

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, MAKHANDA)**

Reportable

Case no: 4034/2021

In the matter between :

**NATIONAL DIRECTOR OF PUBLIC
PROSECUTIONS**

Applicant

and

SIVILE PATRICK KWETANA

Respondent

JUDGMENT

Govindjee J

[1] The respondent is the owner of a Toyota Quantum vehicle (registration number J ... EC) and a trailer (registration number H ... EC) ('the property'). The property was used to transport 15 live sheep on 5 October 2021. It is subject to a preservation order in terms of s 38 of the Prevention of Organised Crime Act, 1998 ('the Act').¹ The applicant ('the NDPP') claims that the property was used as an instrumentality of the offence of stock theft and seeks a forfeiture order in terms of s 50 of the Act. The respondent denies that the property is an instrumentality of an offence referred to in schedule 1 of the Act.

[2] The respondent's version of events may be summarised as follows. He was telephoned by his brother, who was in prison, and informed that another person required transportation 'of goods'. The chairs of the Toyota Quantum should be removed for the goods to fit. A fellow inmate of the respondent's brother, one 'Ex'

¹ Act 121 of 1998.

spoke to the respondent on the telephone on Sunday 3 October 2021. The respondent was told about that inmate's friend, Unathi. According to the respondent's summary of that conversation, Unathi owned a family farm at Cookhouse. The family was splitting their assets because of a quarrel. Ex would give the respondent's number to Unathi.

[3] Unathi called the respondent twice on Monday 4 October 2021 and a price was agreed for transportation of the 'goods' on 5 October 2021. The respondent met Unathi 'at his residence at Sheldon' on that date 'after he had given me directions to the family farm'. Aided by four other men, Unathi loaded 15 live sheep onto the property, claiming that he was in possession of the necessary documentation for their transportation. The respondent had no reason to disbelieve this assertion 'considering the information given to me by Ex as well [as] Unathi':

'At all material times, I was running my business of transporting goods per the agreement. I had no knowledge of any crime nor intention of committing any crime of stock theft. Unathi has since run away [and] I have had no contact with him ... I deny that the property concerned is an instrumentality of an offence ... I have not been able to earn an income since my property was taken.'

[4] On the version of the NDPP, supported by affidavits from a NDPP Senior Financial Investigator and South African Police Service sergeant, the property was seized following information about possible stock theft in Cookhouse. The property left Gqeberha, which is several kilometres away from Cookhouse. It was spotted travelling on a gravel road towards Draaihoek Farm, and returning in the direction of Gqeberha. The property was followed and stopped. The front passenger jumped out of the vehicle as it was slowing, ran away and could not be apprehended. When the vehicle was searched, it yielded 10 sheep inside the Quantum and five sheep inside the trailer. Some of the Quantum seats had been removed, probably to adapt the vehicle to make space for the sheep. No removal certificate to possess or transport the sheep exists and no satisfactory explanation was provided for possession or transportation of the sheep.

[5] It is common cause that the sheep did not belong to any of the occupants of the Quantum and that stock theft was committed. Respondent concedes, through the

heads of argument of his counsel, that the most probable inference to be drawn is that Unathi either had no permit or had a false permit in his possession. His defence is summarised as follows:

- a. He was not aware of the true intentions of Unathi, which was to use his property to commit stock theft;
- b. He had no knowledge 'or did not have a belief of a reasonable possibility' of a commission of an offence and the use of his property as an instrumentality of an offence. In addition to the fraudulent motives of Unathi, the people with whom the respondent had trust relationships were instrumental in developing a business relationship between the respondent and Unathi'.

[6] The criminal case against the respondent flowing from this incident has been provisionally withdrawn.²

Applicable law

[7] Part 3 of POCA incorporates both section 48 and section 50 of the Act, and is headed 'Forfeiture of Property':

'48. Application for forfeiture order.

(1) If a preservation of property order is in force the National Director may apply to a High Court for an order forfeiting to the State all or any of the property that is subject to the preservation of property order ...

(4) Any person who entered an appearance in terms of section 39(3) may appear at the application under subsection (1) –

- (a) to oppose the making of the order; or
- (b) to apply for an order –
 - (i) excluding his or her interest in that property from the operation of the order; or

² The late filing of the respondent's affidavit in support of his opposition to forfeiture was condoned and the filing of supplementary papers regarding the status of criminal proceedings was permitted by way of a ruling during the hearing of the matter.

(ii) varying the operation of the order in respect of that property,
and may adduce evidence at the hearing of the application...

50. Making of forfeiture order.

(1) The High Court shall,³ subject to section 52, make an order applied for under section 48(1) if the Court finds on a balance of probabilities that the property concerned –

- (a) is an instrumentality of an offence referred to in Schedule 1;
- (b) is the proceeds of unlawful activities; or
- (c) is property associated with terrorist and related activities.’

[8] It is convenient to commence the analysis which follows by focusing on the question related to the property as an ‘instrumentality of an offence’. Various issues must be considered as part of this enquiry, including the nature of the offence relied upon by the applicant and whether that offence is referred to in Schedule 1 of the Act.⁴

Is the property an ‘instrumentality of an offence’?⁵

[9] ‘Instrumentality of an offence’ is defined to mean ‘any property which is concerned in the commission or suspected commission of an offence at any time before or after the commencement of this Act, whether committed within the Republic or elsewhere.’⁶

³ The Constitutional Court has read down the word ‘shall’ to be interpreted as ‘may’: *Mohunram and Another v National Director of Public Prosecutions and Another (Law Review Project as Amicus Curiae)* [2007] ZACC 4; 2007 (4) SA 222 (CC) (‘*Mohunram*’) para 121.

⁴ See *National Director of Public Prosecutions v Engels* 2005 (3) SA 109 (C) at para 16.

⁵ This summary, including many of the footnotes, is drawn from *National Director of Public Prosecutions v Gallant* [2021] ZAECPHC 51; 2022 (1) SACR 189 (ECP) paras 7-14.

⁶ S 1 of the Act.

[10] In *National Director of Public Prosecutions v RO Cook Properties (Pty) Ltd and other cases*,⁷ the Supreme Court of Appeal considered the meaning of the phrase. It confirmed that forfeiture of the instrumentalities used in crime is not conviction-based, and may be invoked even when there is no prosecution.⁸ Chapter 6 forfeiture is permitted where it is established on a balance of probabilities that property has been used to commit an offence, even when no criminal proceedings are pending.⁹ Importantly, and in contradistinction to chapter 5 forfeiture, chapter 6 is ‘...focused, not on wrongdoers, but on property that has been used to commit an offence...’¹⁰ As such, the guilt or wrongdoing of the owners or possessors of property is, therefore, not primarily relevant to the proceedings.¹¹

[11] As indicated above, the definition of ‘instrumentality of an offence’ embraces all property ‘which is concerned in the commission or suspected commission’ of an offence. But a wide, literal interpretation cannot be countenanced if it would result in unintended consequences, bearing in mind that the remedial objectives of chapter 6 operates as a punishment.¹² The reference in the Act’s preamble prohibiting the ‘use (of) property for the commission of an offence...’ provides some limitation, denoting a relationship of direct functionality between what is used and what is achieved.¹³ The words ‘concerned in the commission of an offence’ must be interpreted so that the link between the crime committed and the property is reasonably direct, and the employment of the property must be functional to the commission of the crime, so that it can be said to ‘...play a reasonably direct role in the commission of the offence. In a real or substantial sense, the property must facilitate or make possible

⁷ *National Director of Public Prosecutions v RO Cook Properties (Pty) Ltd; National Director of Public Prosecutions v 37 Gillespie Street Durban (Pty) Ltd and another; National Director of Public Prosecutions v Seevnarayan* 2004 (2) SACR 208 (SCA) (*‘Cook Properties’*).

⁸ Para 7. The Act provides that the validity of a forfeiture order is not affected by the outcome of criminal proceedings, or of an investigation with a view to instituting such proceedings, in respect of an offence with which the property concerned is in some way associated: s 50(4).

⁹ Para 10.

¹⁰ *National Director of Public Prosecutions and Another v Mohamed NO and Others* [2002] ZACC 9; 2002 (2) SACR 196 (CC); 2002 (4) SA 843 (CC) (*‘Mohamed’*) para 17. The aspects of the various judgments cited pertaining to property linked to *proceeds of crime* are irrelevant for present purposes. In *Prophet v National Director of Public Prosecutions* 2007 (6) SA 169 (CC) (*‘Prophet (CC)’*), the Constitutional Court held that civil forfeiture rests on the ‘legal fiction that the property and not the owner has contravened the law’ (at para 58).

¹¹ *Ibid.*

¹² See the examples cited in *Cook Properties* supra para 12. The other reason for a restrictive interpretation relates to the constitutional prohibition of arbitrary deprivation of property: *Cook Properties* supra para 15.

¹³ *Mohamed* supra para 17 as cited in *Cook Properties* supra para 14.

the commission of the offence...the property must be instrumental in, and not merely incidental to, the commission of the offence...'¹⁴

[12] In *Prophet v National Director of Public Prosecutions*,¹⁵ the Supreme Court of Appeal had regard to the following factors in measuring the strength and extent of the relationship between the property sought to be forfeited and the offence, and in assessing whether the property was an instrumentality of an offence: (a) whether the use of the property in the offence was deliberate and planned or merely incidental and fortuitous; (b) whether the property was important to the success of the illegal activity; (c) the period for which the property was illegally used and the spatial extent of its use; (d) whether its illegal use was an isolated event or had been repeated; and (e) whether the purpose of acquiring, maintaining or using the property was to carry out the offence. No one factor is dispositive, and a court must be able to conclude, after considering the totality of circumstances, that the property was a 'substantial and meaningful instrumentality' in the commission of the offence(s).¹⁶

[13] In *S v Bissessue*,¹⁷ a magistrate declared a motor vehicle and fishing rods used in fishing without a licence to be forfeited to the state. This was in terms of an ordinance that, in addition to a criminal penalty, required the court to declare any article used 'in, for the purpose of, or in connection with the commission of the offence' forfeit. On appeal, the forfeiture of the fishing rods was upheld, but that of the vehicle was set aside. The Court held that 'to qualify for forfeiture the thing must play a part, in a reasonably direct sense, in those acts which constitute the *actual commission* of the offence in question'. The SCA in *Cook Properties*, having

¹⁴ *Cook Properties* supra para 31.

¹⁵ *Prophet v National Director of Public Prosecutions* 2006 (1) SA 38 (SCA) ('*Prophet* (SCA)') para 27, as cited in *Prophet* (CC) para 22. The Constitutional Court upheld the findings of the Supreme Court of Appeal in respect of the property in question being an 'instrumentality of an offence'.

¹⁶ *Prophet* (SCA) at par 27, with reference to *United States v Chandler* 36 F 3d 358 (4th Cir, 1994).

¹⁷ *S v Bissessue* [1980] (1) SA 228 (N), cited with approval in *S v Mjezu and Another* 1982 (2) PH H164 (C) and *Cook Properties* supra at para 32. Cf *S v Maswanganyi and Another* 1989 (2) SA 759 (O), where it was held that a motor vehicle played a reasonably direct part in the offence of possession for sale of dagga. In that case the vehicle had been used to acquire possession of the dagga for sale and was subsequently involved in arrangements for its disposal (at 764). The full court in *Bissessue* held (at 230 C-E) that 'On the facts of this case it cannot be said that the motor car was used in this sense for fishing as one might, for instance, perhaps have concluded if its headlights had been used to attract fish at night as part of the fishing operation. The motor car was in fact used 'for the purpose of' the journey from the place of departure to the Chelmsford Dam and the fishing was a subsequent and unrelated act.'

considered this decision, concluded that ‘the same...applies to “instrumentality of an offence”’.¹⁸ The determining question, in each case, is whether there is a sufficiently close link between the property and its criminal use, and whether the property has a close enough relationship to the actual commission of the offence to render it an instrumentality.¹⁹ The property must facilitate commission of the offence and be ‘directly causally connected with it so that it is integral to commission of the offence’.²⁰

[14] It is, therefore, apparent that the focus must be on the property, rather than the individual. That criminal charges have been provisionally withdrawn against the respondent is of no assistance at this stage of the enquiry. As indicated, property may be forfeited even where no charge is pending. The focus is on the role played by the property in ‘the commission *or suspected commission* of an offence’.²¹ There should be a relationship of direct functionality between what is used and what is achieved.

[15] In this instance, plans were made, via the respondent’s brother and another inmate, to contact the respondent. A price and date were negotiated and eventually agreed. The property was modified and used to transport 15 live sheep. The respondent travelled several kilometres to the location and that travel would have taken some time. It is common cause that stock theft was perpetrated. That would not have been possible in the way it occurred without the property. The vehicle and trailer were directly engaged in achieving the removal of the sheep from Draaihoek Farm. Although it may be accepted this was an isolated event and the property was not acquired or maintained for this purpose, the totality of factors supports a finding that the property was an instrumentality of an offence. The commission of the offence was only made possible courtesy of the property. Its involvement, far from incidental, was substantial and meaningful and, on a balance of probabilities,

¹⁸ Ibid.

¹⁹ *Cook Properties* supra para 32.

²⁰ *NDPP v Geyser* [2008] ZASCA 15; 2008 (2) SACR 103 (SCA) para 17.

²¹ Section 1(1) of the Act (own emphasis).

sufficient for purposes of this stage of the test. The next question to be considered relates to proportionality.²²

The proportionality test

[16] Criminal activities present a danger to the social order. The Act contains mechanisms to ensure that property used in the commission of an offence is forfeited to the state. In this case, the chapter six mechanisms are relevant. Unrestrained application of these measures would, however, contravene the constitutional protection against arbitrary deprivation of property.²³

[17] It has been held that civil forfeiture rests on the legal fiction that the property, and not the owner, has contravened the law.²⁴ Once property is considered to be an instrumentality of an offence, the proportionality enquiry requires weighing the severity of the interference of individual rights to property against the extent to which the property was used for the purposes of the commission of the offence, bearing in mind the nature of the offence.²⁵ This is a requirement based in equitability and is considered to be a constitutional imperative.²⁶ The precise linguistic formulation of the test is less important.²⁷ A factor-based approach has been applied, involving careful consideration and weighing of matters such as the following:²⁸

- a. The relationship between the purpose of the deprivation and the person whose property is affected;

²² See *Prophet* (CC) supra para 57 et seq.

²³ *Prophet* (CC) supra para 61.

²⁴ *Prophet* (CC) supra para 58.

²⁵ *Ibid.*

²⁶ *Mohunram* supra para 130. In the language of Sachs J in *Mohunram*, it is a 'governing principle imposing limits on how the powers granted under POCA may be exercised': para 142. As such, there is no requirement that the respondent should place facts before the court in order for proportionality to be considered. The burden is on the applicant to do so for this question of law to be weighed. Also see *Brooks and Another v National Director of Public Prosecutions* [2017] 2 All SA 690 (SCA) ('*Brooks*') para 75.

²⁷ *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)* 2002 (4) SA 768 (CC); 2002 (7) BCLR 702 (CC) ('*Wesbank*') para 98. The description of Sachs J in *Mohunram* is again useful (para 142): '... what proportionality loses in categorical determinacy it makes up for in jurisprudential flexibility and constitutional aptness.'

²⁸ *Prophet* (CC) supra para 62.

- b. The relationship between the purpose of the deprivation, the nature of the property affected and the extent of the deprivation;
- c. A more compelling purpose is required where the property rights involved are the ownership of land or corporeal movables;
- d. The reasons should be more compelling as more incidents of ownership are affected;
- e. Depending on the nature and extent of the rights affected, the test is one that comprises elements of rationality and proportionality, moving closer towards proportionality as the effects increase; and
- f. The inquiry takes full account of the relevant circumstances of each case.

[18] The court's task is to weigh the severity of the interference with individual rights to property against the extent to which the property was used for the purposes of the commission of the offence, bearing in mind the nature of the offence.²⁹ This involves consideration of a range of factors, including whether the property was integral to the commission of the crime and whether forfeiture would prevent the further commission of the offence. The court should also consider whether the respondent qualifies as an 'innocent owner', the nature and use of the property and the effect on the respondent of the forfeiture of the property.³⁰

[19] The remarks of Moseneke DCJ in *Mohunram*, are particularly insightful on the proper exercise of this task:³¹

²⁹ *Prophet* (CC) supra para 58.

³⁰ It has been held that a more compelling purpose would have to be established to justify forfeiture in cases where the property in question is ownership of land or a corporeal movable: *Wesbank* supra para 100; *National Director of Public Prosecutions v Braun and Another* 2009 (6) SA 501 (WCC) ('*Braun*') para 60.

³¹ *Mohunram* supra para 126. An offence that results in a criminal conviction coupled with possible confiscation of property could trigger a double punishment, which would be an additional consideration in certain instances: para 127. It must be noted that the judgment of Sachs J assumes that there is no obligatory jurisdictional requirement that the instrument of an offence be shown to have a connection with organized crime, and that once a criminal offence is literally covered by the schedule, and the property concerned is proved to be an instrument in its commission, a forfeiture order in terms of chapter 6 becomes permissible: *Mohunram* supra para 140. That is the same approach adopted in this judgment.

‘In my view, it must follow that, in deciding whether or not forfeiture of property would be proportionate, the question whether the instrumentality of the offence is sufficiently connected to the main purpose of POCA must be considered. I join Sachs J in emphasising that the more remote the offence in issue is to the primary purpose of POCA, the more likely it is that forfeiture of the instrumentality of the crime is disproportionate. In other words, when ordinary crime is in issue, the sharp question should be asked whether it is a crime that renders conventional criminal penalties inadequate. Is it a crime that requires extraordinary measures for its detection, prosecution and prevention? Is it a crime that warrants the extraordinary measures akin to those appropriate to organised crime as envisaged in POCA? Is it a crime that has some rational link, however tenuous, with racketeering, money laundering and criminal gang activities? If the answers to these questions were in the negative, this would be an important indication that forfeiture may be disproportionate.’

[20] Forfeiture must be weighed against the purpose it serves.³² In *Mohamed*, the purpose of civil forfeiture was linked to removal of the incentive for crime, not to punish the offender.³³ In addition to considering the association between the property and the crime, whether the forfeiture will prevent further wrongdoing, the nature and use of the property and the effect of forfeiture on the owner, additional and countervailing considerations apply in cases of forfeiture in terms of the Act:³⁴

‘The nature of the crime must be probed keeping in mind the predominant purpose of POCA. This is a self-evident proposition. The forfeiture must advance the purpose that POCA proclaims. Otherwise, the forfeiture, being the means, will be misaligned with the predominant ends pursued by POCA.’

[21] Civil asset forfeiture must be properly related to the purpose of removing the incentives for crime, considering whether the forfeiture will serve as adequate

³² *Mohunram* supra para 123.

³³ As cited in *Mohunram* supra para 133.

³⁴ *Mohunram* supra paras 123-125, citing *Mohamed* supra on the purposes of the Act. Also see the judgment of Sachs J in *Mohunram* at para 144. Also see the majority judgment of Ponnann JA in *Brooks* supra para 64.

deterrence to the offender and to the broader community.³⁵ The purpose of the legislation is primarily deterrent. In relation to the instrumentalities of an offence, it seeks to prevent people from using their property or allowing it to be used for the commission of offences:³⁶

‘The closer one gets to the prevention of organised crime, which is the primary rationale underlying POCA, the greater the importance of the purpose becomes ... One may say in principle, then, that the closer the criminal activities are to the primary objectives of POCA, the more readily should a court grant a forfeiture order. Conversely, the more remote the activities are from these objectives, the more compelling must the circumstances be to make such an order appropriate.’³⁷

[22] The point made by the judgments of Sachs J and Moseneke DCJ in *Mohunram* is that the purpose of deterrence promoted by the Act, in relation to an instrumentality of an offence, cannot legitimate the forfeiture of every instrumentality of an offence.³⁸ This is because individuals are not to be used ‘... in an instrumental manner as examples to others if the deterrence is set at levels beyond what is fair and just to those individuals’.³⁹ The proportionality enquiry, applied in this sense, serves to protect the human dignity of the property owner.⁴⁰ The extent to which the forfeiture ‘manifestly’ is directed towards preventing organised crime is therefore ‘highly relevant’ and the disjuncture between the basic purpose of the Act and its effect on an individual in the position of the respondent should not be too great.⁴¹ The Act was not intended to provide either a substitute for, or a top-up of, the usual forms of law enforcement.⁴² Sachs J cited the following extract from the judgment of

³⁵ *Mohunram* supra para 134.

³⁶ *Mohunram* supra para 143.

³⁷ *Mohunram* supra paras 143, 145. Any determination of proportionality should also take into account the extent to which the common law and statutes prove inadequate in the circumstances.

³⁸ *Mohunram* supra para 146.

³⁹ *Mohunram* supra para 146.

⁴⁰ *Ibid.*

⁴¹ *Ibid.*

⁴² *Mohunram* supra para 152.

Nugent JA in the SCA decision in *Van Staden* (in the context of possible forfeiture of a motor vehicle because of the offence of drunken driving) to emphasise the point:⁴³

‘Incursions upon conventional liberties that are justified by the particular difficulties encountered in the detection and successful prosecution of organised crime are not similarly justified in cases of ordinary crime that do not present those difficulties. I do not think it is permissible to look to one threat that the Act aims at combating (the threat posed by organised crime) in order to justify its application in relation to a quite different threat (the threat that is posed, for example, by drunken driving) that does not present the same challenges. It must be borne in mind that drunken driving, which does not ordinarily result from organised illicit activity, and presents no special difficulties to detect and prosecute, can attract substantial penalties, and the ordinary criminal law ought to be the first port of call to combat the evil. For the Act exists to supplement criminal remedies in appropriate cases and not merely as a more convenient substitute.’

Is forfeiture proportional?

[23] It is incumbent upon the applicant to place adequate facts before the court to satisfy it that the forfeiture would be constitutionally proportionate. It has been authoritatively established that it bears the onus in this regard.⁴⁴ By contrast, it failed to deal with that aspect in its founding papers and somehow contrived to conclude, in reply, that ‘the constitutional imperative of proportionality finds no application’. As a result, it approached the matter on the basis that a forfeiture order would be appropriate merely because the property was an instrumentality. As discussed, various factors require consideration in determining whether forfeiture would be proportional.

⁴³ *Mohunram* supra para 153 citing *National Director of Public Prosecutions v Van Staden and Others* [2006] ZASCA 107; [2006] SCA 135 (RSA); [2007] 2 All SA 1 (SCA).

⁴⁴ *Brooks* supra para 78.

[24] The property in this instance was not incidental to the offence, a factor emphasised by the Constitutional Court in *Prophet* at this stage of the enquiry.⁴⁵ It was 'employed' to facilitate its commission.⁴⁶ It must also be emphasised that the offence involved was stock theft, a prevalent issue in this province and one that negatively affects the rights of farmers. It has been highlighted that the Act serves various societal ends, also to deter persons from using or allowing their property to be used in crime, and to eliminate some of the ways in which the crime may be committed.⁴⁷ Given the use of the property in this instance, it may be accepted that forfeiture would prevent the further commission of the offence through this movable property. Naturally it will not prevent the further commission of stock theft in general in the region.

[25] On his own version, the respondent appears to have accepted, at face value, a claim by Unathi, a person he had just met, that documentation for the sheep was available and in order. Whatever enquiries were made, the respondent did not consider it necessary to require Unathi to produce the documentation. He certainly did not inspect it. Instead, he proceeded to permit his property, which had been modified for this purpose prior to the time, to be used to transport fifteen sheep from a farm after they had been loaded by five persons unknown to him. In essence, he proceeded in this fashion on the strength of what was said to him telephonically by a friend of an acquaintance of his brother. This after he had removed seats of his vehicle at the telephonic request of his brother, who was in prison at the time. It appears as if this instruction was followed blindly. While the respondent does not indicate that he enquired as to the reason for having to remove seats from the vehicle, the probabilities are such that it must be accepted that his brother knew what 'goods' were to be transported and communicated this to him so that he could prepare for the expedition.

[26] When he met Unathi, he appears not to have made any further enquiries about the circumstances surrounding the alleged division of assets. For example, who was the actual owner of the farm? If Unathi owned the farm, on his version, as

⁴⁵ *Prophet* (CC) supra para 67.

⁴⁶ See the minority judgment of Van Heerden J in *Mohunram* supra para 49.

⁴⁷ *Mohunram* ibid para 57.

the respondent's affidavit suggests, why were the sheep being transported somewhere else? If he did not own the farm, what was the position in respect of any other movable property? Such details are notably absent from the respondent's version. There is also no explanation whether he verified with Unathi telephonically that sheep would be transported. The inclusion of the trailer suggests that he already knew the livestock to be transported as well as their quantity, prior to even speaking to Unathi. That being the case, there is no explanation as to why he only discussed the issue of documentation for the sheep at the time they were loaded, rather than during one of his telephone calls with Unathi. The statement that 'I had no reason to believe he did not have the necessary documentation, considering the information given to me by Ex as well Unathi' does not withstand scrutiny when considering these circumstances in their entirety.⁴⁸ Rather than exercising stewardship and being vigilant about ensuring that his property was not used to advance criminal conduct, the respondent was supine.⁴⁹ The conclusion in this regard is that the respondent does not qualify as an 'innocent owner' as I understand the application of that notion and to the extent that this is relevant.⁵⁰ But, courtesy of the majority judgments in

⁴⁸ The judgment of Van Heerden J in *Mohunrum* notes that an owner faced with a prima facie case established by the applicant would in the usual course be well-advised to place this material before the court, particularly because some of the factual material relevant to the proportionality analysis will often be peculiarly within their knowledge: *Mohunrum* supra para 75.

⁴⁹ *Cook Properties* supra para 58. The provisions of s 1(2) and s 1(3) of the Act support these conclusions: a person has knowledge of a fact, in terms of the Act, also when the court is satisfied that the person believes that there is a reasonable possibility of the existence of that fact and he or she fails to obtain information to confirm the existence of that fact. A person ought reasonably to have known or suspected a fact if the conclusions that he or she ought to have reached are those which would have been reached by a reasonably diligent and vigilant person having both the general knowledge, skill, training and experience that may reasonably be expected of a person in his or her position and the general knowledge, skill, training and experience that he or she in fact has.

⁵⁰ Leaving aside the significance of an 'innocent owner' as part of the proportionality enquiry, it must be accepted that the cases refer to this notion as a self-standing defence at another, 'tightly intertwined' stage of the proceedings when forfeiture is claimed: *Mohamed* supra para 18 as cited in *Cook Properties* supra para 11; *Cook Properties* supra para 17. It must be noted, with respect, that this reading of the Act appears to overlook the wording of s 48(4)(a) and (b): a person who enters an appearance in terms of s 39(3) may appear at the application for a forfeiture order 'to oppose the making of the order; or to apply for an order excluding his or her interest in that property from the operation of the order ...' The opposition to the 'making of [a] forfeiture order' is dealt with in s 50, as described by that section's heading. Section 52 deals with the other option described (leaving aside the further option of variation for present purposes), again as reflected in the section heading: 'Exclusion of interests in property'. It is in that context that s 52(2A) explains the test for exclusion. This Court is bound by the interpretation given by the SCA in *Cook Properties* in respect of the interplay between section 50 and 52, and the possibility of an application for exclusion of a person's interest in property from the operation of a forfeiture order, seemingly even in circumstances where this amounts to the same as opposing the making of the order. The SCA did, however, note that 'this section burdens the owner with an onus to prove certain facts on a balance of probabilities before the Court can make an exclusionary order' (own emphasis): para 24. Importantly, the SCA also noted that *Cook Properties* proceeded 'on a narrow reading of "instrumentality of an offence"'. As a result these

Mohunram, read with the majority judgment in *Brooks*, that is not the end of the enquiry.

[27] Section 25 of the Constitution must be interpreted and applied in a manner that balances society's desire to ensure that private property serves the public, on the one hand, with the need to protect ownership of private property itself, on the other.⁵¹ This is because the effect of civil forfeiture of assets may be draconian.⁵² It must also be considered, as part of the proportionality enquiry, that the property is used for lawful purposes and income generation, even while there may be a suspicion that the property was utilised unlawfully on one occasion in respect of the transportation of the sheep.⁵³ In *Braun*, the fact that the property was only used on two occasions for unlawful activities, together with other factors including that the activities were 'far removed from the principal purpose of POCA', contributed to a conclusion that forfeiture would be disproportionate.⁵⁴ It is also significant that it may be accepted that the property is typically used for legitimate ends.⁵⁵

cases do not require us to give a determinative reading of the second-stage provisions...we therefore express no final views on the interpretation of s 52.' at paras 25, 26. Notably, s 48(4) provides for various options for a person who entered an appearance in terms of s 39(3): 'a) to oppose the making of the order; or b) to apply for an order – i) excluding his or her interest in that property from the operation of the order...' (own emphasis). S 39(3) also uses 'or' in the same manner. The 'or' seems to confirm that opposition to a forfeiture order is distinct from an application for exclusion, which would be appropriate in circumstances where, for example, property subject to forfeiture is co-owned, so that a completely innocent party, such as a spouse married in community of property to a wrongdoer, applies for an order excluding her property from a forfeiture order. For an illustration of the analytical effect of equating ordinary 'opposition' to an application for exclusion, see *National Director of Public Prosecutions v Mpahlwa* [2020] ZACMHC 18. Also see *Brooks* supra para 17, for an example of the second phase of the enquiry being identified as relating to 'exclusion', as opposed to 'proportionality'. The facts in *Brooks* made an 'exclusion' application apposite, the second appellant being an 'innocent' spouse. The reference in s 52(a) to an 'application under section 48(3)' appears to be erroneous, and should in all likelihood refer to s 48(4)(b). Interestingly, the later Constitutional Court decision in *Prophet* made only a single reference to *Mohamed* and, following consideration of whether the property was an instrumentality of an offence, proceeded to consider proportionality. Section 52 was irrelevant to the discussion and not mentioned in the judgment.

⁵¹ *Mkontwana v Nelson Mandela Metropolitan Municipality and Another; Bissett and Others v Buffalo City Municipality and Others; Transfer Rights Action Campaign and Others v MEC for Local Government & Housing in the Province of Gauteng and Others (KwaZulu-Natal Law Society and Msunduzi Municipality as Amici Curiae)* 2005 (1) SA 530 (CC) paras 81-82, cited with approval in *Mohunram* supra paras 59, 60.

⁵² See the judgment of Moseneke DCJ in *Mohunram* supra para 118. The state, for example, is not required to show that the owner has been convicted of the offence or that the owner performed an unlawful act with a criminal intent. The result is a serious incursion into 'well-entrenched civil protections particularly those against arbitrary and excessive punishment and against arbitrary confiscation of property': para 120.

⁵³ *Mohunram* supra para 54.

⁵⁴ *Braun* supra paras 62, 64.

⁵⁵ *Mohunram* supra para 136.

[28] Forfeiting the property, particularly the vehicle, will impact directly on the respondent's ability to earn an income and permanently deprive him of an asset that has significant value to him and, by extension, his child. While it may be unfortunate that no details have been provided by the respondent in this regard, it must be accepted that his only form of income generation is tied to the property. The papers do reflect that he uses the income derived from the property to care for his 13-year-old son. The constitutional rights of children and the paramount importance of their best interests remains a factor to be considered in such instances, and as part of the proportionality enquiry.⁵⁶ There was no attempt to adduce any evidence that forfeiture would not be excessive given the respondent's financial obligations to his child and his use of the property for that purpose. Such omissions have been deprecated, the SCA concluding that the applicant bears 'no less a responsibility' than parents when parents fail to adequately invoke the interests of their children in forfeiture proceedings.⁵⁷ That the respondent may have somehow managed to provide for the child despite the property being subject to a preservation order for some period does not take the matter further. It remains the duty of the court, as upper guardian of all children, not to neglect the specific interests of children in these matters.⁵⁸

[29] While the value of the property is noted as being in excess of R330 000, this is not to suggest that the respondent would 'lose' the full value of the property in the event of forfeiture. The decision in *Mohunram* explains that his loss depends on various factors, including the amount that has been paid off and any amount owing on the property.⁵⁹ No information has been placed before the court in this regard.

[30] The question remains whether 'forfeiture of the whole property would be disproportionate to the seriousness of the crimes committed and the benefits derived from those crimes'. While stock theft is a serious issue, other than the agreed

⁵⁶ *Brooks* supra paras 70, 72, also noting that an appointment of a curator might be appropriate in certain instances: para 74.

⁵⁷ *Brooks* supra para 78.

⁵⁸ *Ibid.*

⁵⁹ *Mohunram* supra para 89. It must be noted that the Constitutional Court did add that it is not *necessary* for a court, in considering proportionality, to undertake a precise financial exercise on all occasions: para 92.

payment for the transportation of the sheep, there is no evidence that the respondent stood to benefit at all from his actions. This is a relevant consideration as part of the proportionality enquiry.

[31] It may be accepted in the applicant's favour that stock theft in certain circumstances may be highly organised and that its prevention might be closely linked to the predominant purposes of the Act. There is, however, little support for speculation that the instrumentality of the offence in this instance is sufficiently connected. It appears, on a balance of probabilities, to be on a more remote part of the spectrum in respect of its correlation with the Act, so that more compelling circumstances are required to justify forfeiture. By contrast, the probabilities favour treatment of the suspected offence as an ordinary criminal offence,⁶⁰ policed during normal operations and not requiring extraordinary measures for its detection, prosecution and prevention. As per the majority in *Mohunram*, the suspected offence is some distance from the 'heartland of organised crime', for which the ordinary criminal penalties, including for driving, conveying or transporting stock along public roads, could have been pursued.⁶¹ The invocation of the Act in these circumstances amounts to a form of substitution for normal criminal processes. Taken together, these are all important indicators that forfeiture might be disproportionate. That being the case, the applicant's failure to properly address this stage of the enquiry in its papers, and bearing in mind its onus to do so, is unfortunate.

[32] It follows that I am of the view that permanently removing the property from the respondent in this instance would amount to a heavy-handed punishment of a suspected offender in circumstances where any proven offence could be prosecuted

⁶⁰ S 14 of the Stock Theft Act, 1959 (Act 57 of 1959) provides for various forms of punishment, depending upon the court in which the matter is prosecuted, including a fine or period of imprisonment not exceeding three or fifteen years. Also see the analogous facts of *National Director of Public Prosecutions v Gigaba* (unreported judgment of the Northern Cape Division) (Case No. 2143/2009) as cited in NC Ndzengu and JC von Bonde 'A critical assessment of the introduction of proportional analysis by the South African courts in civil-forfeiture jurisprudence' *Obiter* (2011) 83-107 at p104. In that instance, Williams J dismissed the application on the basis that the respondent was an unemployed first offender and had to use a Mitsubishi Colt vehicle, which had not been used criminally in the past, to earn a living for his family. There was also no evidence that the vehicle would be used in the future to facilitate the commission of crime. The vehicle had been in police custody for almost a year, resulting in hardship to the family, the sheep had been returned to the complainant and, notwithstanding the fact that criminal processes were to take their course, the deterrent effect of civil forfeiture had already been served.

⁶¹ Section 8 of the Stock Theft Act, 1959 (Act 57 of 1959).

in the ordinary fashion. It cannot be said that the forfeiture in this instance would, on a balance of probabilities, advance the purpose of the Act. The predominant ends pursued by the Act would not be advanced by forfeiture of the property, or by using the respondent's conduct to deter other persons similarly situated. Forfeiture has not been shown to be manifestly directed to the prevention of organised crime in these circumstances.

[33] This outcome may be disheartening to the applicant in its quest to fulfil the mandate afforded to it by the Act. The concluding remarks of Sachs J in *Mohunram* are apposite and worth repeating in full:⁶²

‘I should add that nothing stated above should be taken as suggesting a view favouring an interpretation that would reduce the capacity of the [applicant] to fulfil the mandate given to it by POCA. On the contrary, if it is to accomplish the important functions attributed to it, it should not unduly disperse the resources it has at its command. Its manifest function as defined by statute is to serve as a strongly-empowered law enforcement agency going after powerful crooks and their multitude of covert or overt subalterns. The danger exists that if the [applicant] spreads its net too widely so as to catch the small fry, it will make it easier for the big fish and their surrounding shoal of predators to elude the law. This would frustrate rather than further the objectives of POCA.’

[34] It must be reiterated that this judgment does not suggest that all instances of stock taking may be painted with the same brush. In *Mjeza*, for example, the court noted the difficulties of combating stock theft and that a specialised unit of the South African Police Service had been established for purposes of proper investigation. It also commented on various syndicates in operation in the Northern Cape Province.⁶³ As indicated, similar detailed treatment of such factors in the context of a proportionality enquiry are not evident in the applicant's papers. Still, it must be accepted that when stock theft is perpetrated through motor vehicles and trailers

⁶² *Mohunram* supra para 155.

⁶³ *National Director of Public Prosecutions v Mjeza* [2016] ZANHC 53 para 37.

ordinarily used as taxis in circumstances where there is a rational link with criminal gang activity, for example, forfeiture might well be proportionate. Similarly, in *Brooks*, Ponnann JA highlighted that each forfeiture proceeding is based on unique circumstances. Forfeiture is a strong weapon in the state's efforts to combat organised crime. There are undoubtedly seasoned criminals who specialise in cunning forms of deception to insulate their property from forfeiture. Nonetheless, given the likely impact of forfeiture on persons in the position of the respondent, and their families, this power may only be wielded where it is appropriate to do so. This requires the applicant to demonstrate that forfeiture of an instrumentality of an offence is proportionate to the predominant purpose of the Act, considering the various relevant factors and circumstances at play.⁶⁴

Order

[35] The following order will issue:

1. The application for forfeiture of the respondent's white Toyota Quantum (registration number J ... EC) and trailer (registration number H ...) ('the property'), presently subject to a preservation order granted on 14 December 2021, is dismissed with costs.
2. The preservation order granted on 14 December 2021 is hereby set aside.
3. The applicant is to return the respondent's property, referred to in paragraph 1, to him forthwith.

A. GOVINDJEE
JUDGE OF THE HIGH COURT

Heard: 09 June 2022

Delivered: 10 June 2022

Applicant's Attorney: Mr M. Wolmarans

⁶⁴ *Brooks* supra para 69.

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