Esnart Nenani Ndovi v The Republic [2016]

The Court's Decision

- 30 months' imprisonment for money laundering upheld.
- Full restitution by a person convicted of money laundering will not necessarily be as persuasive a mitigating factor in money laundering cases.

Judge: Justice MCC Mkandawire

Court/Jurisdiction	Case Reference & Citation
The High Court of Malawi, Lilongwe District Registry	Criminal Appeal No. 192 of 2016

Case Summary

The appellant had pleaded guilty to (amongst other things) money laundering and for that offence had been sentenced to 30 months imprisonment with hard labour.

It was contended on appeal that the magistrate had erred by disregarding the fact that the appellant had fully repaid the money she admitted to have laundered. The High Court agreed with the first instance judge that, with regards to money laundering, "the issue of restitution must be looked at from a broader perspective". The money had been siphoned from a government ministry. By the time that it was repaid, the intended purpose may well have become irrelevant, thereby inconveniencing citizens. Restitution was therefore of limited effect in the circumstances.

The court also considered whether the 30 month sentence was excessive. It considered sentences across the whole spectrum, including *Republic v Tressa Namathanga Senzani Criminal Case no. 62 of 2013* where 3 years' imprisonment was given after more than 60,000,000 was laundered and the

offender had pleaded guilty. The court also considered *Republic v Namata and Kasamba Criminal Case no. 45 of 2013,* where the money laundered was Mk14,439,966 and the sentence was 4-5 years after a Not Guilty plea, and Republic v Oswald Lutepo *Criminal case no. 2 of 2014* where the offender had pleaded guilty to laundering approximately Mk4 billion and was sentenced to 8 years' imprisonment. In all of the circumstances, 30 months appeared to be within the reasonable range of sentences.

Points to Note

- This case demonstrates that money laundering is serious and will usually attract serious custodial sentences.
- For public policy reasons, the mere fact that a person has restored the money may not be as great a consideration in money laundering cases as in other cases.

The Republic v Oswald Lutepo [2015]

The Court's Decision
• 8 years' imprisonment imposed for money laundering
• 3 years' imprisonment imposed for conspiracy to defraud

Judge: Kapindu J

Court/Jurisdiction	Case Reference & Citation
The High Court of Malawi, Zomba District Registry	Criminal Cause No 02 of 2014

Case Summary

This prosecution arose out of the "cashgate" scandal. As the learned Judge described it, "in September 2013, gates to what was meant to be a clandestine and non- detectable criminal syndicate of fraudsters and money launderers were flung open. Information revealing an unprecedented fiscal scandal gradually unfolded in a manner an unsuspecting observer would have been forgiven to think was a masterfully scripted piece of fiction. Yet, and very sadly for Malawi, this was no fiction. It was a shocking reality. Billions of Malawi

Kwacha had been embezzled from the national fiscus by some unscrupulous people". The scandal involved "highly placed politicians" and public/civil servants who conspired to defraud the Government of Malawi of large sums of money. IT personnel, with excellent knowledge of the operations Integrated Financial Management Information System (IFMIS) and how it could be compromised and breached to perpetrate the fraud, were recruited. Front businesses were used to create an air of legitimacy.

Mr. Lutepo dishonestly accepted to receive fraudulent Government of Malawi Cheques in favour of two of his businesses when he had delivered no goods or services in consideration. To that end, he agreed to have his business bank accounts to be used to process the fraudulent payment of cheques and in turn handed over almost equivalent sums of cash to some of the principals operating the conspiracy. In total he handled MWK 4,206,337,562. Mr. Lutepo accepted that he personally gained no less that MWK 400,000,000 as a result of the illicit transactions.

The court held that the offences were grave and unprecedented in their scope. Mr Lutepo was a successful businessman rather than desperately poor man lured into a "get-rich-quick" scheme by "sweet talk". He "voluntarily and knowingly joined the conspiring syndicate more out of greed than desperation. He carefully calculated his potential gains out of the scheme. This makes his involvement much worse". There was careful planning of the offence. It was not a one-off transaction. The convict "knowingly agreed with others to invade the national treasury at source, purloining huge amounts of money". Although three years' imprisonment was the maximum sentence for conspiracy to defraud, this "was the worst form of conspiracy to defraud this country has ever witnessed". Three years' imprisonment for conspiracy to defraud was therefore appropriate.

The maximum sentence for money laundering was 10 years' imprisonment. In light of his guilty plea, some restoration to the State and his co-operation, the appropriate sentence for money laundering was 8 years' imprisonment.

Points to Note

- The judge observed that "the maximum sentence under the MLA is particularly strange considering the possibilities of very serious crimes that may be committed contrary to that Act. I am not sure why the maximum penalty was pitched so low. Perhaps the framers of the legislation might not have envisaged that offences under the Act might assume huge proportions of the magnitude encountered in the present case. Today we are dealing with unprecedented amounts of money laundered. Tomorrow we might be confronted with a very bad and appalling case of terrorist financing. The law makers should seriously reflect on whether the punishments we have on the statute book are sufficient".

The Republic v Leonard Karonga [2016]

The Court's Decision

- A sentence of 7 years' imprisonment for money laundering, 2 years' imprisonment for facilitating money laundering, and 1 year of imprisonment for conspiracy to defraud was imposed. The sentences were ordered to be served concurrently.

Judge: Mwale, J

Court/Jurisdiction	Case Reference & Citation
The High Court of Malawi, Lilongwe District Registry	Criminal Case No. 68 of 2014

Case Summary

The defendant had been the Assistant Director of Tourism (Planning and Development) and had served Government for a period of 22 years. He pleaded guilty three counts of embezzlement offences involving Government funds. This was part what had notoriously become known as "cash-gate". All the three counts involved fraudulently obtained cheques drawn on the Reserve Bank of Malawi that were either laundered through the acquisition of valuable assets or paid to bogus contractors for goods and services allegedly supplied.

Count 1 involved a conspiracy to defraud, in which a sum to the total value of not less than MWK 1 billion was paid to bogus suppliers of goods and services.

Count 2 was a count of Facilitating Money Laundering, contrary to section 35(l)(d) of the Money Laundering, Proceeds of Serious Crime and Terrorist Financing Act. It involved a sum of MWK520,000,000, used in the acquisition of six Marco Polo Torino buses. The defendant's role was deliver a fraudulently obtained cheque to an automobile dealer knowing the criminal origins of the cheque and knowing that by purchasing the buses, those criminal origins would be obscured.

Count 3 was a count of Money Laundering, contrary to section 35(l)(c) of the Money Laundering, Proceeds of Serious Crime and Terrorist Financing Act. It involved a sum of MWK 3,252,002,025.

In this case, the level of culpability was high. The total amount embezzeled was said to be unprecedent in the history of Malawi, arguably exceeding the total combined annual budget spent by the entire Government Justice sector, comprising the Ministry of Justice headquarters, the Anti-Corruption Bureau, the Legal Aid Bureau, the Administrator General's Department, the Registrar General's Department, and the Directorate of Public Prosecutions.

Further the State had to devote extensive resources to investigating and prosecuting these offences, and had to invest vast amounts of money to ensure that Government financial systems were strengthened to the point where Malawians and Malawi's cooperating partners can confidently use them.

By way of mitigation, the defendant had pleaded guilty. He also co-operated and provided assistance to the authorities. The defendant had also lost his job and career. Although proceedings for a confiscation order were to be instituted, the defendant volunteered to surrender 2 houses and 5 vehicles to the State. The Court found that "the convict deserves credit for voluntarily rendering their task in tracing such tainted property easier."

A sentence of 1 year of imprisonment was imposed for the conspiracy to defraud. 2 years' imprisonment for facilitating money laundering, and 7 years' imprisonment for money laundering. The sentences were ordered to be served concurrently and not consecutively.

Points to Note

- This case is a good example of a careful evaluation of aggravating and mitigating factors in determining the appropriate sentences for embezzlement, including offences of conspiracy to defraud and money laundering.
- The case also sets out in some detail the considerations to be taken into consideration when contemplating any form of plea-bargaining.
- It is of note that willingness to forfeit property was treated as a mitigating factor. Co-operation of defendants with authorities in asset forfeiture cases can be difficult to achieve, and this may be one way of seeking to encourage co-operation.

Mauritius

Director of Public Prosecutions v AA Bholah [2011]

The Court's Decision
• Money laundering may be charged and proved without proof of a particular predicate offence.

Judges: Lords Phillips, Brown, Kerr and Wilson, and Sir Malachy Higgins

Court/Jurisdiction	Case Reference & Citation
The Judicial Committee of the Privy Council	[2011] UKPC 44 Privy Council Appeal No 0059 of 2010

Case Summary

In September 2004 the respondent was convicted of money laundering. The magistrate found that the respondent had transferred money, which he had reasonable grounds to suspect was the proceeds of crime, from his company bank account to bank accounts outside Mauritius. In the course of the trial the magistrate ruled that the prosecution was not required to specify or to prove the particular crime of which it was alleged the money was the proceeds. The

magistrate held that she was able to infer from the evidence that the monies were the proceeds of criminal activity.

The Supreme Court held the predicate offence needed to be particularised in order that a charge complies with that article 10(2) of the Constitution. This requires that every person charged with a criminal offence "shall be informed as soon as reasonably practicable, in a language that he understands, and in detail, of the nature of the offence". Accordingly, it quashed the conviction. The Director of Public Prosecutions appealed to the Privy Council.

The Privy Council held that article 10(2) requires that a person is informed of the details relevant to the elements of the offence *with which he is charged*, in this case the elements of the offence of money laundering. The statutory language was very clear in dispensing with the requirement to prove a predicate offence as an essential element of the offence. It therefore allowed the appeal and restored the decision of the magistrate.

Points to Note

- The Privy Council held that, although it is not essential to particularise the predicate criminality underlying a money laundering charge, where it is possible to do fairness demands that this information should be supplied.

- Reviewing the Warsaw Convention and the approach in Australia and New Zealand, the Privy Council held that this was by no means an unusual approach to the problems of proof that money laundering offences can present.

- The Privy Council noted that the approach adopted by the magistrate has been applied in England & Wales, where in the case of *Anwoir* [2009] 1 WLR 980 the Court of Appeal held that "there are two ways in which the Crown can prove the property derives from crime, (a) by showing that it derives from conduct of a specific kind or kinds and that conduct of that kind or those kinds is unlawful, or (b) by evidence of the circumstances in which the property is handled which are such as to give rise to the irresistible inference that it can only be derived from crime."

Namibia

Lameck and another v The President of the Republic of Namibia and Others [2012]

The Court's Decision

- The criminal offences of money laundering were not retrospective and did not offend the rights to property or to carry on a business, occupation or trade.

Judges: Hoff J, Smuts J and Miller AJ

Court/Jurisdiction	Case Reference & Citation
The High Court of Namibia	A 54/2011

Case Summary

In this case the High Court examined a number of constitutional issues relating to money laundering offences.

Retrospective criminalisation of conduct.

The money laundering offences in the Prevention of Organised Crime Act (POCA) had been defined as acts in connection with "the proceeds of unlawful activities". Pursuant to s1(1) of POCA such unlawful activities may have taken place prior to the commencement of the Act. It was therefore contended that the money laundering offences were retrospective.

The Court held that this was not the case. The money laundering offences criminalised current possession, acquisition or use of the proceeds of unlawful activities. It therefore relates to conduct after POCA came into force. What matters is the date of the dealing with the criminal money, not the date of the unlawful activity.

Right to property

The right to property was not infringed by POCA because proceeds of unlawful activity would not constitute property in respect of which protection is available.

Right to practise any profession, or carry on a business, occupation or trade

As with the right to property and endorsing the decision of the Supreme Court of Namibia in *Africa Personnel Services v Government of Namibia.* the constitution does not protect unlawful economic activities and would thus not protect the proceeds of those activities.

Points to Note

- The High Court adopted the South African interpretation of the purpose of proceeds of crime and anti-money laundering legislation in *NDPP v Mohamed* and *Mohunram v NDPP* as being applicable to Namibia [see para 53].
- This case also dealt with the constitutionality of the asset forfeiture regimes in POCA, and that part of the case is dealt with elsewhere in this Casebook.

Tanzania

Mariam Mashaka Faustine and others v The Attorney General and another [2011]

The Court's Decision
• It is does not infringe the right to equality or the presumption of innocence to deny admission to bail to people charged with money laundering. • The court had no discretion to admit to bail a person who is charged with money laundering

Judges: I.H. Juma, J.H.K. Utamwa, S.V.G. Karua JJJ.

Court/Jurisdiction	Case Reference & Citation
The High Court of Tanzania at Dar Es Salaam Main Registry	Consolidated Miscellaneous Civil Causes No 88 and 95 of 2010.

Case Summary

The petitioners sought to challenge s148(5)(a)(v) of the Criminal Procedure Act, which provided that "a police officer in charge of a police station or a court before whom an accused person is brought or appears, shall not admit that person to bail if that person is charged with money laundering". It was contended that this violated the right to equality before the law.

In dismissing the petitioners' challenge, the court held that "in as much as money laundering activities can undermine the integrity and stability of national and international financial institutions and systems, they have destabilizing effect posing national insecurity and threatens the economic security of the whole country". The prohibition on the admission to bail is therefore "constitutional and in the best interests of defence, public safety, public order…Tanzania and the international community has so far made efforts to fend off the vice of money laundering and its potential link to terrorist financing. Parliament is therefore entirely justified to shut out these offences from admission to bail. The prohibition on the admission to bail is also proportionate. It does not change the presumption of innocence and is a reasonable way to safeguard public interests.

Furthermore, in light of the clear statutory provisions, the court had no discretion to admit a person to bail when charged with a money laundering offence.

Points to Note

- In finding that it is constitutionally permissible to refuse to admit a person to bail on the grounds that they have been charged with money laundering, the court emphasised the need, both nationally and internationally, to tackle money laundering.

The Director of Public Prosecutions v Harry Msamire Kitilya and others [2016]

The Court's Decision

- The different methods of money laundering described in the Anti-Money Laundering legislation are each provide for an actus reus and a mens rea. This means that each method described is a separate criminal offence, albeit known by the umbrella name of 'money laundering'.
- Any charge of money laundering must be sufficiently clear to enable a person who is charged to prepare their defence.

Judges: Mkasimongwa J

Court/Jurisdiction	Case Reference & Citation
The High Court of Tanzania, Dar Es Salaam District Registry at Dar Es Salaam	Criminal Appeal No 105 of 2016

Case Summary

The respondents were charged with (amongst other things) money laundering, contrary to section 12(a) of the Anti-Money Laundering Act No. 12 of 2006. s12 of the Act creates an 'offence of money laundering', which can be committed by:

(a) engaging in a transaction involving property,

(b) converting, transferring, transporting or transmitting property,

(c) concealing, disguising or impeding the establishment of the true nature, source, location, disposition, movement or ownership of or rights with respect to property,

(d) acquires, possesses, uses or administers property, that he knows or ought to have known is the proceeds of a predicate offence.

(e) Participating in, associating with, conspiring to commit, attempting to commit, aiding or abetting, facilitating or counselling the commission of any of the acts described above.

The particulars of the offence alleged that the 'engagement' involved transferring property. The trial judge found that each paragraph of s12 created a distinct offence and that, effectively, the money laundering charge rolled two charges up into one. The charge was therefore defective and so confusing that the respondents may not be in a position of understanding clearly what offence they are specifically being charged with so as to be able to prepare a defence. The trial judge therefore struck out the charge. The DPP appealed to the High Court.

The High Court agreed with the trial court that each paragraph under section 12 creates a separate offence. Each paragraph provides for an act (*actus reus*) and a necessary mental element (*mens rea*). Each offence created is known as 'money laundering'. However, it disagreed that the charge was defective and confusing because it effectively conflated two separate offences. The 'engagement' in a transaction under s12(a) had to be particularised, and 'transferring' had been used as the term to explain this. The order striking out the money laundering count was therefore quashed.

Points to Note

- This case dealt with the issue of whether the various methods of money laundering outlined in legislation create separate offences or just a single offence that can be committed in a number of different ways. This decision confirms that each section of the statute creates a separate offence of money laundering.
- Whichever form of money laundering is alleged, it must be particularised sufficiently clearly to allow the person who was charged to prepare their defence.

Director of Public Prosecutions v Elladius Cornelio Tesha and others [2016]

The Court's Decision

- It is permissible to charge both money laundering and its predicate offending.
- Clear description of the alleged money laundering offences is needed, including the names of victims who have paid money into bank accounts used in the offending.

Judges: Arufani J

Court/Jurisdiction	Case Reference & Citation
The High Court of Tanzania, Dar Es Salaam District Registry at Dar Es Salaam	Criminal Appeal No 135 of 2013

Case Summary

The respondents were charged with money laundering, contrary to section 12(d) of the Anti-Money Laundering Act No. 12 of 2006. S12(d) provides that it is an offence to acquire, posses, use or administer property that a person knows or ought to have known is the proceeds of a predicate offence. The respondents were also charged with the predicate offences leading to the money laundering, namely forgery and an offence involving false documents. The trial judge struck out the money laundering charge, holding that:

(i) the money which the respondents received was not proceeds of a predicate offence.

(ii) money laundering could not be charged together with the predicate offences; and

(iii) the money laundering charge was defective in its substance.

The Director of Public Prosecutions appealed the decision. The High Court found that:

(i) The trial judge had sought to make a preliminary determination that could only have been properly determined after hearing all of the evidence.

(ii) Although money laundering and its predicate offences are often premised on related facts, they are based on distinct acts and address different aspects of criminality. Money laundering has its own ingredients which are different from those of the predicate offences. They can be included on the same charge sheet if they are founded on the same facts or form part of a series of offences of a same or similar character.

(iii) Although it is not a requirement of the law to state in the particulars of the offence each and every thing relating to the offence and proof of what happens comes during the hearing of the case, the particulars should have included such particulars as may be necessary for giving reasonable information as to the nature of the offence charged. This should have included the name of the victim who deposited the money in the bank account in question. The money laundering charge was therefore defective in its substance.

The High Court therefore ruled that the matter should be returned to the trial court forthwith for necessary steps to be taken, which might include proceeding on the money laundering charge after it had been amended or rectified to conform with the requirements as to better particularisation of the offending.

Points to Note

- This case reiterates the point made in *Harry Msamire Kitilya* that the offending must be sufficiently well particularised to allow a person who is charged to clearly understand an allegation of money laundering.

- The court drew support for charging both the predicate offence and for money laundering from a decision from the High Court of Malawi, *Maxwell Namata v Luke Kasamba* (not in this Casebook).

Zambia

The People v Austin Chisangu Liato [2015]

The Court's Decision
• A conviction for possession of property reasonably suspected to be the proceeds of crime was upheld. • The prosecution bears the burden in relation to reasonable suspicion. • The prosecution does not have to show the link between the source of the money or the accused to possible criminal conduct. It is sufficient that possession and reasonable suspicion are proved.

Judges: Wanki, Muyovwe and Malila, JJS

Court/Jurisdiction	Case Reference & Citation
The Supreme Court of Zambia holden at Lusaka (Criminal Jurisdiction)	Appeal No 291/2014

Case Summary

The respondent was arraigned, tried and convicted by the Subordinate Court of the first class on one count of possession of property suspected of being proceeds of crime contrary to s71 (1) of the Forfeiture of Proceeds of Crime Act No. 19 of 2010. S71(1) criminalizes the receipt, possession, concealment, disposal of, or bringing into Zambia, any money or other property that my reasonably be suspected of being proceeds of crime. The particulars of the offence were that the respondent, on the 24th November, 2011 possessed and concealed money at his farm, amounting to K2,100,100,000, being reasonably suspected of being proceeds of crime. Whilst possession was accepted, reasonable suspicion was in dispute.

The learned Magistrate convicted the respondent. She found that, on the totality of the evidence before her, the prosecution had proved the case against the respondent to the requisite standard. A large sum of cash had been found, far larger than would ordinarily be kept in a home, even in light of any diminished confidence in the banking system. The notes had also been concealed at a farm house where the respondent did not ordinarily reside, hidden in trunks buried underground beneath two concrete slabs. These facts are totally out of the ordinary and were sufficient to ground reasonable suspicion.

s71(2) states that it is a defence if a person satisfies the court that the person had no reasonable grounds for suspecting that the property referred to in the charge was derived or realised, directly or indirectly, from any unlawful activity. The learned Magistrate found that the Respondent had failed to discharge the onus placed on him by section 71 (2) of the Forfeiture of Proceeds of Crime Act, when he elected to remain silent.

The learned Magistrate subsequently sentenced him to twenty-four months imprisonment with hard labour. She also ordered forfeiture of the K2,100,100,000 and the farm to the State.

The High Court overturned the conviction and an appeal was brought to the Supreme Court. It found that the prosecution had not discharged its burden of proof.

Did the High Court err in holding that the prosecution had not discharged its burden of proof?

The Supreme Court first considered the relevant test to be applied in establishing that the money 'may reasonably be suspected of being the proceeds of crime'. The Supreme Court found that there were four relevant questions to be addressed: first, who should have the suspicion; second, how should that suspicion be proved; third, who should establish it; and fourth, whether on the facts of the present case, reasonable suspicion was indeed established. The Supreme Court held that:

(i) It is the prosecution which must harbour the reasonable suspicion and which must prove it.

(ii) Reasonable suspicion is mere conjecture or surmise, shy of actual proof that a state of affairs exists. Proof of reasonable suspicion never involves certainty of the truth. Where it does, it ceases to be suspicion and becomes fact.

(iii) The suspicion must be based of articulable facts, which will assist the court in determining whether the suspicion is reasonable, or is not reasonable under those circumstances.

(iv) The phrase 'may reasonably be suspected' supports the conclusion that proof beyond reasonable doubt of reasonable suspicion, was not contemplated or intended when section 71(1) was formulated. This is further supported by the fact that there is no need to prove a predicate offence.

(v) To prove reasonable suspicion under section 71 (1) of the Act, the prosecution does not have to show the link between the source of the money or the accused to possible criminal conduct. It is sufficient that possession and reasonable suspicion are proved.

(vi) On the facts of the case as articulated above, there were clear grounds for reasonable suspicion.

The Supreme Court went on to consider s71(2). It held that it was incumbent upon the respondent to raise the defence under section 71 (2). The prosecution did not have to prove that the respondent did not have reasonable grounds for suspecting that the money was derived from unlawful activity.

On the facts of the case, the respondent chose not to avail himself of that defence, opting instead to exercise his constitutional right to remain silent. Although this is his right, in the absence of his evidence, the court had to proceed on the evidence before it. The court could not speculate.

In all of the circumstances, the prosecution had satisfied the burden of proof to the requisite standard.

Did the construction of section 71 of the Forfeiture of Proceeds of Crime Act adopted by the High Court render it impossible to give effect to the intention of the Legislature?

The Forfeiture of proceeds of Crime Act was "prompted in large measure by the desire to circumvent the difficulties encountered in proving and dealing with serious offences such as money laundering and drug trafficking". The court noted that in many jurisdictions it is now a common occurrence for the burden of proof to shift, or to be lowered during confiscation or forfeiture proceedings of property reasonably suspected to be proceeds of crime. Zambia is a signatory to various international conventions which provided for flexible standards on the burden of proof.

"The passage of the Forfeiture of Proceeds of Crime Act in 2010 was therefore, a deliberate act of the State, sequel to international clamour in this regard, to restate the burden and the standard of proof in proceedings relating to forfeiture of proceeds of crime. The framing of section 71 (1), (2) and (3) was a conscious and deliberate desire to change the standard of proof and the evidentiary burden of proof."

Accordingly, the construction of the burden and standard of proof did not give effect to the intention of the legislature. The appeal therefore succeeded, and the conviction, sentence and forfeiture order were confirmed.

Points to Note

- In this case the Supreme Court reviewed the international context in which the asset forfeiture regime operates.
- The Supreme Court set out clear guidance to assist judges in determining the issue of 'reasonable suspicion'.

The People v Henry M Kapoko and 10 others [2018]

The Court's Decision

- 5 persons were convicted of theft by a public servant and money laundering and sentenced to a total 18 years' imprisonment each.
- Forfeiture of the proceeds of money laundering was ordered.
- Statutory judgment for recovery of 6.8m Kwacha entered in favour of the Attorney-General.

Judge: E. Zulu (Principal Resident Magistrate)

Court/Jurisdiction	Case Reference & Citation
The Subordinate Court of the First Class for the Lusaka District holden at Lusaka (Criminal Jurisdiction)	SSY/109/2009

Case Summary

The accused were charged with 69 counts, including theft by a public servant and money laundering. Ministry of Health Human Resources Director Henry Kapoko, three accoutants and an internal auditor were convicted. In essence, the accused were alleged to have stolen money by purporting to make payments for workshops that never actually took place. The fees were for training a number of participants. However, when the fees were divided the purported number of participants, it came out to a decimal point figure, which is "a position uncharacteristic to the enumeration of human beings" (there are either 2 or 3 human beings, not 2.75 for example). Furtehremore, the the frequency with which the same cadre of employees was purportedly trained with a short period of time raises suspicion. The payments exceeded the threshold for the Permanent Secretary's Procurement authority and so authority for payment should have been sought from the Ministerial Tender Committee. No such authorisation was sought.

Kapoko made huge bank deposits at the same time he was acquiring high value motor vehicles and properties. They were each sentenced to a total of 18 years imprisonment with hard labour. Their properties were ordered to be forfeited to the State. These included 24 motor vehicles, 3 houses, 2 lodges and a filling station. Accounts in which stolen money was deposited were ordered to be forfeited to the State. A statutory judgment was also entered in favour of the Attorney General to recover over K6.8m from the convicts.

Points to Note

- This case was an example of large-scale corrupt activity, from which there had been huge financial gains from the public purse. It is also an effective example of how provisions permitting the forfeiture of the money laundering can be used to send a clear message that crime will not pay.

NOTES

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