

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: HC-MD-CIV-MOT-GEN-2020/00374

In the matter between:

MARTIN NANDE SHILENGUDWA

FIRST APPLICANT

HILMA DALONDOKA SHILENGUDWA

SECOND APPLICANT

and

THE PROSECUTOR-GENERAL

FIRST RESPONDENT

THE PRESIDENT OF THE REPUBLIC OF NAMIBIA

SECOND RESPONDENT

THE MINISTER OF JUSTICE

THIRD RESPONDENT

THE ATTORNEY-GENERAL OF NAMIBIA

FOURTH RESPONDENT

**THE DIRECTOR OF THE ANTI-CORRUPTION
COMMISSION**

FIFTH

RESPONDENT

BUSINESS AND INTELLECTUAL PROPERTY

AUTHORITY

SIXTH RESPONDENT

MINISTER OF FINANCE

SEVENTH RESPONDENT

Neutral citation: *Shilengudwa v The Prosecutor-General* (HC-MD-CIV-MOT-GEN-2020/00374) [2023] NAHCMD 496 (11 August 2023)

Coram: MASUKU J, OOSTHUIZEN J *et* PRINSLOO J

Heard: 14 October 2022

Delivered: 11 August 2023

Flynote: *Constitutional law* – Articles 8, 16 and 21(1)(j) of the Constitution – were these Articles breached or offended by the definition of ‘proceeds of unlawful activities’ as set out in Prevention of Organised Crime Act 29 of 2004

Statute – Prevention of Organised Crime Act 29 of 2004 – Constitutionality of s 1 – Definition of the ‘proceeds of unlawful activities’

International agreements and Conventions – Palermo Convention- Namibia’s obligations as a member state and a signatory to the Covenant, having ratified the Convention on 16 August 2002 - Article 12(4) of the Convention

Summary: Applicants sold immovable property to the predecessor of the sixth respondent. The proper procedure was not followed and proper authorisation was not obtained for the purchase of their immovable property.

First respondent obtained a preservation order several months after the property was transferred and the purchase price paid into the first applicant’s bank account. First respondent obtained a preservation order concerning the positive balances in the investment and bank accounts of the first applicant, including any interest accrued thereon. These balances exceeded the purchase price paid for the property of the applicants.

First respondent relies on the definition of ‘proceeds of unlawful activities’ in POCA for the preservation of future forfeiture of the preserved funds of the first applicant.

The definition reads 'any property or any service, advantage, benefit or reward that was derived, received or retained, directly or indirectly in Namibia or elsewhere, at any time before or after the commencement of this Act, in connection with or as a result of any unlawful activity carried on by any person, and includes any property representing property so derived and includes property which is mingled with property that is proceeds of unlawful activity.'

Applicants challenged the constitutionality of the last part of the definition of the definition which reads '...and includes the property which is mingled with property that is proceeds of unlawful activity'.

First respondent is of the view that without the above impugned part in the definition the State and the public would be unprotected against criminals, who mix 'clean' money with 'dirty' money, and would be prevented to forfeit proceeds of unlawful activities.

Held that due to the courts' view concerning the effect of the impugned part of the definition of 'proceeds of unlawful activity' on Article 16 property rights, it was not necessary to deal in any detail with Articles 8 and 21(1)(j) of the Constitution.

Held that the forfeiture of lawfully acquired property is akin to an expropriation of property without just compensation, which is constitutionally prohibited and is not in the public interest. The impugned part of the definition of proceeds of unlawful activities is arbitrary and deprives owners of lawfully acquired property of their rights to that property without providing sufficient reasons.

Held that civil forfeiture is not meant to be punitive but rather remedial. The characterization of civil forfeiture as not being punishment stands, however the result of the definition of 'proceeds of unlawful activity' causes it to stand in stark contrast with the intended remedial purpose that the Act purports to have. It is irrational to preserve or eventually forfeit millions of 'clean' money because of tainted, perceived or real, money that was mixed with the untainted millions. This amounts to punishment.

Held further that it is clear that the definition must be interpreted restrictively in order to be consistent with the Constitution. For the detailed reasons advanced, POCA does not comply with Article 22 of the Constitution.

Held further that Chapter 5 of the Namibian POCA is in compliance with Article 12(4) of the Palermo Convention in respect of criminal prosecutions, however, Chapter 6 of the Namibian POCA deals with preservation and forfeiture regardless of whether criminal prosecution is pursued under Chapter 5. Chapter 6 of the Namibian POCA is however not in accord with the Palermo Convention.

Held further that it is expected of our courts when interpreting a statute like POCA, which derives from an international agreement or covenant such is the Palermo Convention, to do so in conformity with international law.

Held further that the impugned definition does not only fall short of the Palermo Convention but more importantly, it falls short of the Namibian Constitution, Article 22 in particular.

Held further that the portion in the definition of 'proceeds of unlawful activities', which reads 'and includes property which is mingled with property that is proceeds of unlawful activity' is unconstitutional and should be struck from the definition of the proceeds of unlawful activities.

Held further that the *Biowatch* principle in relation to costs applies, the effect of which is that private parties who seek constitutional redress against government and are unsuccessful, should ordinarily not pay the costs, unless they have acted vexatiously, frivolously or improperly.

Held further that where a private party succeeds in a constitutional matter, the *Biowatch* principle does not apply as costs against government do not have the chilling effect they may have on private individuals.

ORDER

1. The last portion of the definition of 'proceeds of unlawful activities' contained in s 1 of the Prevention of Organised Crime Act 29 of 2004, which reads 'and includes property which is mingled with property that is proceeds of unlawful activity;' is declared to be unconstitutional and is struck out from the definition.
2. The respondents are ordered to pay the costs of the application consequent upon the employment of one instructing and two instructed counsel.
3. The matter is regarded as finalised and removed from the roll.

JUDGMENT

THE COURT

The parties

[1] The applicants are Martin Nande Shilengudwa and Hilma Dalondoka Shilengudwa, residing at Erf no 40, Voltaire Street, Academia, Windhoek.

[2] The respondents are as follows:

a) The first respondent is the Prosecutor-General ('the PG), appointed in terms of Article 88 of the Namibian Constitution with her head office at Corporate House, JP Karuaihe Street, Windhoek.

b) The second respondent is the President of the Republic of Namibia, cited in his official capacity, in the care of the Government Attorney situated at the 12th Floor, Sanlam Building, Independence Avenue, Windhoek.

- c) The third respondent is the Minister of Justice, duly appointed as such in terms of the Constitution. She is cited in her official capacity, in the care of the Government Attorney situated on the 12th Floor, Sanlam Building, Independence Avenue, Windhoek.
- d) The fourth respondent is the Attorney-General of Namibia, cited in his official capacity, in the care of the Government Attorney situated at the 12th Floor, Sanlam Building, Independence Avenue, Windhoek.
- e) The fifth respondent is the Director of the Anti-Corruption Commission, cited in his official capacity, with his place of business situated at c/o Mont Blanc and Groot Tiras Str. Eros, Windhoek.
- f) The sixth respondent is the Business and Intellectual Property Authority ('BIPA'), duly established in terms of s 3 of the Business and Intellectual Property Act 8 of 2016, with its place of business situated at PZN Building, 3 Ruhr Street, Northern Industrial Area, Windhoek.
- g) The seventh respondent is the Minister of Finance, duly appointed in such terms of the Constitution. He is cited in his official capacity, in the care of the Government Attorneys situated on the 12th Floor, Sanlam Building, Independence Avenue, Windhoek.

The application

[3] The applicants brought the current application to challenge the constitutionality of the definition of 'the proceeds of unlawful activities' in s 1 of the Prevention of Organised Crime Act 29 of 2004 (POCA). If the court finds that the definition of 'proceeds of unlawful activities' is not unconstitutional, the applicants seek declaratory relief in the alternative. The relief sought is set out as follows:

'1. Declaring that the portion reading "and includes property which is mingled with property that is proceeds of unlawful activity" in the definition of proceeds of unlawful activities contained in the Prevention of Organized Crime Act, 1998, is unconstitutional, null and void, and be struck from the definition of proceeds of unlawful activities.

2. Alternatively, declaring that the definition of proceeds of unlawful activities as contained in the Prevention of Organized Crime Act, 1998, means the following: "proceeds of unlawful activities" means any property or any service, advantage, benefit or reward that was derived, received or retained, directly or indirectly in Namibia or elsewhere, at any time before or after the commencement of this Act, in connection with or as a result of any unlawful activity carried on by any person, and includes any property representing property so derived and includes property which is mingled with property that is proceeds of unlawful activity but not exceeding the assessed value of the proceeds of the unlawful activity before mingling.

3. That the First Respondent together with those Respondents who oppose this application, shall pay the Applicants' costs of one instructing and two instructed legal practitioners.

4. Further and / or alternative relief, in particular, and in the event of the respondents conceding that the definition of proceeds of unlawful activities contained in the Prevention of Organized Crime Act, 1998, can only be saved from being unconstitutional by "in-reading", for the court to consider the respondents' proposed (different) phraseology (i.e. other than suggested in prayer 2 above).'

Background

[4] The applicants, who are married in community of property, were the owners of immovable property situated at Portion 1 Erf 2780, Wanaheda, Katutura since 1992. The couple operated a restaurant, bar and gambling house on the said property, which traded under the name and style of 'Club Vaganza'.

[5] The applicants sold the said property to BIPA¹ for N\$18,000,000 in 2017. The property was registered under BIPA's name on 31 August 2017. Following the sale, Mr Shilengudwa, the first applicant, received a sum of N\$16 982 538.01 in his Bank

¹ Prior to the enactment of the BIPA Act, BIPA was registered as a s 21 company in terms of the Companies Act 24 of 2008 pending the enactment of the BIPA Act. The BIPA Act came into operation on 16 January 2017 and thereby established the Business and Intellectual Property Authority in terms of s 3 of the Act.

Windhoek account. In contrast, Ms Shilengudwa, the second applicant, received a sum of N\$1 031 956.16 in her Bank Windhoek account.

[6] On 1 September 2017, when the sum of N\$16 982 538.01 was deposited into the bank account of the first applicant, he had a positive balance of N\$5 478 818.71 in the said account.

[7] The first applicant thereafter proceeded to transfer N\$13 000 000 into his Capricorn Asset Management Investment Fund account.

[8] On 3 May 2018, the PG obtained a preservation order in terms of s 51 of POCA in respect of the accounts of the applicants in the following terms²:

'2. A preservation of property order as contemplated by section 51 of POCA is granted in respect of:

2.1 The positive balance or value of the Capricorn Asset Management Investment Fund, entity No 13849639, account number 26382 held in the name of Mr Martin Shilengudwa ("the Capricorn Investment Account of Mr Shilengudwa"), including any interest accrued thereon;

2.2 The positive balance in the Bank Windhoek account number 10142917 held in the name of Martin Shilengudwa ("the Bank Windhoek account of Mr Shilengudwa"), including any interest accrued thereon, herein referred to as "the properties".

[9] The application brought by the PG averred that the N\$13 000 000 transferred to Mr Shilengudwa's Capricorn Investment account constituted the proceeds of unlawful activities. The PG further averred that the remainder of the balance in the Bank Windhoek account also constituted the proceeds of unlawful payment of the purchase price of the Erf as the definition of proceeds of unlawful activities includes money that mingled with proceeds of unlawful activities.

² *The Prosecutor-General v Martin Nande Shilengudwa* HC- MD- CIV- MOT- POCA 2018/00140.

[10] The finalisation of the forfeiture proceedings depends on the outcome of this matter. It is important to note that the current application does not concern the validity of the preservation order or the outcome of the forfeiture application.

The founding papers

[11] Mr Shilengudwa, the first applicant, deposed to the founding affidavit on behalf of both applicants. He explained that he was approached by a certain Mr Andima, who introduced himself as the CEO of BIPA (BIPA-21) and informed him that BIPA-21 was interested in buying the applicants' business premises as the property was ideally situated to be a satellite office.

[12] The first applicant stated that the sale price of the immovable property was not negotiable, and Mr Andima was informed that the asking price was N\$18 000 000. The asking price of N\$18 000 000 was with reference to the running-concern value of the business and not the property's market value.

[13] At the time, BIPA-21 could not afford the high asking price of the property. As an alternative, Mr Andima requested the applicants to consider leasing the property to BIPA with the option to buy. The applicants were amenable to leasing the property to BIPA-21, and the parties entered into a lease agreement with a five-year lease period. As a result, the applicants closed down their business, and BIPA-21 occupied the property in terms of the lease agreement from 2012.

[14] During the lease period, Mr Andima continued in his attempts to secure the immovable property on behalf of BIPA-21. Towards the end of the lease period, BIPA-21 managed to source the funds from the line ministry, i.e. the Ministry of Finance, which approved BIPA's request and the immovable property was sold to BIPA-21 for N\$18 000 000.

[15] The first applicant stated that unbeknownst to him, the PG obtained a preservation order several months after the finalisation of the sale and the transfer of

the immovable property. The first applicant states that in the affidavits in the preservation and forfeiture proceedings, the PG averred that:

- a) Mr Andima lacked the authority to conclude the sales agreement.
- b) Mr Andima further lacked the authority to request the transfer of funds from the Ministry, and the Permanent Secretary of Finance lacked the authority to approve the transfer of the funds;
- c) The transfer could not happen because BIPA-21 (the s 21 company as it then was) was terminated, deregistered and replaced by BIPA (the sixth respondent).
- d) There were reasonable grounds to believe that the proceeds of the sale were proceeds of unlawful activities, i.e.
 - i) Fraud;
 - ii) Contravention of the Public Procurement Act 15 of 2015;
 - iii) Offences in terms of the Public Procurement Act 15 of 2015;
 - iv) Contravention of the BIPA Act;
 - v) Contravention of the State Finance Act 31 of 1991 and treasury instructions;
 - vi) Offences in terms of the Anti-Corruption Act 8 of 2003; and
 - vii) Money Laundering in contravention of s 6 of POCA.

[16] The first applicant stated that the PG failed to make out a case for the relief sought in the POCA matter. In support of his contention, the first applicant states in summary as follows:

- a) He was only aware of BIPA as an s 21 company, and if Mr Andima did not have the authority to conclude the transaction, then neither he nor his wife were aware of his lack of authority;
- b) The facts relied upon by the PG for her case fall outside the applicants' knowledge, even if those facts were true.
- c) Mr Andima represented BIPA-21 throughout all negotiations and the agreements concluded, and Mr Andima signed all the relevant documentation on behalf of BIPA-21.

d) The Permanent Secretary of the Ministry of Finance provided Mr Andima with a letter of authorisation for the payment of the purchase price. Accordingly, the payment was made on behalf of BIPA-21.

e) Therefore neither the applicants can be linked to any information which could lead to a conclusion that they were involved in unlawful activities.

[17] In the current application, the first applicant referred to the PG's founding affidavit in the preservation application, where the PG raised concerns about the property valuation and alleged overpayment of N\$13 700 000. The first applicant stated that PG relied on s 1 of POCA to obtain a preservation order which included the funds in his Bank Windhoek account, before the proceeds of the sale of the property were deposited in that account. The PG alleged that the N\$16 982 956.16 paid into his account constituted proceeds of unlawful activities, which then comingled with the amount already in the account. As a result, the PG attempts to make out a case that the remainder of the balance in the Bank Windhoek account also constitutes the proceeds of unlawful payment of the purchase price of the immovable property as the definition of proceeds of unlawful activities includes money that mingled with proceeds of unlawful activities.

[18] The first applicant accepts that for the current application, the court may assume that the N\$16 982 956.16 received into his account is proceeds of unlawful activities, although that remains disputed. The first applicant stated that the PG preserved and seeks forfeiture of all his funds. However, as of June 2020, the funds in the respective accounts exceeded the purchase price of N\$18 000 000 by N\$2 778 482.75. Therefore, the first applicant submitted that the PG cannot and does not allege that these excess funds are the actual 'proceeds of unlawful activities'.

[19] The first applicant submitted that the definition of unlawful activities as set out in s 1 of POCA is challenged as being unconstitutional. The first respondent submitted that the PG's interpretation does not distinguish between the unlawful and lawful funds in the applicant's account. However, on plain interpretation, the concept of 'includes property which is mingled with property' covers all monies kept in an account into which alleged

illicit proceeds are paid. The first applicant concedes that the PG's interpretation in this regard appears to be correct.

[20] The first applicant contended that the PG's 'correct' interpretation renders the definition of proceeds of unlawful activities unconstitutional as the portion of POCA that reads '*includes property which is mingled with property that is proceeds of unlawful activity*' amounts to an arbitrary deprivation of property in violation of Art 16 of the Namibian Constitution. Further, the first applicant submitted that this portion of the definition also breaches Articles 8 and 21(1)(j) of the Constitution because his life's savings in his cheque and investment accounts (the N\$5 478 818.71) are not and cannot be alleged to be proceeds of unlawful activities.

[21] The first applicant submitted that the provision which reads '*includes property which is mingled with property that is proceeds of unlawful activity*' is open to abuse. If the PG's interpretation is to be followed, it may lead to a crippling result for the Namibian economy.

[22] The first applicant urged the court to find that the portion of the definition of proceeds of unlawful activities per s 1 of POCA mentioned, above should be declared unconstitutional, null and void and struck from the definition of proceeds of unlawful activities.

[23] In the alternative, should the court not be satisfied that the PG's interpretation is incorrect, then the phrase '*includes property which is mingled with property that is proceeds of unlawful activity*' can only be saved from being unconstitutional by 'reading in' the words at the end of the sentence '*but not exceeding the assessed value of the proceeds of the unlawful activity before mingling*'.

[24] The first applicant referred the court in this regard to the Palermo Convention³, to which Namibia is a signatory and on which our POCA is based. Article 12(4) of the Palermo Convention⁴ provides that 'if proceeds of crime have been intermingled with

³ The Palermo Convention is the United Nations Convention against Transnational Organized Crime and Protocols thereto.

⁴ General Assembly Resolution 55/25 of 15 November 2000.

property acquired from legitimate sources, such property shall, without prejudice to any powers relating to freezing or seizure, be liable to confiscation up to the assessed value of the intermingled proceeds.'

Answering papers

[25] The answering affidavit was deposed to by the Prosecutor-General, Ms Olyvia Martha Imalwa. As a point of departure, the PG raised a point in limine that the present application is procedurally impermissible. The PG averred that it is an impermissible attempt to achieve a piecemeal hearing of the forfeiture application and further submitted that even if the constitutional challenge succeeds, it will not dispose of the forfeiture application.

[26] The PG submitted that the constitutional challenge to the definition of proceeds of unlawful activities is without foundation for two reasons:

- a) POCA provides for remedies for a person who has an interest in any property held under a preservation of property order or property to be forfeited to the State. The remedies in POCA protect the rights of affected individuals who have an interest in properties that are preserved or about to be forfeited to the State.
- b) The court dealing with an application under Chapter 6 of POCA will apply the principle of proportionality in making its order to avoid consequences inconsistent with the Constitution.

[26] Regarding the remedies available in terms of POCA, the PG referred to s 63 of the Act, which provides that when the High Court makes a forfeiture order in terms of s 61(1), it may exclude specific interests in property on application. In addition, s 63(2) of the Act provides that in such an application for exclusion, the 'innocent owner' must prove, on a balance of probabilities, that he or she acquired the interest concerned legally and for a consideration not significantly less valuable than the value of the interest. The 'innocent owner' must also prove that he or she neither knew nor had

reasonable grounds to suspect that the property in which the interest is held was the proceeds of unlawful activities.

[27] The PG submitted that the applicants failed to demonstrate that the definition of '*proceeds of unlawful activities*' violates their constitutional rights. In this regard, the PG made the following submissions:

- a) Art 16 property rights: The PG denied that there was or will be an arbitrary deprivation of the applicants' right to property and further denies that the definition of '*proceeds of unlawful activities*' negates the essential contents of rights to property. The PG further stated that the proceeds of unlawful activities do not constitute property for which constitutional protection is available.
- b) Article 8 rights to human dignity: The PG submitted that the applicants made an assertion of breach without explaining why this is said to be the case or how the definition breaches the applicants' right to human dignity or will result in such a breach.
- c) Article 21(1)(j) right to practise any profession, or carry on any occupation, trade or business: In this regard as well, the PG submitted that the applicants made a bare allegation without any explanation of the manner in which the definition breaches the rights set out in Article 21(1)(j). The PG denies that there is or will be such a breach.

[28] In respect of the proportionality principle, the PG submitted that in the application for the preservation order, it was alleged that the applicants knew or ought to reasonably have known that the transaction with BIPA was unlawful on various grounds and as a result of an illegal and unlawful agreement the N\$18 000 000 was paid over to the applicants via the law firm Ellis Shilengudwa Incorporated into their respective accounts.

[29] The PG further averred that the payment would not have been made, but for the unlawful activities, which constituted a variety of criminal offences and on that basis, it was submitted in the forfeiture application that the positive balance in the first

applicant's Capricorn Investment account and his positive balance in his Bank Windhoek account are proceeds of unlawful activities.

[30] The PG submitted that if the contentions of the applicants are correct and the definition of 'proceeds of unlawful activities' is inconsistent with the Namibian Constitution and is struck out, it would result in placing a person receiving proceeds of unlawful activities beyond the reach of Chapter 6 of POCA by simply intermingling the illegitimate funds with the legitimate fund in an account. This would defeat the purpose of the Act.

[31] The PG accepted that the mingling of proceeds with other funds does not automatically render all funds liable for forfeiture on the basis that they all constitute the proceeds of an offence. However, the PG submitted that in determining whether such mingled funds are to be declared forfeited, a court would have regard to the principle of proportionality.

[32] The PG submitted that the main relief should be refused and further contended that the alternative relief sought (that the court should 'read into' the definition) is incompetent for the following reasons:

- a) The court will read words into a statute only once it has found that the statute is inconsistent with the Constitution. 'Reading in' is not a mechanism for avoiding a finding for unconstitutionality. Instead, it is a mechanism for remedying unconstitutionality.
- b) In the course of litigation, the court would not issue a declaration as to the meaning of the statute in question as the court would not determine the litigation piecemeal, save in exceptional circumstances. Instead, the applicant should have raised the constitutionality of the definition of 'proceeds of unlawful activities' through a counter-application.
- c) The courts do not issue general or abstract declarations as to the meaning of a statute.

d) The declaration of the kind sought by the applicants would amount to legislation rather than a determination of the dispute between the opposing parties based on the facts of that case.

[33] In response to the founding affidavit, the PG submitted on the issue of the mingling of funds that the N\$5 000 000 odd that was in the first applicant's bank account was used prior to the granting of the preservation order. The PG avers that from the N\$5 000 000, payments were made inter alia to Point Break Investments, Agribank, Anne Shilengudwa, Agra, ASS Motors and the second applicant, leaving a balance of N\$1 671 618.72 in the bank account of the first applicant, which mingled with the N\$16 982 538.01. The PG further reasons that because the second applicant already spent N\$1 000 000 of the proceeds of the unlawful activity, it can be concluded that the 'legitimate amount' that co-mingled with the proceeds of unlawful activities in the account amounted to N\$671 618.71.

[34] The PG further submitted that the illegitimate funds paid into the applicants' accounts and mingled with the legitimate funds caused the latter to lose its identity and cannot be separately identified.

[35] The PG further contended that the first applicant was yet to seek the release of the restrained funds to pay his living and legal expenses and concluded that the first applicant must have an alternative source of funds.

[36] In conclusion, the PG submitted that, in her view, the applicants failed to demonstrate that their rights have been adversely affected as their rights are protected by the remedy provided by the Act and the principle of proportionality.

Arguments advanced on behalf of the parties

[37] In the course of this judgment, the words 'submitted' and 'argued' and their derivatives must be understood to encompass both the heads of arguments and the oral submissions made in court.

On behalf of the applicants

[38] Mr Heathcote, arguing on behalf of the applicants, submitted that the definition of 'proceeds of unlawful activities as contained in s 1 of POCA, is unconstitutional. In this regard, Mr Heathcote argued that the last portion of the definition is so wide that it has the potential to 'criminalise' the entire Namibian economy daily as a result of the overbroad portion of the definition.

[39] The impugned portion of the definition that the applicants take issue with, reads '...and includes property which is mingled with property that is proceeds of unlawful activity.'

[40] Mr Heathcote submitted by illustration that if a Namibian citizen uses stolen money to pay his VAT and the illicit funds are received into the Receiver of Revenue's account, then in terms of the overbroad definition of 'proceeds of unlawful activity', the tainted money would have the effect to turn Namibia's economy into proceeds of crime economy. Mr Heathcote conceded that the example might be extravagant and ridiculous but submitted that the wide portion of the definition lends itself to the absurd and irrational.

[41] He submitted with reference to *New Africa Dimensions CC and Others v Prosecutor General*⁵ that the inadvertent result of the transfer of illicit money from one account to the next is that it causes the mingled money in all those accounts to become proceeds of unlawful activity. If any purchases are made from those funds, it follows that all that property is liable for forfeiture. In a practical application to the current facts, it would mean that all the beneficiaries of payments made by the first applicant after the N\$16 982 538.01 was received in his account would mingle with all the money in those accounts, causing it to become proceeds of unlawful activity. This includes, for example, Agribank.

⁵ *New Africa Dimensions CC and Others v Prosecutor General* 2018 (2) NR 340 SC at para 43.

[42] Mr Heathcote argued that the solution to the overbroad definition is to strike out the portion which reads as ‘...and includes property which is mingled with the property that is proceeds of unlawful activity.’ He submitted that once struck out, the definition would read the same as the South African definition and would be in harmony with the Namibian Constitution and the Palermo Convention. It would also automatically cover a constitutionally compliant commixtio principle.

[43] Mr Heathcote submitted that Namibia is the only democratic country in the world, with a comparative constitutional dispensation, that cast the net so wide in its definition of proceeds of crime to include property mingled with property that is proceeds of unlawful activity.

[44] Mr Heathcote further argued that at the core of the current application lies Article 16 of the Constitution, which guarantees all Namibians the fundamental human right to property, as underpinned by Article 8. Mr Heathcote submitted that Article 16 had been considered by the Supreme Court on numerous occasions,⁶ and despite the complaint of the PG, the applicants need not set out in their founding affidavit what the meaning and effect of property rights are. Mr Heathcote referred the court to *Namibia Grape Growers and Exporters Association and Others v The Ministry of Mines and Energy and Others*,⁷ where the Supreme Court held that there are interrelations between various articles of the Constitution and held at p 209 F that:

‘I agree that the protection granted by the article encompasses the totality of the rights in ownership of property. This article, being part of Chap 3 of the Constitution, must be interpreted in a purposive and liberal way so as to accord to subjects the full measure of the rights inherent in ownership of property. (See in this regard *Minister of Defence v Mwandighi* 1993 NR 63 (SC).)’

⁶ *Namibia Grape Growers and Exporters Association and Others v The Ministry of Mines and Energy and Others* 2004 NR 194 (SC).

⁷ *Ibid.*

[45] The Supreme Court went further to state at p 210 J of the judgment that ‘the owner of property has the right to possess, protect, use and to enjoy his property. This is inherent in the right to own property.’

[46] Mr Heathcote further referred the court to *Shali v Prosecutor-General*,⁸ where Article 16, in the context of POCA was considered by the court (Smuts J and Geier J). Mr Heathcote submitted that the principle laid down in *Shali* is that preservation of ‘proceeds of crime’ does not violate Article 16 of the Constitution because it does not protect the ownership and possession of proceeds of crime. However, so Counsel argued, when put in the negative, the preservation and forfeiture of anything which is not the proceeds of crime will indeed violate Article 16 of the Constitution.

[47] Mr Heathcote further argued that such a rational understanding would accord with Namibian law as postulated by the Palermo Convention, more specifically, Article 12 of the Convention. Counsel referred the court to *State v Henock and Others*,⁹ where a full bench of this court discussed the interpretation of statutes that derives from international agreements, such as the Palermo Convention and submitted that there is a presumption that Parliament when enacting a statute, intended it to be in accord with international law.

[48] With this in mind Mr Heathcote argued that the definition of proceeds of unlawful activity should be limited to the contributing value of the ‘dirty money’, thereby restoring the constitutional safeguard of the Palermo Convention in the definition.

[49] Mr Heathcote submitted that the applicants’ case is unassailable, and this is demonstrated by the following, in summary:

- a) Unlike criminal forfeiture, the primary purpose of civil forfeiture is remedial and not punitive and therefore it is irrational to freeze untainted millions.
- b) Civil forfeiture has been described as draconian because the State only needs to prove on a balance of probabilities that the property was used as an instrumentality of

⁸ *Shali v Prosecutor-General* (9 of 2011) [2012] NAHC 289 (31 October 2012).

⁹ *State v Henock and Others* (CR86/299) [2019] NAHCMD 466 (11 November 2019) at para 12.

an offence or is proceeds of crime in order to obtain a forfeiture order. Because of this, courts have cautioned that civil forfeiture has the potential to produce arbitrary consequences.

c) The proportionality principle plays a double role, i.e. firstly, the constitutionality of the impugned section must be determined, and secondly, at the level of forfeiture, the value of forfeiture is determined by a court. An unconstitutional provision in an Act cannot be saved from unconstitutionality because its devastating effects may be set straight at the second level of the enquiry.

d) In *Prophet v National Director of Public Prosecutions*,¹⁰ the South African Constitutional Court stressed that the 'unrestrained application' of the civil forfeiture provisions of POCA may violate the constitutional right not to be arbitrarily deprived of property.

e) Established and vested rights are deferred by the impugned definition. In *Atlantic Slots and Another v MEC for Economic Affairs, North West and Others*,¹¹ the Court held:

'There is sound principle to regard a deferment of a right as an infringement of a right. It signifies that for the period of deferment or postponement the right cannot be exercised.'

f) The impugned portion of the definition destroys core content (i.e. to use lawful property), being the 'essential content of the right'.

[50] In conclusion, Mr Heathcote submitted that the applicants did not make themselves guilty of any unlawful activities. They sold their property on the open market on the basis of willing buyer/willing seller. The applicants' life savings are not linked to any unlawful activity except for the fact that these funds mingled with the funds generated from the sale of the property in question.

On behalf of the respondents

¹⁰ *Prophet v National Director of Public Prosecutions* 2007 (6) SA 169 (SC) at paragraphs 61-62.

¹¹ *Atlantic Slots and Another v MEC for Economic Affairs, North West and Others* 1997 (2) BCLR 176 (B) at 184H – I.

[51] Mr Budlender submitted on behalf of the respondents that it is common cause that the funds represented by the applicants' bank balance are mingled. As a result, the funds lost their separate identity and are not capable of being separately attached or dealt with. Mr Budlender submitted that the difficulty with funds that are co-mingled becomes clear in the current matter. The allegation is that N\$16 982 538.01 are proceeds of unlawful activity however these funds became inextricably mingled with the other funds in the first applicant's account and any attempt to separate them would raise a series of irresolvable difficulties.

[52] Mr Budlender further submitted that there are a number of flaws in the applicants' application, which we briefly summarise below:

- a) The first applicant is not frank regarding the state of his financial affairs.
- b) Innocent owner defence: The lack of frankness of the applicants can be tied to their failure to make use of the remedy available to them in terms of s 63, which can be referred to as the 'innocent owner' defence. Section 63 empowers the court, on application, to exclude certain interests in the property from a forfeiture order. All that is required is that in terms of s 63(2) the 'innocent owner' must prove on a balance of probabilities that he or she acquired the interest legally and for a consideration not significantly less valuable than the value of the interest. The applicants have failed to date, to make such an application, with no explanation on their part as to why they were not making use of the remedy which provides the answer to their complaint that the definition is overbroad.
- c) Delay: It seems that the applicants may be concerned about the alleged delay in the innocent owner defence, giving rise to the applicants' complaint of 'brutal bureaucracy'. However, if this is their complaint, the applicants misunderstood the process. Mr Budlender submitted that s 59(4) of POCA provides that where an application has been made for a forfeiture order, any person who gave notice in terms of s 52(3) may apply for an order excluding his or her interest in that property from the operation of forfeiture. There was no such application.

d) The examples offered in support of the applicants' contention that the mingling provision is unconstitutional: Mr Budlender contended that the answer to the examples of the applicants is that in each case if an application was made for preservation or forfeiture of funds, it would be quickly answered by an application for the 'innocent owner' exclusion of the property, which could hardly fail. The owners of the property would easily satisfy the test for the 'innocent owner' defence, as in the example, the Minister of Finance would not know that a criminal paid his tax with tainted money.

[53] On proportionality and discretion, Mr Budlender argued that in light of the applicants' failure to explain why the provisions for an 'innocent owner' application would not provide adequate means of ensuring that disproportionate or arbitrary deprivation does not take place, the respondents do not deem it necessary to traverse the question if there is a proportionality requirement inherent in POCA.

[54] Mr Budlender submitted that despite the assertion of the applicants that the definition of proceeds of unlawful activity breaches three fundamental rights, i.e. right to property, right to human dignity and right to carry on any occupation, trade or business, the definition breaches none of them.

[55] In support of this contention, Mr Budlender argues in respect of Article 16 (right to property) that the inclusion in the definition of property, which is mingled with property that is proceeds of unlawful activity, is to achieve a public purpose, i.e. preventing offenders from protecting their illicitly gained funds from forfeiture by mingling them with 'clean' money. Mr Budlender submitted that although the qualification as per Article 12(4) of the Palermo Convention has its advantages, it does not mean that the Constitution obliges the adoption of this approach. The reason lies in the fact that POCA makes provision for a remedy in s 63 for the 'innocent owner'. Therefore, so argued Counsel, the complaint that the impugned definition breaches Article 16 property rights is without merit.

[56] It was further argued, on the issues of rights to human dignity, that the applicants did not identify how the mingled funds referred to in the definition, breach their human

dignity. In this regard, Mr Budlender submitted that the applicants alleged no facts apart from making conclusionary assertions that their rights to dignity are breached. This, according to Counsel, leaves the respondents in the dark as they do not know what facts to meet in order to answer this challenge. Mr Budlender drew the court's attention to *Amadhila v Government of the Republic of Namibia*,¹² wherein the plaintiff alleged that the provisions of s 133(3) of the Correctional Service Act 9 of 2012 offends Article 10(1) of the Constitution. The court held that the plaintiff's allegation in the amended particulars of claim regarding the breach of Article 10 was an inference and the primary facts upon which the plaintiff's challenge depended were omitted and the failure to place primary facts before the court was thus fatal.

[57] Reliance was also placed on the *Shali* matter¹³ but in a different context. Mr Budlender pointed out that in the said matter, the court rejected a challenge to the forfeiture process on the grounds of its impact on human dignity. The court held that because the proceedings themselves are constitutionally permissible, any indignity inherent in them is constitutionally permissible, therefore, any indignity in them would be constitutionally sanctioned and would not violate Article 8(1). Mr Budlender submitted that once the proceedings themselves are found not to violate the Constitution in other respects, the inherent indignity accompanying them, would not violate Article 8 and the applicants' claim based on a breach of rights to human dignity must fail.

[58] Mr Budlender was brief on the applicants' complaint regarding the breach of their Article 21 rights and submitted that yet again the applicants failed to allege any factual basis to show that the inclusion of mingled funds in the definition affects their rights to carry on any occupation, trade or business

[59] On the relief sought by the applicants, Mr Budlender argued that the main relief sought, i.e. declaration of invalidity of the portion of the definition, is without qualification.

¹² *Amadhila v Government of the Republic of Namibia* (HC-MD-CIV-ACT-DEL-2019/00602) [2021] NAHCMD 428 (24 September 2021).

¹³ *Supra* at footnote 9.

[60] Mr Budlender submitted that the mischief that the definition intends to combat is to prevent a criminal from walking away with 'dirty' money mingled with 'clean' money and the definition succeeds in doing so. In the view of the respondents, the consequence of the main relief sought by the applicants will facilitate the mischief instead of avoiding it. Therefore the consequences of an order in terms of prayer 1 of the notice of motion will be to facilitate that mischief.

[61] In respect of prayer 2, as an alternative to prayer 1, according to Mr Budlender, proceeds on the premise that a declaration of invalidity is not made and that the definition of the Act remains in force. As a result the applicants seek a declaration of the definition of 'means', which means that the applicants are asking the court to insert a phrase in the statutory definition.

[62] Mr Budlender argued that the applicants are not asking the court to 'read in' words into the definition in order to save the section from invalidity. Instead, the applicants are requesting the court to make a declaration as a result of an exercise in interpretation. The applicants are asking the court to make a substantial amendment to a statute, without having decided and declared that the relevant provision of the statute is inconsistent with the Constitution and invalid.

[63] Mr Budlender submitted that there are instances where a court would 'read in' words into a statute and that would be in those circumstances where 'reading in' may save the provision of an Act from the consequences of it being declared invalid.

[64] However, the technique of 'reading in', would follow a declaration of invalidity. In other words, the premise of reading-in is that the relevant part of the statutes is found to be inconsistent with the Constitution and without it, there can be no reading-in.

[65] Michael Bishop in the authoritative work Constitutional Law of South Africa¹⁴ was referenced by Mr Budlender where the learned author draws attention to the

¹⁴ Michael Bishop "Remedies", Chapter 9 in Woolman and Others, Constitutional Law of South Africa (2nd ed) Vol 1 at 9-104 to 9-105.

caution which courts will exercise in reading words into a statute following upon a declaration of invalidity. The reason is that reading-in creates the risk that the courts will open themselves to the charge of a breach of the separation of powers in that they are carrying out a legislative function which is reserved to Parliament.

[66] Mr Budlender submitted that even if the court is inclined to order a 'reading-in', despite the fact that it is not prayed for in prayer 1, the matter in casu would not be the appropriate case for doing so.

[67] Counsel emphasized that there are many different ways of addressing the problem of 'mingling' and it would be inappropriate, and possibly even impermissible, for the court to decide which way should be adopted because it is ultimately a matter for legislation and not adjudication.

[68] In conclusion, Mr Budlender dealt with the remedy of reading down and opined that it appears that the applicants are confusing reading down with reading-in. The former is a purely interpretative exercise. When reading down takes place, the text of the legislation remains untouched. It is simply giving a meaning that conforms to the Constitution, whereas reading-in changes the text. This, according to Counsel, would be unprecedented if this court assumes the power to amend a statute by reading words into it when it is not preceded by a declaration of invalidity.

[69] According to Mr Budlender, the relief requested by the applicants is fundamentally flawed. In reality, if the main relief sought by the applicants were granted, the State and the public would be left vulnerable to criminals and their tactics, whereas alternative relief is simply not competent.

The constitutional attack

[70] The parties agree that the constitutional attack launched by the applicants can be succinctly summarised as follows:¹⁵

¹⁵ Respondent's answering affidavit at para 12.

The applicants challenge the constitutionality of the definition of the 'proceeds of unlawful activities' in s 1 of the Act. They challenge the inclusion, in that the definition of 'property which is mingled with property that is proceeds of unlawful activity and they do so on two grounds:

- a) First, the applicants contended that the inclusion results in the arbitrary deprivation of the property in breach of Article 16 of the Constitution, and negates the essential content of the right to property in breach of Article 22(a) of the Constitution;
- b) Second, the applicants contend that the definition is in breach of Article 8 and 21(1)(j) of the Constitution, on the grounds that the first applicant's life savings do not constitute proceeds of unlawful activities, and were earned by him through the exercise of his rights in terms of Article 21(1)(j) of the Constitution.

[71] This is unfortunately as far as the consensus goes.

Issues for determination

[72] The issues for the determination by this court is therefore:

- a) Whether the definition of 'proceeds of unlawful activities' in s 1 of POCA is unconstitutional and invalid to the extent that it includes the phrase 'and includes property which is mingled with the property that is proceeds of unlawful activity', and whether that phrase should be struck from the definition; alternatively,
- b) Whether this Court should declare that the definition of proceeds of unlawful activities 'means' that it includes property which is mingled with the property that is proceeds of unlawful activity 'but not exceeding the assessed value of the proceeds of the unlawful activity before mingling'.

The onus

[73] The incidence of the onus in matters where a constitutional challenge is mounted against a statutory provision is clearly set out by Strydom AJA in *Alexander v Minister of Justice and Others*.¹⁶ A person complaining that a constitutional freedom of his or her has been breached must prove such breach. Once this onus is discharged it is for the party relying on a permissible limitation to prove that the limitation falls within the scope of what is permitted in terms of the Constitution. Strydom AJA in this regard followed what the court held in *Africa Personnel Services (Pty) Ltd v Government of the Republic of Namibia*.¹⁷

The legal framework

[74] For purposes of this application, it is necessary to refer to the relevant provisions of the Constitution, which is contended to be breached or offended by the definition of 'proceeds of unlawful activities' as set out in the Act. These are Articles 8, 16 and 21(1)(j) of the Constitution.

[75] Article 8 reads as follows:

'Article 8 Respect for Human Dignity

(1) The dignity of all persons shall be inviolable.

(2)(a) In any judicial proceedings or in other proceedings before any organ of the State, and during the enforcement of a penalty, respect for human dignity shall be guaranteed.

(b) No persons shall be subject to torture or to cruel, inhuman or degrading treatment or punishment.'

[76] Article 21, and more specifically Article 21(1)(j) reads as follows:

'Article 21 Fundamental Freedoms

¹⁶ *Alexander v Minister of Justice and Others* 2010 (1) NR 328 (SC) at para 122.

¹⁷ *Africa Personnel Services (Pty) Ltd v Government of the Republic of Namibia* 2009 (2) NR 596 (SC) at para [65].

- (1) All persons shall have the right to:
- (a) –(i) not relevant
- (j) practise any profession, or carry on any occupation, trade or business.’

[77] Lastly, Article 16, which lies at the core of the application, reads as follows:

‘Article 16 Property

(1) All persons shall have the right in any part of Namibia to acquire, own and dispose of all forms of immovable and movable property individually or in association with others and to bequeath their property to their heirs or legatees: provided that Parliament may by legislation prohibit or regulate as it deems expedient the right to acquire property by persons who are not Namibian citizens.

(2) The State or a competent body or organ authorised by law may expropriate property in the public interest subject to the payment of just compensation, in accordance with requirements and procedures to be determined by Act of Parliament.’

Overview of POCA

[78] The impugned and related provisions of POCA are contained in the definitions of the Act, and in Chapter 6 of POCA (civil forfeiture).

[79] However, before discussing those provisions it would be instructive to have an overview of similar POCA provisions in other countries with a similar dispensation as Namibia. From a comparative law point of view, the focus is limited to the neighbouring jurisdictions of South Africa and Botswana.

[80] We were repeatedly referred to South Africa which has an Act with similar provisions as Namibia’s POCA. Although it has been said that the Namibian POCA and South African POCA,¹⁸ are carbon copies, it appears not to be a correct statement.

[81] The South African definition reads as follows:

¹⁸ Prevention of Organised Crime Act 121 of 1998.

‘(xv)“proceeds of unlawful activities”, means any property or part thereof or any service, advantage, benefit or reward which was derived, received or retained, directly or indirectly, in connection with or as a result of any unlawful activity carried on by any person, whether in the Republic or elsewhere, except for purposes of Chapter 5 where it means—

(a) any unlawful activity carried on by any person; or

(b) any act or omission outside the Republic which, if it had occurred in the Republic, would have constituted an unlawful activity, and includes any property representing property so derived;’

[82] The material difference between the two Acts is the add-on to the Namibian POCA after the words ‘so derived’ as Namibia’s POCA proceeds with ‘*and includes property which is mingled with property that is proceeds of unlawful activity*’.

[83] The Botswana Proceeds and Instruments of Crime Act 28 of 2014, reads similarly to Namibia’s POCA. It reads as follows:

“proceeds” means property that was derived or realised, or substantially derived or realised, directly or indirectly, by any person from the commission of an offence or a serious crime related activity or foreign serious crime related activity and includes property with which proceeds have been mixed;’

[84] The notable difference between Namibia’s POCA and that of Botswana is therefore not the definition of proceeds of unlawful activities but during the preservation stage, where their s 43(1) provides that the court may, when it makes a restraining order or at any later time, make such orders in relation to the property to which the restraining order relates as it considers just. This implies that at the preservation stage of the proceedings, the court may make a just order.

[85] Mr Heathcote conceded that in essence the Namibian definition of proceeds of unlawful activities is similar to that of Botswana but submitted that the Botswana Act, although at odds with the constitution, has a ‘release valve’ in the word just, to ease the tension between the Act and the Constitution. The Namibian POCA does not have any tension release clause between the constitutional rights of the individual and the Act.

[86] In addition to the POCA models referred to above, the international convention which relates to POCA is the Palermo Convention, which is the United Nations Convention against Transnational Organised Crime and the Protocols thereto.

[87] On 15 November 2000, the United Nations General Assembly passed a resolution adopting the United Nations Convention against Transnational Organized Crime known as the Palermo Convention. Its aim was to establish a baseline standard for member states to follow in their fight against criminal activities and the acquisition of illicit profits. Article 1 of the Convention declares that its objective is to enhance collaboration among nations in order to more efficiently prevent and combat transnational organized crime.

[88] As a member state, Namibia was a signatory to the Covenant on 13 December 2000 and ratified the Convention on 16 August 2002.

[89] Article 32(3)(e) of the Constitution requires that international agreements be negotiated and signed by the President or under his authority. The seriousness and commitment in respect of Namibia's international obligations culminate in Article 144 of the Constitution, which in material parts provides that:

'Unless otherwise provided by this Constitution or Act of Parliament, the general rules of public international law and international agreements binding upon Namibia under this Constitution shall form part of the law of Namibia.'

[90] Article 12 of the Convention deals with the confiscation and seizure, and the relevant portion for purposes of the matter in casu reads as follows:

'1. States Parties shall adopt, to the greatest extent possible within their domestic legal systems, such measures as may be necessary to enable confiscation of:

(a) Proceeds of crime derived from offences covered by this Convention or property the value of which corresponds to that of such proceeds;

(b) Property, equipment or other instrumentalities used in or destined.

2. Not relevant.
3. Not relevant.
4. If proceeds of crime have been intermingled with property acquired from legitimate sources, such property shall, without prejudice to any powers relating to freezing or seizure, be liable to confiscation up to the assessed value of the intermingled proceeds.
5. Income or other benefits derived from proceeds of crime, from property into which proceeds of crime have been transformed or converted or from property with which proceeds of crime have been intermingled shall also be liable to the measures referred to in this article, in the same manner, and to the same extent as proceeds of crime.' (our emphasis)

[91] Article 12(4) of the Convention and Chapter 5 of POCA provide for the principle of proportionality where provision is made for confiscation up to the assessed value of the intermingled proceeds which is echoed in s 32(6) of POCA for confiscation of the benefits of crime up to the value of the proceeds of the offences or related criminal activities as determined by the court. In our view the provisions in article 12(4) of the Convention serves as a constitutional safeguard.

[92] The full bench in *S v Henock*¹⁹ discussed the domestication and the interpretation of statutes which are derive from international agreements such as the Palermo Convention as follows:

[12] With regards to the interpretation of statutes which derive from international agreements such as Covenants, the author Devenish²⁰ is of the view that courts, when interpreting statutes, should endeavor to interpret those statutes in conformity with international law. Furthermore, that there is a presumption that Parliament, in enacting a statute, intended it to be in agreement with international law. To this end, the Legislative Guides drafted by the United Nations office on Drugs and Crime Division for Treaty Affairs assist in the interpretation of those provisions. When interpreting domesticated laws, it is imperative to look at the legislative guides, especially where the domesticated law is silent on a certain aspect.'

The constitutional issues that arise

¹⁹ *State v Henock and Others* (CR 86/2019) [2019] NAHCMD 466 (11 November 2019).

²⁰ Devenish, *GE Interpretation of Statutes* 1992 Cape Town: Juta & Co, at p 129.

[93] As a point of departure, in interpreting the provisions of the Constitution, we are guided by sentiments of the Supreme Court as set out in *AG of Namibia v Minister of Justice*²¹, where the following appears:

[7] It has also become necessary to restate the well-known general principles relating to constitutional interpretation, with which all counsel were in agreement and which are, in any event, incontrovertible. The first principle is that the Constitution of a nation is not to be interpreted like an ordinary statute. In his characteristic eloquence, the late Mahomed AJ described the Constitution as 'a mirror reflecting the national soul, the identification of the ideals and aspirations of a nation; the articulation of the values bonding its people and disciplining its government'. The spirit and tenor of the Constitution must therefore preside and permeate the process of judicial interpretation and judicial discretion.²² In keeping with the requirement to allow the constitutional spirit and tenor to permeate, the Constitution must not be interpreted in 'a narrow, mechanistic, rigid and artificial' manner.²³ Instead, constitutional provisions are to be 'broadly, liberally and purposively' interpreted so as to avoid what has been described as the 'austerity of tabulated legalism'.²⁴ It is also true to say that situations may arise where the generous and purposive interpretations do not coincide.²⁵ In such instances, it was held that it may be necessary for the generous to yield to the purposive.²⁶ Secondly, in interpreting constitutional rights, close scrutiny should be given to the language of the Constitution itself in ascertaining the underlying meaning and purpose of the provision in question.²⁷

²¹ *AG of Namibia v Minister of Justice* 2013 (3) NR 806 (SC) at para [7].

²² *S v Acheson* 1991 NR 1 (HC) (1991 (2) SA 805) at 10A – B.

²³ *Government of the Republic of Namibia and Another v Cultura* 2000 and *Another* 1993 NR 328 (SC) (1994 (1) SA 407) at 340A.

²⁴ *Ibid* at 340B – C.

²⁵ See the South African Constitutional Court cases of *S v Makwanyane and Another* 1995 (3) SA 391 (CC) (1995 (2) SACR 1; 1995 (6) BCLR 665; [1995] ZACC 3) in para 9 fn 8; *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 (1) SA 765 (CC) (1997 (12) BCLR 1696; [1997] ZACC 17) para 17.

²⁶ *Kauesa v Minister of Home Affairs and Others* 1995 NR 175 (SC) (1996 (4) SA 965; 1995 (11) BCLR 1540) at 183J-184B; *S v Zemburuka* (2) 2003 NR 200 (HC) at 201E-H; *Tlhoru v Minister of Home Affairs* 2008 (1) NR 97 (HC) at 116H-I; *Schroeder and Another v Solomon and 48 Others* 2009 (1) NR 1 (SC) at 6J-7A; *Africa Personnel Services (Pty) Ltd v Government of the Republic of Namibia and Others* 2009 (2) NR 596 (SC) at 269B-C.

²⁷ *Minister of Defence v Mwandighi* 1993 NR 63 (SC) (1992 (2) SA 355); *S v Heidenreich* 1998 NR 229 (HC) at 234.

[94] We have set out the relevant Articles of the Constitution above. The point of departure in interpreting the provisions of the Constitution, is Article 1 of the Constitution. It provides that the Constitution shall be the Supreme Law of Namibia. Certain rights and freedoms are recorded as being fundamental are enshrined in Chapter 3 of the Constitution, and must be respected by the Executive, the Legislature and the Judiciary.

[95] The court in *Alexander v Minister of Justice and Others*²⁸ held that:

'Where an Act of Parliament encroaches upon a fundamental right, the question whether that is at all permissible must be answered according to whether such limitation is authorised by the particular article and on art 22 of the Constitution. Where the article does not permit any limitation, it is said that the protection is absolute. An example of this is to be found in *Ex Parte Attorney-General: In re Corporal Punishment by Organs of the State* 1991 NR 178 (SC) at 187I - 188B (1991 (3) SA 76 at 86D - F), where the court stated that the obligation of the State in regard to art 8 was 'absolute and unqualified'.

[96] However, in terms of Article 80(2) of the Constitution, the court has original jurisdiction in 'cases which involve the interpretation, implementation and upholding of this Constitution and the fundamental rights and freedoms guaranteed thereunder.'

[97] The applicants plead that the impugned portion of the definition also breaches Articles 8 and 21(1)(j). The basis for this claim is the fact that the first applicant's cheque and investment accounts are not alleged to be proceeds of unlawful activities, and the amounts in those accounts were earned through exercise and manifestation of the applicants' Article 21(1)(j) rights.

[98] The respondents were of the view that the constitutional complaint in this regard is inadequately pleaded.

²⁸ Supra footnote 16 at para [117].

[99] Due to our view concerning the effect of the impugned part of the definition of 'proceeds of unlawful activity' on Article 16 property rights, it is not necessary to deal in any detail with Articles 8 and 21(1)(j) of the Constitution.

Article 16

[100] The issue of the ambit of property rights as entrenched in Article 16 and the constitutionality of statutory provisions limiting such rights was examined in *Namibia Grape Growers and Export Association and Others v Minister of Mines and Energy*,²⁹ and from this case the following is clear:

- a) Article 16, being part of Chapter 3, must be interpreted in a purposive and liberal way in order to accord subjects the full measure of rights inherent in ownership in property (209 F-G);
- b) The owner of property has the inherent right to possess, use and enjoy his property (210 J);
- c) The right to property is not absolute, but is subject to certain constraints which, in order to be constitutional, must comply with certain requirements (211 I), and
- d) Keeping in mind the values and sentiments expressed in the Constitution, legislative constraints placed on ownership of property which are reasonable, which are in the public interest and for legitimate object would be constitutional (212 E-F).

[101] Article 16(1) of the Constitution itself makes one original exception concerning the right of foreigners to acquire property in Namibia. The property proviso authorises Parliament to limit and regulate the right of non-Namibian citizens to acquire property in Namibia.

[102] Article 16(2) then provides that the State or a competent authorised body or organ may expropriate property (inclusive of immovable or movable) in the public

²⁹ *Namibia Grape Growers and Exporters Association and Others v The Ministry of Mines and Energy and Others* 2004 NR 194 (SC).

interest, subject to payment of just compensation, in accordance with the requirements and procedures to be determined by Act of Parliament.

[103] Our case law and common law inform us that property unlawfully obtained is not subject to the protection of Article 16. That in our view is logical. A thief cannot be heard to call on the protection availed by Article 16 for property stolen by him.

[104] The applicants' constitutional attack is focused on the last portion of the definition of 'proceeds of unlawful activities', which reads '...and includes property which is mingled with property that is proceeds of unlawful activities.' The PG relied on this part of the definition to justify her authority to seize, preserve, and potentially forfeit any property that was mixed with the proceeds of unlawful activities. This includes the balance in the bank account at the time when the sales price of the applicants' property was deposited into the first applicant's account.

[105] In order to comprehend the constitutional challenge, we must have regard to both the definitions of 'unlawful activity' and 'proceeds of unlawful activities'. An 'unlawful activity' means any conduct, which constitutes an offence or which contravenes any law, whether that conduct occurred before or after the commencement of this Act and whether that conduct occurred in Namibia or elsewhere, as long as that conduct constitutes an offence in Namibia or contravenes any law of Namibia.

[106] An offence or contravention of the law is an essential requirement of an unlawful activity.

[107] The definition of 'proceeds of unlawful activities' focuses on the proceeds of such unlawful activities, which is logical and reasonable. The part that reads 'and includes property which is mingled with property that is proceeds of unlawful activities' is however not rationally and constitutionally explicable because it is property not tainted by unlawful activity. Bar the definition which seeks to include lawful property with the proceeds of unlawful property, there is no constitutional rationale to include lawfully acquired property. The lawfully acquired property deserves constitutional protection and

is indeed protected. Our Supreme Court said as much in *Namibia Grape Growers and Exporters Association and Others v The Ministry of Mines and Energy and Others*³⁰.

[108] We accept the principle laid down in *Shali v The Attorney-General*³¹ wherein the court held that preservation and forfeiture of 'proceeds of crime' does not violate Article 16 of the Constitution because it does not protect the ownership and possession of proceeds of crime. However, the upshot of that finding is then that put in the negative, the preservation and forfeiture of anything that is not proceeds of crime violates Article 16 of the Constitution.

[109] We are of the view that the forfeiture of lawfully acquired property is akin to an expropriation of property without just compensation, which is constitutionally prohibited and is not in the public interest. The impugned part of the definition of proceeds of unlawful activities is arbitrary and deprives owners of lawfully acquired property of their rights to that property without providing sufficient reasons therefor.

[110] We are of the view that the current matter is a telling example of how arbitrary the definition is.

[111] Due to the fact that the definition of 'proceeds of unlawful activities' appears in s 1 of POCA and not in Chapter 6 where 'proceeds of unlawful activities' are employed to preserve and forfeit, one tends to overlook the fact that POCA does not comply with Article 22 of the Constitution concerning the impugned part of the definition.

[112] Apart from the fact that there is no section in Chapter 6 of the Act complying with Article 22, there is also nothing in the Preamble of the Act supplying sufficient reason for the preservation and forfeiture of lawful proceeds.

Co-mingling

³⁰ Ibid.

³¹ *Shali v Attorney-General and Another* 2013 (3) NR 613 (HC) at para 45.

[113] In the current instance, the respondents aver that the applicants should have known that the sale of their property to BIPA was unlawful as the market-related value of the property was N\$4 500 000 yet they sold it for N\$18 000 000 and as a result of an illegal and unlawful agreement the amount of N\$18 000 000 was received by the applicants.

[114] Applicants did not only lose their property and the proceeds of the sale but also the funds that were in their accounts prior to receiving the N\$18 000 000. There is no allegation that the positive balance of N\$5 478 818.71 in the first applicant's account was the proceeds of illegal activities. It is not and cannot be disputed that the money was the life saving of the applicants. The effect of the definition as it currently stands is that the money that was in the applicants' accounts prior to receiving the proceeds of the sale of the immovable property stands to be forfeited.

[115] The descriptive examples mentioned by Mr Heathcote concerning the effect of mingling might sound farfetched and ridiculous, however, it is the direct result of the impugned portion of the definition. The strict application of the definition would cause all the money of the bank, to be proceeds of unlawful activities upon the deposit of the proceeds of the sale into the bank account of the applicants. It is common law that money deposited in a bank account becomes the property of the bank, and the beneficiary of the deposit only has a claim against the bank in the amount of the deposit.³²

[116] The respondents seem to argue that the accounts paid by the first applicant from his account after receiving the proceeds of the sale of the property to have come from the 'clean' money leaving only N\$671 618.71 to co-mingle with the proceeds of unlawful activities. However, if only one dollar of the tainted money mingles with other moneys it would cause it all to be tainted. This is why the example of a thief putting one stolen dollar in the collection plate at church causing all the money of that church to be 'proceeds of unlawful activity' is not so farfetched. The church's money then stands to

³² *S v Kearney* 1964(2) SA 495 (A) at 502H-503A.

be preserved and ultimately to be forfeited in terms of the interpretation of the relevant provisions of POCA as argued by the respondents.

[117] Civil forfeiture is not meant to be punitive but rather remedial.³³ The characterization of civil forfeiture as not being punishment stands, however the result of the definition of 'proceeds of unlawful activity' causes it to stand in stark contrast with the intended remedial purpose that the Act purports to have. It is irrational to preserve or eventually forfeit millions of 'clean' money because of tainted, perceived or real, money (the one-dollar example above) that was mixed with the untainted millions. This amounts to punishment. We are cognizant of the fact that although the Act is remedial it does not mean that it does not have a punitive dimension. It would, however, be irrational to punish the applicants if the object of civil forfeiture is precisely the opposite.

[118] The respondents are of the view that the mingling of proceeds would not automatically render all mingled funds liable for forfeiture, on the basis that they all constitute the proceeds of an offence. The respondents submit that in determining whether such mingled funds are to be declared forfeited, a court will have regard to the principle of proportionality. Therefore, if proceeds of crime for example of N\$1 000 is placed in an account containing N\$1 000 000 of legitimate funds, the court will not issue an order forfeiting the N\$1 000 100 as that would breach the principle of proportionality and would result in arbitrary deprivation of property. Conversely, if proceeds of N\$1 000 000 are deposited into an account N\$1000 the proceeds are not protected against forfeiture by the mere fact of their having been mingled with legitimate funds.

[119] Interestingly enough, in the two scenarios set out would result in the exact same outcome. The money would co-mingle and as a result, once the money is transferred into an account with other money it loses its separate identity and all the money would be tainted in terms of the current definition in POCA.

³³ *National Director of Public Prosecutions v Seevnarayan* 2004 (2) SACR 208 (SCA) (2004 (8) BCLR 844; [2004] 2 All SA 491; [2004] ZASCA 37) at [17].

[120] From our understanding of the respondents' argument, in order to avoid the possibility of arbitrary deprivation, if s 63 of the Act is disregarded, the respondents rely on the principle of proportionality.

Proportionality

[121] The respondents submit that forfeiture of property in terms of Chapter 6 (civil forfeiture) may be ordered in respect of an instrumentality of an offence or proceeds of unlawful activities. In both those instances, civil forfeiture could result in disproportionate consequences, and for that reason, the courts will hold requests for civil forfeiture to the standard of proportionality, which requires that the forfeiture should not amount to arbitrary deprivation of property.

[122] In the *Alexander* matter the court held that where the Constitution allows a limitation of a constitutional right, such limitation must be proportional.³⁴ To pass the test of proportionality, the limitation of the constitutional right must also be fair and not arbitrary, and the means used must impair the right as minimally as is reasonably possible.³⁵ The Act allowing for proportionality must explicitly provide therefore by complying with Article 22 of the Constitution.

[123] Article 22 of the Constitution reads:

'Limitation upon Fundamental Rights and Freedoms

Whenever or wherever in terms of this Constitution the limitation of any fundamental rights or freedoms contemplated by this Chapter is authorised any law providing for such limitation shall:

- (a) be of general application, shall not negate the essential content thereof, and shall not be aimed at a particular individual;
- (b) specify the ascertainable extent of such limitation and identify the Article or Articles hereof on which authority to enact such limitation is claimed to rest.'

³⁴ Supra footnote 16 at para [124].

³⁵ Ibid para [125].

[124] It is clear that the definition of proceeds of unlawful activities must be interpreted restrictively in order to be consistent with the Constitution. In our considered view and for the detailed reasons advanced above, the definition of proceeds of unlawful activities POCA does not comply with Article 22 of the Constitution.

[125] We reiterate that Chapter 5 of the Namibian POCA is in compliance with Article 12(4) of the Palermo Convention in respect of criminal prosecutions. Whereas Chapter 6 of the Namibian POCA, deals with preservation and forfeiture, regardless of whether or not criminal prosecution is pursued under Chapter 5. Chapter 6 of the Namibian POCA is however not in accord with the Palermo Convention, to which Namibia is a signatory. It is expected of our courts when interpreting a statute like POCA, which derives from an international agreement or covenant such as the Palermo Convention, to do so in conformity with Namibia's obligation under international law. The constitutional safeguard in the Palermo Convention, as discussed in para 91 above, is singularly missing from the POCA definition of "proceeds of unlawful activities".

[126] The impugned definition does not only fall short of the Palermo Convention but more importantly, it falls short of the Namibian Constitution, Article 22 in particular.

[127] The first respondent's argument concerning the necessity of the impugned portion of the definition of 'proceeds of unlawful activities' in order to prevent criminals from escaping preservation and forfeiture by mingling 'dirty money' with 'clean money', is not valid or applicable under Chapter 6 of POCA.

Remedies in the Act

[128] It was argued on behalf of the respondents that there are remedies and safeguards built into the Act. The 'innocent owner' remedy, as per s 63 of the Act, provides that when the court makes a forfeiture order, the said court can make an order excluding certain interests in property, which are subject to the order from the operation of the order.

[129] In terms of s 63(2) of the Act, the 'innocent owner' must prove, on a balance of probabilities, that he or she acquired the interest legally and for consideration not significantly less valuable than the value of the interest. The 'innocent owner' must further prove that he or she neither knew nor had reasonable grounds to suspect that the property in which the interest is held was proceeds of unlawful activities.

[130] Michael Rhimes, in his article *Forfeiting Proceeds: Civil Forfeiture, the Right to Property and the Constitution*³⁶ opined that the defence of 'innocent owner' in s 52 of South African POCA (Namibian s 63 counterpart), is not a fail-safe against disproportionate forfeiture. It requires a person with an interest in the proceeds to make an application to the court (which requires knowledge, time and money). He further contends that it is a blunt tool that cannot cater for the broad range of factors that might render forfeiture disproportionate.

[131] In the current matter it was submitted by the first respondent that the applicants are yet to seek the release of their restrained funds and concluded that the applicants must have alternative funds at their disposal. This contention is speculative and without foundation in fact. One should not lose sight of the fact, as pointed out by the learned author above, that in order to approach a competent court to exclude lawful funds from being forfeited requires alternative funds as access to justice involves funds and knowledge, which some individuals' lack. In the current matter the applicants had to secure the services and specialised knowledge of senior counsel for purpose of reclaiming their lawful funds. It is clear that the 'innocent owner' remedy is far from satisfactory.

[132] On p 352, Rhimes further states that 'it is therefore not easy to conclude with a degree of confidence that POCA eliminates the risk of arbitrary deprivation of proceeds. Forfeiting proceeds is less likely to be constitutionally offensive than with instrumentalities. But the fact that POCA is less likely to result in disproportionate

³⁶ SALJ Volume 138 Part 2 p 323 "Forfeiture, the Right to Property and the Constitution by Michael Rhimes.

forfeiture of proceeds does not mean that it would never result. As has been often been recognised by the courts, there is an ever-present threat that the forfeiture powers in chap 6 of POCA may result in arbitrary deprivation of property.’ Rhimes made these comments in the context of the South African POCA, which does not have the add-on to its definition of proceeds of crime contained in the Namibian POCA. In the Namibian setting, the danger of arbitrariness is ever present, culminating in draconian results.

[133] To tie in with what Rhimes said, it is necessary to refer to *Prophet v National Director of Public Prosecutions*,³⁷ where Nkabinde J stated:

[61] While the purpose and object of Ch 6 must be considered when a forfeiture order is sought, one should be mindful of the fact that unrestrained application of Ch 6 may violate constitutional rights, in particular the protection against arbitrary deprivation of property particularly within the meaning of s 25(1) of the Constitution, which requires that 'no law may permit arbitrary deprivation of property'. In *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* ('FNB') this Court held that 'arbitrary' in s 25(1) means that the law allowing for the deprivation does not provide sufficient reason for the deprivation or allows deprivation that is procedurally unfair. The Court said:

“(F)or the validity of such deprivation, there must be an appropriate relationship between means and ends, between the sacrifice the individual is asked to make and the public purpose this is intended to serve. It is one that is not limited to an enquiry into mere rationality, but is less strict than a full and exacting proportionality examination.”

Conclusion

[134] Having considered the arguments advanced and the relevant authority presented to us, we conclude that the portion in the definition of 'proceeds of unlawful activities', which reads 'and includes property which is mingled with property that is proceeds of unlawful activity' is unconstitutional and should be struck from the definition of the proceeds of unlawful activities.

³⁷ *Prophet v National Director of Public Prosecutions* 2007 (6) SA 169 (CC) at para 61-62.

Costs

[135] It is now opportune that we deal with the question of costs. At para [124] of *Kambazembi Guest Farm CC t/a Waterberg Wilderness v Minister of Lands and Resettlement*³⁸, the Supreme Court stated the following:

‘There remains the question of costs. Mr Totemeyer argued that this court should apply the approach of the South African Constitutional Court in *Biowatch Trust v Registrar, Genetic Resources* in the event of the appellant’s challenge not succeeding and that no costs order should be made against it. The Constitutional Court held that in litigation between private parties and government, where a private party unsuccessfully seeks to assert a constitutional right each party would bear its own costs. In *Biowatch*, the Constitutional Court made it clear that this general approach is not unqualified or risk free, adding:

“If an application is frivolous or vexatious or in any way manifestly inappropriate, the applicant should not expect that the worthiness of its cause will immunize it against an adverse costs award.”

[136] It is accordingly plain that the *Biowatch* principle, as adopted by the Supreme Court, applies in cases where a private party, in a constitutional matter, does not succeed in obtaining the constitutional relief that it seeks. In that event, each party bears its own costs, unless, as found in *Kambazembi*, that the private party in the proceedings, acted vexatiously, frivolously or in a manifestly inappropriate manner. The rationale behind this reasoning is that private parties, in constitutional litigation, should not be induced to be shy or frigid in approaching this court in case an adverse order for costs, which may have a chilling effect in private parties approaching the court for constitutional redress, is issued.

³⁸ *Kambazembi Guest House Farm CC t/a Waterberg Wilderness v Minister of Lands and Resettlement* 2018 (3) NR 800 (SC), p 826H-827A.

[137] We are of the considered view that the *Biowatch* principle, as positively endorsed in *Kambazembi*, does not find application in the instant case. This is because when proper regard is had to the order that follows below, it is clear that the applicants have succeeded. The chilling effect that a costs order may have on private litigants, does not apply when the government has been on the losing side. It would appear that the government does not have the same protection extended to private parties, whose resources may be extremely limited.

[138] In the premises, we incline to the view that the ordinary rule applicable to costs should follow, namely that costs should follow the event. There is nothing indicated to us or apparent from the papers before court that would justify this court departing from the application of the general rule to costs. The respondents shall jointly and severally pay the applicants' costs on the ordinary scale.

[139] In the premises, the court makes the following order:

1. The last portion of the definition of 'proceeds of unlawful activities' contained in s 1 of the Prevention of Organised Crime Act 29 of 2004, which reads 'and includes property which is mingled with property that is proceeds of unlawful activity;' is declared to be unconstitutional and is struck out from the definition.
2. The respondents are ordered to pay the costs of the application consequent upon the employment of one instructing and two instructed counsel.
3. The matter is regarded as finalised and removed from the roll.

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