CASE NO.: A 54/2011

1. **IN THE HIGH COURT OF NAMIBIA**

2. In the matter between:

TECKLA NANDJILA LAMECK	**1st APPLICANT**
JEROBEAM KONGO MOKAXWA	**2nd APPLICANT**

and

THE PRESIDENT OF THE REPUBLIC OF NAMIBIA	**1st RESPONDENT**
THE MINISTER OF JUSTICE	**2nd RESPONDENT**
PENDUKENI IIVULA-ITHANA	**3rd RESPONDENT**
THE PROSECUTOR-GENERAL OF NAMIBIA	**4th RESPONDENT**
THE ATTORNEY-GENERAL OF NAMIBIA	**5th RESPONDENT**
YANG FAN	**6th RESPONDENT**
THE DIRECTOR OF THE ANTI-CORRUPTION COMMISSION	**7th RESPONDENT**

CORAM:	**HOFF, J *et* SMUTS, J *et* MILLER, AJ**
Heard on:	30 November 2011
Delivered on:	20 February 2012

JUDGMENT

Smuts, J [1] This application for declaratory relief concerns the validity of the dual appointment of Ms Pendukeni Iivula-Ithana as Minister of Justice and Attorney-General, as well as the validity of certain provisions in the Prevention of Organized Crime Act, 2004 (Act No 29 of 2004) ("POCA") and the Anti-Corruption Act, 2003 (Act 8 of 2003) ("ACA").

3. [2] After POCA was passed by Parliament, it was signed by the President and promulgated in December 2004. In terms of s 103(1) of that Act, it would **"come into operation on a date to be fixed by the Minister** (of Justice) **by notice in the Government Gazette"**. The Minister proceeded to do so on 5 May 2009 by Government Notice 77 of 2009. [1]

4. [3] The applicants and the sixth respondent stand accused of a range of criminal charges in pending criminal proceedings. These charges include alleged contraventions of POCA and ACA. Certain of the charges arise from the supply of x-ray equipment to the Ministry of Finance of the Government of Namibia by a concern called Nuctech Company Ltd, a company incorporated in the People's Republic of China for a sum exceeding U$55 million.

5. [4] It is alleged that Nuctech in February 2009 entered into two contracts with a Namibian close corporation called Teko Trading CC (Teko) in which the applicants each have a 50% members' interest. The one contract was described as an agency agreement and the other was for consulting services. During March 2009 Teko received payments pursuant to invoices

[1] Proclamation

provided to Nuctech in a total amount exceeding N$42 million. In April 2009 further contracts were entered into between Nuctech and Teko.

6.

7. [5] The dates of these payments and contracts are raised in this application by the applicants because the contracts were entered into and the sums in question were received by Teko prior to 5 May 2009 when POCA was put into operation. The applicants contend that POCA has retrospective operation in respect of these payments despite the fact that POCA did not have enforceable status at the time when the payments were received and the underlying contracts were entered into. The applicants thus seek to set aside certain provisions in POCA including some relating to asset forfeiture which they contend provide for retrospectivity. The applicants also apply for the declaration as invalid certain sections in both POCA and ACA which they contend are impermissibly wide.

8. [6] The eleven declaratory orders sought in this application can usefully be divided into three separate categories or issues. The first issue concerns the constitutionality of the concurrent appointment of Ms Iivula-Ithana as Minister of Justice and Attorney-General. This issue is raised by paragraphs 1 and 2 of the notice of motion. These paragraphs respectively seek an order declaring the appointment of Ms Iivula-Ithana as Minister of Justice and Attorney-General to be ultra vires article 32(3)(i) and 32(8) read with arts 86 and 87 of the constitution and an order declaring Government Notice 77 ultra vires the Constitution and s103 of POCA.

9.

10.

11. [7] In the second instance, the constitutionality of various provisions of POCA specified in the charge sheet, namely sections 1(5), 4, 6, 7, 8, 11, 22 and 23 and the definitions of "**unlawful activity"** and **"proceeds of unlawful activity"** are challenged as being unconstitutional.

12.

13. [8] Thirdly, the applicants take issue with constitutionality of two definitions in ACA, namely "corruptly" and "gratification" contained in s 32. They contend that sections 33, 36, 42 and 43 of ACA, which are raised in the charge sheets, depend for their validity upon those definitions. They contend that these provisions are likewise unconstitutional and invalid and seek declaratory orders to that effect.

14.

15. [9] Before dealing this those issues in that sequence, certain preliminary issues raised in the respondents' answering affidavit are briefly referred to. They question the ripeness of the application and the standing of the applicants to seek the relief contained in the notice of motion.

16.

17. Ripeness and standing

18.

19. [10] The respondents, in the answering affidavit also raised defences to this application by taking issue with the standing of the applicants and whether the matter is ripe for hearing in the sense of being premature.

20.

21. [11] As to the question of standing, Mr Trengove, who appeared for the

governmental respondents with Mr N. Marcus, did not press the issue and said that those respondents would want to have the issues raised in the application being determined. This court has correctly stressed that a broad approach to standing should be adopted in constitutional challenges[2]. The Supreme Court has confirmed this approach[3]. The applicants are currently charged with offences which include contraventions of and the impugned provisions of POCA and others relating to them as well as contraventions of ACA dependent upon the impugned definitions of that Act. This would in my view give them standing to challenge the coming into operation of POCA and the provisions in POCA and ACA raised in the charge sheet against them.

[12] The ripeness point taken by the respondents would appear to be founded on the fact that it is presently uncertain that the applicants will be convicted on the charges against them and, even if convicted, it is uncertain that the asset forfeiture procedures contained in chapter 5 of POCA would be invoked against them. But the applicants currently face charges which could give rise to those procedures being invoked against them. They have also already been the subjects of prior proceedings involving POCA. This Act has thus been invoked against the applicants and they are at risk of those procedures (involving asset forfeiture) being employed against them. They are in my view entitled to challenge the provisions in question which are pertinent to the proceedings against them under POCA.

---

[2]Uffindell t/a Aloe Hunting Safaris v Government of Namibia 2009(2) NR 670(HC) at 15-156

[3]Trustco Insurance Limited t/a Legal Shield Namibia v Deeds Registries Regulation Board SA 14/2010 par 18

[13] It follows that these defences, not pursued with any vigour by Mr Trengove, are not sustained.

Attorney-General and Minister of Justice

[14] It is common cause that the President of the Republic of Namibia appointed Ms Iivula-Ithana as both Minister of Justice and as Attorney-General on 21 March 2005. [4] The applicants contend that this was invalid under the Constitution because, so they contend, the Attorney-General may not hold office as a member of Cabinet. They contend that Ms Iivula-Ithana's appointment as Minister of Justice was thus invalid and that she did not then have the power to validly put POCA into operation under s 103(1) of POCA. If that were to be the case, POCA would not have validly come into force and the declaratory relief in respect of the specific provisions of POCA raised in this application would not arise.

22. [15] Mr Gauntlett SC, who with Mr R Heathcote SC and Mr F Pelser, appeared for the applicants, submitted that the Constitution construed in context makes it clear that the different roles of Cabinet Minister and Attorney-General cannot vest in the same individual at the same time. Mr Gauntlett stressed that the Constitution required the President to appoint an Attorney-General. Mr Trengove agreed that the appointment of an Attorney-General was essential under the Constitution. But their arguments thereafter diverged.

23.

[4] Proclamation 4 of 24 May 2005

24. [16] Mr Gauntlett argued that the scheme of the Constitution was against a dual appointment of the kind held by Ms Iivula-Ithana as Minister of Justice and Attorney-General at the time when Notice 77 was published. He submitted that the institutional integrity of State structures and the roles of its different constituent parts are diluted where any autonomous component thereof such as the office of Attorney-General is held by an individual who simultaneously heads a Government Ministry. The applicants thus contend that the autonomy of the office of the Attorney-General would exclude the incumbent from serving as a member of Cabinet.

25.

26. [17] For support for this submission, the applicants referred to art 35. It provides for the composition of Cabinet. Mr Gauntlett referred to the three constituent parts, namely the President, Prime Minister and other Ministers. He submitted that the exclusion of the Attorney-General from this class should be accorded due weight. He further referred to the different constitutional models for the office of Attorney-General referred to by the Supreme Court in *Ex Parte Attorney-General in re Relationship between the Attorney-General and Prosecutor-General* [5] (the Attorney-General-case). One of the models referred to by the Supreme Court was the merging of the office of Minister of Justice with that of Attorney-General. He submitted that this was not adopted in the Constitution and that the fundamental choice in not doing so could not then be undone by presidential predilection.

27.

28. [18] Mr Gauntlett argued that the exclusion of the Attorney-General from Cabinet membership meant that it would be impermissible to fill that office

[5] 1998 NR 282 (SC) at 295-296

by a Cabinet member. He also referred to the constitutional scheme which deliberately created separate offices in respect of functionaries such as the Ombudsman, the Governor of the Central Bank and Prosecutor-General and pointed out that these are excluded from Cabinet posts. He also submitted that the dual appointment would weaken the importance attributed to the principle of legality where the government's chief legal advisor is also tasked with the full responsibilities of a whole government ministry. The burden of running and being responsible for a ministry, he submitted, would impact upon the ability to render legal advice of high quality to all ministries, the Government as a whole and to the President. This, he submitted, weakens the constitutional state based upon the rule of law, entrenched in art 1 of the Constitution. Mr Gauntlett thus contended that the presidential appointment of Ms Iivula-Ithana to the dual position of both Minister and Attorney-General subverted a legal advisor's position and rendered the appointment both qualitatively and conceptionally unconstitutional. Mr Gauntlett also referred to the various provisions in the Constitution which specifically set out certain functions for the Attorney-General. He accordingly submitted that the dual appointment vitiated the proclamation of the commencement date of POCA and that Notice 77 should be declared invalid as a consequence and that POCA did not validly enter into force.

29. [19] Mr Trengove however countered that, although the Constitution did not make the Attorney-General a member of Cabinet or require the incumbent to be a member of Cabinet, the Constitution also did not preclude the appointment of the Attorney-General to Cabinet. He argued that the President had a wide discretion in deciding whether or not to appoint the Attorney-General

to Cabinet. He further referred to the wide power of appointment by the President when it came to appointing the Attorney-General. He submitted that the applicant's case amounted to an implied limitation on the President's power to appoint the Attorney-General and submitted that there was no justification for such an approach.

30.

31. [20] Mr Trengove submitted that the Attorney-General, upon a proper construction of the Constitution, was a member of the executive branch of Government. He stressed out that the Attorney-General is a political appointee holding office at the President's pleasure. He submitted that the significance of the office of the Attorney-General lies in its separation from the office of the Prosecutor-General and not in its autonomy or exclusion from Cabinet.

32. [21] In addressing the first question to be determined in this matter, the starting point is the constitutional scheme and the establishment, appointment and functions of the office of Attorney-General.

33. [22] Article 86 established the office of the Attorney-General. It provides:

> **"There shall be an Attorney-General appointed by the President in accordance with the provisions of Article 32(3)(1)(cc) hereof."**

34. [23] Article 87 sets out the powers and functions of the Attorney-

General as follows:

> **"The powers and functions of the Attorney-General shall be:**
>
> **(a) to exercise the final responsibility for the office of the Prosecutor-General;**
>
> **(b) to be the principal legal advisor to the President and the Government;**
>
> **(c) to take all action necessary for the protection and upholding of the Constitution;**
>
> **(d) to perform all such functions as may be assigned to the Attorney-General by Act of Parliament.**"

35. [24] Article 32, which in general terms provides for the functions, powers and duties of the President, includes the power, subject to the Constitution, to appoint the Attorney-General. This is contained in Article 32(3)(i)(cc). The appointment of the Attorney-General falls within the same category as the appointment of the Prime Minister, [6] Ministers and Deputy Ministers [7] and the Director-General of Planning. [8]

36.

37. [25] It is to be stressed at the outset that the President has a wide discretion in appointing the Attorney-General. As is pointed out by the Supreme Court in *the Attorney-General* case with regard to the office of the Attorney-

[6] In Article 32(3)(i)(aa),

[7] Article 32(3)(i)(bb),

[8] Article 32(3)(i)(dd).

General, [9]

> **"Although the Constitution does not require the Attorney-General to possess any legal qualifications one can assume that in practice he would as he is the Chief Legal Advisor to the President and the Government.**
>
> **However, it is clear under the Constitution that his appointment is a political one and that his functions are executive in nature."**

38.

39. [26] The appointment of the Attorney-General and Ministers under art 32(3)(i) is unlike the power of the President to appoint Judges, the Ombudsman and Prosecutor-General as the latter appointments under Article 32(4) can only occur on the recommendation of the Judicial Service Commission. The Supreme Court referred to the difference in the appointment of the Prosecutor-General which, unlike the Attorney-General, expressly requires legal qualifications and certain further constitutional requirements for the incumbent. After referring to these provisions and the manner of appointment of the Prosecutor-General, the Supreme Court concluded in the *Attorney-General* case that: [10]

---

[9]Ex Parte Attorney-General, In re: The constitutional relationship between the Attorney-General and the Prosecutor-General 1998 NR at 288 (SC)

[10]*Supra* p 289 G-H.

> **"The provisions of the Constitution referred to above suggest to me that the functions of the Prosecutor-General are quasi-judicial in nature unlike the executive functions of the Attorney-General. Moreover, the manner of his appointment makes it clear that, unlike the Attorney-General, the Prosecutor-General is not a political appointment because he is appointed by the Judicial Services Commission. That Commission is constituted under art 85 of the Constitution and consists of the following persons: The Chief Justice, a judge appointed by the President, the Attorney-General and two nominated members of the legal profession."**

40. [27] In the course of oral argument, Mr Gauntlett criticised the Supreme Court's characterisation of the Prosecutor-General's functions as being *quasi*-judicial. Although this phrase has in the past been more frequently utilized in the context of administrative action[11] and may, with respect, have been better selected in this context, it is however clear that the Supreme Court employed this phrase for the purpose of describing the distinction between the two offices in question. The use of that term is to be understood within that context. The thrust of what was stated by the Supreme Court in this regard was to stress the distinction between the political and executive nature of the office of the Attorney-General which forms part of the Executive on the one hand from that of the Prosecutor-General on the other, which although not part of the

[11] (and in that sphere less frequently following the diminishing need for the characterisation of different types of administrative action, in so far as this was previously helpful or particularly sound, after the advent of art 18 of the Constitution

judicial branch is none the less to be viewed as essentially separate from the executive in the sense of the powers and functions of that office which are to be exercised independently of the executive.

41. [28] As was correctly pointed out by Mr Trengove, the Attorney-General is thus a political appointee who holds office at the President's pleasure. This is entirely unlike the position of the Prosecutor-General and the other appointments under sub-art 32(4).

42.

43. [29] The main functions of the Attorney-General as set out above are to exercise "final responsibility" for the office of the Prosecutor-General, to be principal legal advisor to the President and the Government, to take action for the protection and upholding of the Constitution and those further functions which are specifically assigned to the Attorney-General in legislation.

44.

45. [30] As to the first of these functions, namely the exercise of the final responsibility for the office of the Prosecutor-General, the Supreme Court, after a detailed analysis, concluded:

> **"In the light of what I have said earlier in this judgment on my understanding of the aspirations, expectations and the ethos of the Namibian people, it seems to me that one must interpret the Constitution in the most beneficial way giving it the full amplitude of the powers which are given to the Prosecutor-General. Thus interpreted, the office, appointed**

by an independent body, should be regarded as truly independent subject only to the duty of the Prosecutor-General to keep the Attorney-General properly informed so that the latter may be able to exercise ultimate responsibility for the office. In this regard it is my view that final responsibility means not only financial responsibility for the office of the Prosecutor-General but it will also be his duty to account to the President, the Executive and the Legislature therefor. I accept that on this view of the respective articles the 'final responsibility' may be more diluted and less direct but it is nevertheless still possible for such responsibility to be exercised provided that the Attorney-General is kept properly informed. On this view of the matter the Constitution creates on the one hand an independent Prosecutor-General while at the same time it enables the Attorney-General to exercise final responsibility for the office of the Prosecutor-General. The notions are not incompatible. Indeed it is my strong view that this conclusion is the only one which reflects the spirit of the Constitution, its cardinal values, the ethos of the people, and articulates their values, their ideals and their aspirations. It also is entirely in accordance with the 'uniquely caring and humanitarian quality of the Constitution'."[12]

46. [31] It is accordingly clear that the Supreme Court posits the position of

[12]Supra at p……

Attorney-General within the Executive branch of Government. The Court in its judgment also noted that the then incumbent (at the time of those proceedings) was a Minister and member of Cabinet. This was referred to in the following way:

> **"When the matter was first argued it was assumed by both counsel that the Attorney-General in Namibia is a minister and a member of the executive by virtue of his office. At the second hearing it was correctly conceded in reply to a question raised by this Court at the earlier hearing that this is not correct. While the present incumbent is indeed a minister and a member of the Cabinet there is nothing in the Constitution which requires him to be such or indeed to hold political office. However, it is clear from what follows that he is a political appointee."[13]**

47. [32] Mr Trengove submitted that the Supreme Court, in this passing reference, did not suggest that there was anything untoward in the fact that the incumbent was a member of Cabinet and a Minister. Mr Gauntlett however submitted that this reference would not constitute authority for that point and questioned the correctness of that statement in the judgment.

48. [33] What is however clear from the judgment is that, upon the assumption that the incumbent at that time was a member of Cabinet and a Minister as stated by the court, the Supreme Court clearly did not consider that

[13] Supra at p…..

this was untoward or inappropriate after finding that cabinet membership was not required by the Constitution, after expressly referring to the incumbent's membership of cabinet.

49.

50. [34] Both counsel also referred to the other provisions in the Constitution where there was specific and express reference to Attorney-General. These include art 64. It deals with the power of the President to withhold his assent to a bill passed by parliament on the grounds of a conflict with the Constitution. In such an event the Attorney-General **"may then take appropriate steps to have the matter decided by a competent Court"**. This provision is to be read with the provision contained in the Supreme Court Act empowering the Attorney-General to refer matters to that Court for determination, as occurred in respect of corporal punishment.[14] I agree with Mr Trengove's submission that there would not be an inconsistency between this function and if the Attorney-General were to be member of Cabinet. It would seem to me that there is thus no inherent conflict in this context.

[35] It is both clear from the terms of art 32 and the approach of the Supreme Court that the Attorney-General, being a political appointee in the same category as Minister, falls within the Executive branch of government. The Attorney-General holds office at the President's pleasure who may appoint any person to that position. Whilst the Constitution would not appear to contemplate that a person appointed to the specific offices referred to in art 32(4) could hold office as Attorney-General, as contended by Mr Gauntlett, it does not in my view follow

[14] Ex parte Attorney-General: In re corporal punishment by organs of State 1991 NR 178 (SC)

See s15 of Act 15 of 1990.

that a Minister cannot be appointed as Attorney-General or vice versa. The appointments under art 32(4) not only have different prerequisites, requiring recommendations for those appointments by different bodies established by the Constitution. But those offices contemplate functions at variance (and not compatible with) with those to be exercised by the Attorney-General under the Constitution. The latter's powers and functions would in my view not necessarily preclude and be incompatible with membership of Cabinet, as argued by Mr Gauntlett. Given the wide powers of appointment vested in the President, it would not in my view be in conflict with the Constitution for the President to appoint a Minister as Attorney-General or the latter as a member of Cabinet if he or she is a member of the National Assembly as is required (for Cabinet membership) by art 35.

51.

52. [36] Although it may be desirable for qualitative reasons, as argued by Mr Gauntlett, for an Attorney-General not to be burdened with the further demands of being responsible for the running of a Ministry, it would not seem to me that a dual position, as occurred with Ms Iivula-Ithana, is a matter of law impermissible and in conflict with the Constitution. It may also be desirable that the Attorney-General as the Executive's Chief Legal Advisor should not be a member of Cabinet to whom advice is given and be responsible for a portfolio in respect of which she provides advice, this would also not of itself in my view be in conflict with the Constitution.

53.

54. [37] The Constitution does not in my view require that the positions of Minister of Justice and Attorney-General are to be held by two people. Even if I

were to be wrong in finding that the Constitution did not permit the Attorney-General to hold office as a member of Cabinet, and that the Constitution would not permit a member of Cabinet to be appointed to that office, it would not seem to me that the converse would necessarily follow and that the appointment of the Minister of Justice would be tainted by the simultaneous appointment as Attorney-General. But, in view of the conclusion I have reached, it is not necessary to further consider this question or to deal with what Mr Gauntlett termed as the "floodgates" argument raised by Mr Trengove or his reliance upon *Oudekraal Estates v City of Cape Town*[15].

55. The constitutional challenge upon POCA

56.

57. [38] The applicants contend that certain of the provisions of POCA relied upon by the Prosecutor-General in the charges against them, breach art 12(3) of the Constitution on the ground that they violate the fundamental principle embodied in art 12(3) of the Constitution by retrospectively criminalising and imposing penalties for conduct which was lawful when it was committed and also by contravening art 21(1)(j) and other articles reinforcing those provisions such as articles 7, 8, 11 and 16. The applicants then seek to have certain provisions in POCA declared invalid in their notice of motion including the definitions of **"unlawful activity"** and **"proceeds of unlawful activities"** in s 1(1) as well as ss 1(5), 4, 6, 11, 22 and 23. The provisions in question relate to money laundering offences provided for in s 4, 6 and 11 and asset forfeiture in terms of chapters 5 and 6 respectively.

[15] 2004(6) SA 222 (SCA)

58. [39] Article 12(3) of the Constitution provides:

> **"No persons shall be tried or convicted for any criminal offence or on account of any act or omission which did not constitute a criminal offence at the time when it was committed, nor shall a penalty be imposed exceeding that which was applicable at the time when the offence was committed."**

59. [40] The Supreme Court has held that this sub-article concerns only criminal proceedings and proscribes the retrospective imposition of offences or increase of penalties for the commission of criminal offences. Art 12(3) would thus not apply to civil proceedings or civil penalties imposed pursuant to them, as was held by the Supreme Court[16].

60. [41] The applicants contend that the money laundering offences have retrospective operation by virtue of the definitions of "**unlawful activity"** and **"proceeds of unlawful activities"** and by virtue of s 1(1)(5). They contend that these definitions read with s 1 (1)(5) have a similar effect upon the provisions relating to asset forfeiture in both Chapters 5 and 6 of POCA.

61. [42] The definition of **"unlawful activity"** contained in s 1(1) of the Act is in the following terms:

---

[16] S v Myburgh 2008(2) 592 (SC) 597 F-G. See also S v Amalovu 2005 NR 438 (HC) at 446

"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."

62. [43] The definition of **"proceeds of unlawful activities"** is stated to mean:

> **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."**

63. [44] The applicants further rely upon s 1(5). It provides:

> **"(5) Nothing in this Act, or in any other law, is to be construed so as to exclude the application of any provision of Chapter 5 or 6 on account of the fact that-**

(a) any offence or unlawful activity concerned occurred; or

(b) any proceeds of unlawful activities were derived, received or retained

before the commencement of this Act."

64. [45] The money laundering offences contained in ss 4 and 6, s 4 render it an offence to conceal or disguise the proceeds of unlawful activities whilst s 6 makes it an offence to acquire, use, possess, import or export the proceeds of unlawful activities.

65. [46] Section 11 sets out the penalties for money laundering. They are severe and include a fine not exceeding N$100 million or imprisonment for a period not exceeding 30 years for a contravention of s 4, 5 or 6 of POCA.

[47] The applicants contend that the definitions read with s1 (1)(5) thus render the offences created by s4 and s6 retrospective as the proceeds may have been derived from activities which were not unlawful (and thus lawful) prior to the coming into operation of POCA.

[48] Despite the wording of the definitions in question, it would not seem to me that the money laundering offences created in ss4 and 6 operate retrospectively, as contended by the applicants. These sections in my view

criminalise only current conduct, as submitted by Mr. Trengove. The current conduct contemplated by those sections relate to the acquisition, possession, importation and exporting use of proceeds of unlawful activities. That is what is criminalised in those sections and not any conduct committed prior to the coming into operation of POCA. The offences created by these sections thus concern conduct after POCA came into force. That is in my view the clear meaning of the sections.

[49] What is thus criminalised is the current possession, acquisition and use of the proceeds of unlawful activities and not the original conduct which rendered those proceeds as unlawful. That conduct could have occurred before POCA came into force. But it is the subsequent possession, use or acquisition after POCA came into force which is criminalised by POCA. An accused would thus not be charged with the underlying (and prior) unlawful activity or activities which gave rise to the proceeds. What is hit by the sections is the subsequent use, possession or acquisition of those proceeds after POCA came into operation. This would not in my view mean that these offences operate retrospectively. Their operation is on the contrary prospective. They do not in my view offend against art 12 (c).

[50] Even if there were to be any ambiguity in this regard, Mr Trengove correctly submitted that this would in any event be excluded by the application of the presumption against retrospectivity, strongly reinforced by art 12(3). Mr. Trengove also pointed out that counts 6 and 7 charge the applicants with contraventions of s7 read with ss4 and 6 relating to conduct which occurred

between 5 May and 7 July 2009 (and not before POCA came into force).

[51] The reliance upon their rights to property protected under art 16 can also not in my view avail the applicants. This is because proceeds of unlawful activity would not constitute property in respect of which protection is available. These proceeds arise from unlawful activity which is defined to "constitute an offence or which contravenes any law". Mr Trengove's analogy of possession of stolen property illustrates both this and the previous point. It is the current possession which is criminalised (and not the prior theft) and further that that property would not be protected by art 16.

[52] The protection of property under art 16 is not absolute but subject to constraints and restrictions which are reasonable, in the public interest and for a legitimate object, as was made clear by the Supreme Court in *Namibia Grape Growers and Exporters v Ministry of Mines and Energy and Others*[17]*:*

> *"If it is then accepted, as I do, that art 16 protects ownership in property subject to its constraints as they existed prior to independence, and that art 16 was not meant to introduce a new format free from any constraints then, on the strength of what is stated above, and bearing in mind the sentiments and values expressed in our Constitution, it seems to me that legislative constraints placed on the ownership of property which are reasonable, which are in the public interest and for a legitimate object, would be constitutional. To this may be added that, bearing in mind the provisions of the Constitution, it follows in my opinion that legislation which is arbitrary would not stand scrutiny by the Constitution."*

[17] 2004 NR 194 (SC) at 212E to F

[53] The prohibitions contained in ss4 and 6 with regard to the proceeds of unlawful activity are in my view eminently reasonable. The Act was furthermore passed in 2004 and put into operation in May 2009. Members of the public had thus very ample advance warning of the creation of offences relating to the proceeds of prior unlawful activities. The restrictions and prohibitions are also in my view in the public interest and serve a legitimate object. The purpose of similar legislation in South Africa was, with respect, succinctly summarised by that country's Constitutional Court in the following way:

> *"The Act's overall purpose can be gathered from its long title and preamble and summarised as follows: The rapid growth of organised crime, money laundering, criminal gang activities and racketeering threatens the rights of all in the Republic, presents a danger to public order, safety and stability, and threatens economic stability. This is also a serious international problem and has been identified as an international security threat. South African common and statutory law fail to deal adequately with this problem because of its rapid escalation and because it is often impossible to bring the leaders of organised crime to book, in view of the fact that they invariably ensure that they are far removed from the overt criminal activity involved. The law has also failed to keep pace with international measures aimed at dealing effectively with organised crime, money laundering and criminal gang activities. Hence the need for the measures embodied in the Act.*
>
> *It is common cause that conventional criminal penalties are inadequate*

as measures of deterrence when organised crime leaders are able to retain the considerable gains derived from organised crime, even on those occasions when they are brought to justice. The above problems make a severe impact on the young South African democracy, where resources are strained to meet urgent and extensive human needs. Various international instruments deal with the problem of international crime in this regard and it is now widely accepted in the international community that criminals should be stripped of the proceeds of their crimes, the purpose being to remove the incentive for crime, not to punish them. This approach has similarly been adopted by our Legislature."[18]

These considerations also apply to the Republic of Namibia.

[54] The invocation of art 21 (1)(j) which protects the right to practise any profession or carry on a business, occupation or trade can likewise not avail the applicants. That constitutional provision does not protect unlawful economic activities and would thus not protect the proceeds of those activities. As was stressed by the Supreme Court in *Africa Personnel Services v Government of Namibia*[19],

"Article 21(1)(j) in effect only protects lawful economic activities. If certain economic activities are proscribed by legislation lawfully enacted, i.e. enacted in accordance with the Constitution, those activities may no longer be exercised as contemplated by sub-article (2) or, as the court

[18]NDPP v Mohamed No. 2002(4) SA 843(CC) at paragraphs 14-15 approved and followed by that court in Mohunram v NDPP 2007(4) SA 222(CC) at paragraph 125

[19]2009 (2) NR 596 (SC) at paragraph 50

stated in Hendricks' case, they are no longer on 'the menu of lawful business options available'. Similarly, if certain economic activities are unlawful under common law, i.e. so much of the common law as does not conflict with the Constitution or any other statutory law, those activities are illegal and, they too, are not available on the 'menu'."

Asset forfeiture in POCA

[55] The applicants also challenge the asset forfeiture regime in chapters 5 and 6 as offending against the Constitution. In their application, they do not identify the specific provisions they take issue with in this regard, save for ss 22 and 33 of POCA. They rather adopt the position that the retrospective effect of the impugned definitions (of unlawful activity and proceeds of unlawful activity) make property which was not originally obtained in contravention of the law subject to confiscation or forfeiture under POCA would render that forfeiture unconstitutional.

[56] Mr Trengove submitted that the applicants' attack upon asset forfeiture was not properly pleaded and unsubstantiated in their founding affidavit.

[57] Although the notice of motion seeks to set aside ss22 and 33 of POCA dealing with affected gifts and anti-disposal orders by court respectively as well as the other sections and definitions already referred to, the applicants do not identify any other provisions which relate to asset forfeiture. The founding affidavit furthermore does not address quite how and in what manner these provisions offend against the Constitution.

[58] The rules of pleading clearly apply to applications in which statutory provisions come under constitutional attack. It is thus imperative that the impugned provisions are precisely identified and the attack upon them substantiated with reference to them so that a respondent is fully apprised of the case to be met and evidence which might be relevant to it. The relevant principle in this context, neatly summarised in *National Director of Public Prosecutions v Phillips and Other* [20], referred to by Mr Trengove, in my view find application in Namibia. This court has also confirmed this principle in the context of a Constitutional challenge[21].

[59] It would appear that the applicants' challenge on asset forfeiture in chapters 5 and 6 is based upon the contention that asset forfeiture contemplated by POCA is a "penalty" for the purpose of art 12(3) and that the impugned definitions (identified in the notice of motion) bring about a retrospective sanction in the form of asset forfeiture. They contend that the agreements or transactions, if completed before POCA took effect, render the applicants at risk of being deprived of property which, when they were transacted, they were free to do so. Their attack on the basis of the impugned definitions, as I understand it, is raised on the face of those provisions, and is consequently in my view sufficiently identified as a challenge on that confined basis.

---

[20] 2002(4) SA 60(W) at 106-7 (par 36-37) and the cases usefully collected in par 36 and 37

[21] Zaahl and Others v Swabou Bank Limited and Others. (Case No. A 35/2006) Unreported 23 November 2006 following Prince v President, Care Law Society & Others 2001(2) SA 388(CC) at paragraph 22.

[60] Mr Gauntlett submitted that the characterisation of the measures involving asset forfeiture as "civil" in nature[22] would not avail the respondents and that this court should have regard to the true nature and effect of the provisions. He argued that they amounted to the imposition of additional sanctions and are proscribed by art 12(3) because of their retrospective reach achieved by the impugned definitions read with s1(5).

[61] Mr Trengove submitted that asset forfeiture under chapter 5 of POCA does not operate retrospectively, relying upon *NDPP v Basson*[23].

[62] Asset forfeiture is dealt with in chapter 5 of POCA. That chapter is entitled "confiscation of benefits of crime". It essentially provides for the court to inquire into benefits an accused may have derived from an offence after being convicted of a criminal offence. This would arise by way of an application on the part of the prosecutor. In the event of the court finding that the accused had benefited from a crime or criminal activity sufficiently related to the offence, then the court is authorized to make a confiscation order against the person convicted for the payment to the State of any amount which the court considers appropriate.

[63] Section 18, contained in chapter 5, provides that proceedings in an application for a confiscation order, restraint order and disposal order are civil proceedings and not criminal proceedings and that they are to be determined

[22] In s18 of POCA

[23] 2002 (1) SA 419 (SCA) at paragraphs 14 to 17

upon a balance of probability. The order thus given by the court is, as was submitted by Mr Trengove, a civil judgment, despite the reference to confiscation. The amount of the order is furthermore within the discretion of the court subject to the limitation contained in s 32(6)(b) that the amount of the order should not exceed the value of the defendant's proceeds of the offences or related criminal activities.

[64] In their notice of motion, the applicants challenge s 22 in part one of chapter 5. It concerns affected gifts as defined in that section. The other section challenged is, s 33. It is contained in part 3 of chapter 5 and concerns an anti disposal order by court.

[65] What is not however challenged by the applicants is s17(3). It is contained at the very outset of chapter 5. It provides:

> *"For the purpose of this chapter, a person has benefited from the commission of an offence or related criminal activity if he or she has at any time, whether before or after the commencement of this Act, received or retained any proceeds of an offence or related criminal activity, whether or not that person is still in possession of those proceeds of an offence or related criminal activity subsequent to having received or retained those proceeds."*

[66] As was submitted by Mr Trengove, a court when seized of an enquiry under chapter 5, is enjoined, upon application by the prosecutor to have regard to benefits which a defendant in those proceedings has derived from criminal

activities which may thus have been received of retained before the commencement of POCA.

[67] The question is whether the forfeiture or confiscation regime set out in chapter 5 and 6 constitutes a penalty for a criminal offence which exceeds that which was applicable at the time when the offence was committed, in breach of art 12(3) of the Constitution. The first part of the question concerns whether the forfeiture or confiscation regime in chapter 5 amounts to the imposition of a penalty as punishment for the commission of criminal offences.

[68] As was made clear by Mr Trengove, the asset forfeiture regime in chapter 5 is only triggered in terms of s 32(1) by the conviction of an accused of an offence. That offence, he correctly contends, must be one committed after POCA came into operation. Once the conviction has occurred, the court may on application have regard to the benefits which an accused derived from the offence or criminal activity prior to POCA but sufficiently related to the offence, under the regime provided for in chapter 5 of POCA. That regime would however have been in place at the time when the offence was committed for which the accused is convicted and which then triggers the confiscation remedy, even if sufficiently related criminal activity from which an accused derives a benefit had occurred before POCA came into force.

[69] It follows that the confiscation order would only arise in respect of a crime committed after POCA was put into operation. It does not increase any penalty in respect of any crime committed prior to when POCA came into force. It is after

all the regime of confiscation which is a consequence of conviction for an offence committed after POCA came into operation even if the benefits of criminal activity before POCA came into force are sufficiently related. Mr Trengove's reliance upon the Supreme Court of Appeals' dictum in *Basson* in my view finds application even though the wording of the respective statutes differs. That Court held:

> *"The fact that events preceding the coming into operation of Act are to be taken into account in determining whether the defendant has 'benefited from unlawful activities' (section 13(3)), and in valuing the 'proceeds of unlawful activities' (section 19(1)), is not decisive of whether section 18(1) operates with the same effect. Those sections allow for benefits received before the commission of the particular offence to be taken into account, both in commission of the particular offence to be taken into account, both in determining whether a confiscation order should be made, and in determining the scope of such an order, and are equally consistent with the section operating only prospectively as they are with it operating retrospectively. To the extent that they are of assistance at all, in my view they indicate a contrary intention to that which the appellant contends for: the express reference in those sections (and the definitions of 'pattern of criminal gang activity' and 'pattern of racketeering activity') to events that preceded the Act coming into operation, indicates that the legislature was alive to the question to retrospectivity, and that the absence of similar words in 18(1) suggests that omission was deliberate."*
>
> *"....The section must thus be construed as operating only prospectively,*

with the result that a confiscation order may not be imposed in consequence of a conviction for an offence committed before the Act came into effect".[24]

[70] I also agree with Mr Trengove's submission that art 12(3) is directed at the imposition of penalty as punishment exceeding that which was applicable at the time when the offence was committed and would concern only the particular penalty imposed on the accused for the commission of the specific offence. I agree with his submission that art 12(3) is not directed at every potential adverse consequence imposed by law upon the conviction of the criminal offence. This could entail civil liability which may arise. But there are also the other examples referred to by Mr Trengove, such as prohibitions upon those who are convicted for serious offences from holding public offices, positions of trust or from obtaining licences of certain kinds. Mr Trengove correctly pointed out that prohibitions of this nature would not only disqualify those who committed the disqualifying crimes after the enactment of the prohibition.

[71] But more importantly in this context, I respectfully agree with the approach adopted by the Constitutional Court in South Africa in *S v Shaik*[25] that the purpose of asset forfeiture under similar legislation is not to punish. In *S v Shaik*, O'Reagan ADCJ stated on behalf of a unanimous court:

"In my view it is this clause in the preamble which points most directly to the key purpose of Ch 5: to ensure that no person can benefit from his or her wrongdoing. That this is the primary purpose of Ch 5 has also been

[24] Supra PAR 15-17

[25] 2008(5) SA 354 (CC)

recognised by the Supreme Court of Appeal, which held in National Directory of Public Prosecutions v Rebuzzi that '(t) he primary object of a confiscation order is not to enrich the state but rather to deprive the convicted person of ill-gotten gains."[26]

"From this primary purpose, two secondary purposes flow. The first is 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. And the second is prevention: the scheme seeks to remove from the hands of criminals the financial wherewithal to commit further crimes. These purposes are entirely legitimate in our constitutional order."[27]

O'Reagan , ADCJ concluded that part of the enquiry after her detailed analysis as follows:

> *"Upon proper construction of the Act, I am not persuaded that a primary purpose of Ch 5 is the punishment of offenders. Its primary purpose seems rather to be to ensure that criminals cannot enjoy the fruits of their crimes. It may well be that the achievement of this purpose might at times have a punitive effect, but that is not to say that the primary purpose is punitive."*[28]

[72] The reasoning underpinning this approach was reaffirmed by that Court in *Falk v NDPP* where it held:

---

[26]At paragraph 51

[27]PAR 52

[28]PAR 57

"The primary purpose of Chapter 5 of POCA is not punitive, but to ensure that no person benefits from his or her wrongdoing. Its secondary purpose is to promote general crime deterrence and prevention by depriving people of 'ill-gotten gains'."[29]

[73] Mr. Trengove also referred to the approach adopted by the South African High Court in *NDPP v Phillips*[30] where that Court stated[31]:

"The mere fact that an application for a confiscation order follows upon a criminal conviction and culminates in a judgment against the defendant for payment to the state of an amount based on the benefit he has derived from his crimes is not sufficient in itself to constitute the proceedings criminal and to render the confiscation order criminal punishment."

[74] This approach also accords with the characterisation of an order obtained in such proceedings as a civil judgment by O'Reagan ADCJ in *Shaik* in her discussion of confiscation orders in the scheme of that legislation:

"A confiscation order is a civil judgment for payment to the State of an amount of money determined by the court and is made by the court in addition to a criminal sentence. Before going further, it is important to emphasise that the order that a court may make in terms of Chapter 5 is not for the confiscation of a specific object, but an order for the payment of an amount of money to the State, even though it is ordinarily referred

[29] Supra para 39

[30] 2002(4)SA 60 (W)

[31] Supra paragraph 39

to as a 'confiscation order' and shall be throughout this judgment."[32]

[75] The South African High Court concluded in *Philips* that a confiscation order under Chapter 5 of the South African legislation was not punishment for a criminal offence for the reasons articulated thus:

> *"Whether a confiscation order constitutes punishment depends on its purpose. It constitutes punishment only if its purpose is to punish the defendant for his crime. But that is not the purpose of a confiscation order. Its purpose is to deprive him of the ill-gotten gains of his criminal conduct. That much is clear from the provisions of chapter 5. In terms of section 18(1) a confiscation order may only be made against a defendant who has derived benefit from his crimes. It follows that, if two people are convicted of the same offence from which the one derives benefit but the other not, a confiscation order may be made against the first but not against the second. This distinction would have been absurd if the intention was to punish. It makes sense only because the purpose is the deprivation of the proceeds of crime. In terms of section 18(2)(a) the amount of the confiscation order may not exceed the value of the benefit derived from the defendant's crimes. This limitation also makes it clear that the confiscation order is directed at the benefit and not the crime. The heinousness, severity or impact of the crime is entirely irrelevant. In terms of section 18(2)(b) the amount of the confiscation order may not exceed so much of the value of the benefit as remains in the hands of the defendant and those of third parties enriched by his affected gifts. Once again this illustrates that the purpose of the order is to confiscate*

[32] Supra at paragraph 24

his gains and not to punish him. If two people are convicted of the same crimes from which they derive the same benefit and the one is still in possession of the benefit but the other has lost it, a confiscation order would be competent against the first but not the second. This distinction too would be out of place if the intention was to punish. In terms of s30(2) read with sections 14(1) and 33(1)(b) a confiscation order extends to and may be execute against the recipients of the defendant's gifts to the extent of the value of those gifts. That would be illogical if the purpose of the confiscation order was to punish because the Act does not postulate that they are guilty of any offence at all. It makes sense only because the purpose of the order is to deprive them of the value of their enrichment by the affected gifts that they received from the defendant."[33]

[76] I respectfully agree with the reasoning of the South African courts cited above which in my view finds application to forfeiture in chapter 5 of POCA.

[78] I agree with Mr. Trengove that the pronouncements of the South African Courts in respect of similar legislation are of more assistance than the judgment of the European Court of Human Rights in Welch v United Kingdom[34] relied upon by the applicants, given the difference in the wording of the European Convention as opposed to the provisions in the South African and Namibia legislation and the Namibian Constitution.

[79] I also agree with Mr Trengove that art 12(3) does not impose a

[33]Supra at paragraph 42

[34] (1995) 20 EHRR 247

prohibition or restriction on retrospective laws even if they retrospectively create civil liability. His reliance upon Professor Hogg's work[35] which refers to examples in taxation law would in my view be apposite.

[80] Asset a forfeiture under chapter 6 of POCA entails two categories of property. These are what are termed the "instrumentalities" of crime and the proceeds of unlawful activities, as set out in s61(1). The latter category by making use of the terms "the proceeds of unlawful activities" and "unlawful activities" would, by virtue of the impugned definitions of those terms referred to above, include within its reach the proceeds of unlawful activities prior to the commencement of POCA. I agree with Mr Trengove's submission that asset forfeiture under chapter 6 would also not offend against the Constitution for the same reasons that the money laundering offences under s4 and 6 do not offend against the Constitution and that there is no breach of art 12(3) because asset forfeiture under chapter 6 is a civil remedy unrelated to the criminal prosecution and punishment of the offenders.

[81] Mr. Trengove correctly points out that the remedy itself is directed against the proceeds and instrumentalities of crime whether in the hands of a convicted person or a third party. The purpose of asset forfeiture under chapter 6 is thus not to punish a person convicted for an offence but rather to serve the underlying purposes of POCA, as cogently set out by the Supreme Court of Appeal in South Africa with reference to similar legislation in *Prophet v NDPP;*[36]

---

[35] Hogg Constitutional Law of Canada Fifth Edition Suplemented Vol 2, page 51-33

[36]2006(1) SA 38 (SCA) para 34 See also NDPP v R.O. Cook Properties (Pty) Ltd; NDPP v 37 Gillespie Street Durban (Pty) Ltd and another; NDPP v Seevnayaran 2004(2) SACR 208 (SCA)

as follows: 2006(1) 38 paragraph 34 page 54 first sentence."

> *"The interrelated purposes of chapter 6 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, and (d) advancing the ends of justice by depriving those involved in crime of the property concerned.*

[82] Asset forfeiture is, as is stated in s50 of POCA, a civil remedy directed at confiscation of the proceeds of crime and not at punishing an accused. Chapter 6 proceedings are furthermore not necessarily related to a prosecution of an accused. Those proceedings are open to the State to invoke whether or not there is a criminal prosecution. As is pointed out by Mr Trengove with reference to s61(6) of POCA, even if there is a prosecution, the remedy is not affected by the outcome of the criminal proceedings. The remedy is thus directed at the proceeds and instrumentalities of crime and not at the person having possession of them. This is in furtherance of the fundamental purpose of these procedures referred to above. As is also pointed out by Mr. Trengove, ss63 and 65 clothe innocent third parties with an "innocent owner" defence where they own or have an interest in the proceeds or instrumentalities of crime.

[83] The retrospective operation of chapter 6 is brought about by providing for the forfeiture of instrumentalities or proceeds of crime, even where the crimes were committed prior to POCA's commencement. To that extent the reach of chapter 6 may be retrospective. But the forfeiture proceedings under chapter 6 do not in my view constitute a penalty imposed upon an accused as punishment

---

paragraph 18; Mohunran v NDPP 2007(4) SA 222(CC) paragraph 57

for a crime. Those proceedings are directed at the proceeds of crime and not at the person who committed the crime. I agree with Mr Trengove's submission that those proceedings do not in my view engage art 12(3) and are thus not in conflict with the Constitution.

Challenge to the Anti-Corruption Act

66.

67. [84] The applicants contend that the definitions of "corruptly" and "gratification" contained in ACA together with sections 33, 36, 42(2) and 46 of ACA, which are dependent upon those definitions, should be struck down as unconstitutional on the basis of their vagueness and their wide sweep in that they violate the rule of law and the constitutional principle of legality, entrenched in the Constitution of Namibia. Both counsel referred us to the formulation of this principle by the House of Lords, approved of by the Supreme Court in *Alexander v Minister of Justice,* [37] to the following effect:

> **[W]hether the law or rule in question is sufficiently accessible to the individual who is affected by the restriction, and sufficiently precise to enable him to understand its scope and foresee the consequences of his actions so that he can regulate his conduct without breaking the law."**

68.

69. [85] The term **"corruptly"** is defined in s 32 of ACA to mean:

---

[37] 2010(1) NR 328 (SC) at par [96] approving HS (Somalia) v Secretary of State for Home Department [2009] 4 All ER 711 par [17].

“in contravention of or against the spirit of any law, provision, rule, procedure, process, system, policy, practice, directive, order or any other term or condition pertaining to-

(a) any employment relationship;

(b) any agreement; or

(c) the performance of any function in whatever capacity;”

70.

71. [86] The applicants also attack the definition of “gratification” which is defined to include:

“(a) money or any gift, loan, fee, reward, commission, valuable security or property or interest in property of any description, whether movable or immovable;

(b) any office, dignity, employment, contract of employment or services and any agreement to give employment or render services in any capacity;

(c) any payment, release, discharge or liquidation of any loan, obligation or other liability, whether in whole or in part;

(d) any valuable consideration or benefit of any kind, any discount, commission, rebate, bonus, deduction or percentage;

(e) any forbearance to demand any money or money's

worth or valuable thing;

(f) any service or favour, including protection from any penalty or disability incurred or apprehended or from any action or proceedings of a disciplinary, civil or criminal nature, whether or not already instituted, and including the exercise or the forbearance from the exercise of any right or any official power or duty;

(g) any right or privilege;

(h) any aid, vote, consent or influence, or any pretended aid, vote, consent or influence;

(i) any offer, undertaking or promise, whether conditional or unconditional, of any gratification within the meaning of any of the preceding paragraphs;"

[87] Mr. Gauntlett argued that the ACA seeks to make unlegislated norms binding by the definition of "corruptly" by incorporating contraventions of a procedure, process, system, policy or practice. He correctly points out that policies are not binding legal instruments. He also referred to the difficulties of establishing practices. They need not be written or of general application and may thus be indeterminate. He submitted that the vagueness of the definition is compounded by use of the term "against the spirit of" with reference to being

against the spirit of any law, rule, practice and the like. He submitted that it was constitutionally impermissible to criminalise non-compliance with non binding measures or the spirit of those provisions by means of this statutory definition. But the definition is to be read in the context of the provisions where it is employed in creating offences. It is not the non-compliance with those measures alone which is criminalised. Those offences have further elements as well as requiring *means rea* which would include knowledge of unlawfulness.

[88] Mr. Gauntlett also argued that the definition of gratification is limitless and is unreasonably and impermissibly wide. He further submitted that the impugned ACA provisions cannot be saved by severance.

[89] Mr Trengove on the other hand submitted that what is required in penal statutory provisions is "reasonable certainty and not perfect lucidity" with reference to Affordable Medicines Trust v Minister of Health[38] and to R v

Pretoria Timber Co (Pty) Ltd and Another.[39] Ngcobo, J (as he then was) in the former matter, with respect, lucidly summarised the applicable principles to a challenge on the basis of vagueness in a constitutional dispensation in the following way:"

> *"The doctrine of vagueness is founded on the rule of law, which, as pointed out earlier, is a foundation value of our constitutional democracy. It requires that laws must be written in a clear and accessible manner. What is required is reasonable certainty and not perfect lucidity. The*

[38] 2006(3) SA 247 (CC) at paragraph 108

[39] 1950(3) SA 163 (A) at 176G

doctrine of vagueness does not require absolute certainty of laws. The law must indicate with reasonable certainty to those who are bound by it what is required of them so that they may regulate their conduct accordingly. The doctrine of vagueness must recognise the role of government to further legitimate social and economic objectives and should not be used unduly to impede or prevent the furtherance of such objectives. As the Canadian Supreme Court observed after reviewing the case law of the European Court of Human Rights on the issue:

> *"Indeed...laws that are framed in general terms may be better suited to the achievement of their objectives, inasmuch as in fields governed by public policy circumstances may vary widely in time and from one case to the other. A very detailed enactment would not provide the required flexibility, and it might furthermore obscure its purposes behind a veil of detailed provisions. The modern State intervenes today in fields where some generality in the enactments is inevitable. The substance of these enactments remains nonetheless intelligible. One must be wary of using the doctrine of vagueness to prevent or impede State action in furtherance of valid social objectives, by requiring the law to achieve* a *degree of precision to which the subject-matter does not lend itself...*[40]*"*

These principles in my view apply with equal force to the position in Namibia.

[40]Supra at paragraph 108

[90] Ngcobo, J formulated the test to be applied in determining a challenge of this nature is whether a provision construed in accordance with the rules of statutory construction indicates with reasonable certainty to those who are bound by it what is required of them. In applying this test to the attack upon the provisions in ACA, I stress at the outset my agreement with Mr Trengove's submission that the concept of corruption is one which does not lend itself to neat and precise formulation and delineation. He referred to the legislative history of the statutory offences of bribery and corruption which have required that the conduct in question be committed "corruptly". He argued that the impugned definition of corruptly amounts to an attempt on the part of the legislature to codify the element of unlawfulness. He submitted that it is no more vague then the requirement of unlawfulness which under common law is an element of a crime.

[91] Mr Trengove correctly concluded that the requirement of unlawfulness as applied to the crime of corruption is particularly difficult to formulate, involving as it would, the community's perceptions of justice or equity and its legal convictions. But the legislature has in ACA attempted to do that and, in doing so, seeks to criminalise certain conduct with reference to non compliance with non-binding measures by means of this definition when the term is read as na element of the offences referred to. As Mr Gauntlett submitted, this is compounded by incorporating a conflict to the "spirit" of those non-binding measures. Despite Mr Trengove's explanation for the definition (as an attempt to codify the concept of unlawfulness), it would seem to me to be unduly vague and not meet the test of indicating with reasonable certainty what is hit by it to

those who are bound by it, as is required by the principle of legality[41]. The removal of the phrase “against the spirit of” would not in my view cure the provision from this inherent vagueness. This definition should thus in its current form be struck down and the applicants are entitled to their relief sought in paragraph 9 of the notice of motion.

[92] The same cannot be said for the definition of gratification. Although wide, it is not in my view unduly vague. The concept of gratification in the context of corruption would doubtless take on many varying forms. The definition would of necessity be wide. But that does not translate itself into impermissible vagueness in the sense referred to. Applying the test set out above to this definition, I find that the applicants have not established that is impermissibly vague.

[93] Turning to the challenge upon the sections which ss 33, 36, 42(2) and 46), it would not in my view follow that these sections would necessarily need to be struck down because they use term “corruptly” in them. That term would need to be interpreted by the courts. In doing so, the courts would have regard as to how the term is understood including its dictionary definition, its definitions in international instruments and how it has been interpreted by this or other courts in giving content to that concept. As to the latter, the South African High Court set out a widely accepted understanding of the term “corruptly” contained in that country’s Corruption Act of 1992 as follows:

> “Then finally, it remains to make clear that such giving is done corruptly if it is done with the intention of persuading or influencing the recipient to

[41] See S v Dodo 2001(3) SA 382(CC) at paragraph 13

act other than in impartial or proper discharge of his or her prescribed duties to the advantage of the donor or some other indicated person. As part of this requirement, the giving of the benefits or offer to give it must be unlawful, which means it is of a nature not sanctioned by society's perception of what is just or acceptably proper, and it is this requirement that excludes from the ambit of corruption under the Act the giving of tips such as a reward for some service done well enough to deserve some recognition, or lunches or entertainment facilities for clients or customers that are a common practice among business activities, though that may depend on the nature and extent of the benefit."

[94] I do not agree with Mr Gauntlett submissions that the impugned definition of "corruptly" is not severable from the other sections in which it is used. Those sections should in my view remain intact and "corruptly" would then bear its ordinary meaning. This would be in accordance with the test for severability approved by the Supreme Court in Government of the Republic of Namibia v Cultura 2000[42].

Costs

[95] The applicants have succeeded in securing the relief set out in one out of 11 paragraphs. In the context of the entire application, this most certainly does not constitute substantial success. On the contrary the respondents were substantially successful in resisting almost all the relief sought by the applicants. But the applicants should be entitled to recover a portion of their costs, as would the respondents in resisting the bulk of the relief claimed against them. Taking

[42] 1993 NR 328 (SC) at 346-348

into account the time spent on the various issues and in the exercise of my discretion, I would consider that the applicants should be entitled to 20 per cent of their costs whilst the respondents to 80 per cent of theirs. The parties rightly agreed that the issues raised in this application warrant a costs order including the costs of two instructed counsel.

Order

[96] In the result, I make the following order:

1. The definition of “corruptly” contained in s 32 of the Anti-Corruption Act 8 of 2003 is declared unconstitutional and struck down.
2. The relief sought in paragraphs 1 to 8, 10 and 11 of the notice of motion is dismissed.
3. The first to fifth and seventh respondents are to pay 20% of the applicants’ costs.
4. The applicants are to pay 80% of the costs of the first to fifth and seventh respondents’ costs.
5. These costs orders include the costs of two instructed and one instructing counsel

_____

SMUTS, J

I agree

_____

HOFF, J

I agree

_____

MILLER, AJ

ON BEHALF OF APPLICACNT:	**JJ GAUNTLETT SC, R. HEATHCOTE SC AND F. PELSER**
Instructed by	Sisa Namandje & Co. Inc.
ON BEHALF OF THE RESPONDENT:	**W. TRENGOVE SC, S. MARCUS**
Instructed by:	Government Attorney