



CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 311/22

In the matter between:

**MINISTER OF RURAL DEVELOPMENT
AND LAND REFORM**

Applicant

and

**LAND AND AGRICULTURAL DEVELOPMENT BANK OF
SOUTH AFRICA**

Respondent

Neutral citation: *Minister of Rural Development and Land Reform v Land and Agricultural Development Bank of South Africa* [2024] ZACC 14

Coram: Maya DCJ, Kollapen J, Mathopo J, Mhlantla J, Rogers J, Schippers AJ, Theron J, Tshiqi J and Van Zyl AJ

Judgments: Maya DCJ (majority): [1] to [70]
Rogers J (dissenting): [71] to [100]

Heard on: 17 August 2023

Decided on: 12 July 2024

Summary: Prevention of Organised Crime Act 121 of 1998 — civil recovery of property under Chapter 6 — competing claims for exclusion of “interest” in property from operation of forfeiture order — meaning of “interest”

ORDER

On appeal from the Supreme Court of Appeal (hearing an appeal from the High Court of South Africa, Eastern Cape Division, Makhanda). The following order is made:

1. Leave to appeal is granted.
2. The appeal is partly upheld to the extent set out in paragraph 3 below.
3. The order of the Supreme Court of Appeal is amended as follows:
 - “1. The appeal is upheld with no order as to costs.
 2. The order of the Full Court is set aside and replaced with the following:
 - (a) The appeal is dismissed with costs.
 - (b) The cross-appeal is upheld with costs.
 - (c) Paragraphs 2, 3 and 5 of the order of Goosen J are set aside and replaced with the following:
 - ‘2. The interest of the first applicant, the Land and Agricultural Development Bank of South Africa, consisting of the debt secured by its mortgage bond over the property concerned is excluded from the operation of the forfeiture order.
 3. The interest of the first respondent, the Minister of Rural Development and Land Reform, consisting of a grant allocated for the purchase of the property concerned, is excluded from the operation of the forfeiture order.’”
4. There shall be no order as to costs.

JUDGMENT

MAYA DCJ (Kollapen J, Mathopo J, Mhlantla J, Theron J and Tshiqi J concurring):

Introduction

[1] This is an application for leave to appeal against a judgment of the Supreme Court of Appeal delivered on 13 October 2022. The core issues to be determined are (a) whether the applicant, the Minister of Rural Development and Land Reform (Minister), has an interest in the immovable property concerned as defined in the Prevention of Organised Crime Act¹ (POCA), and if she does, (b) how her claim to the property and that of the respondent, the Land and Agricultural Development Bank of South Africa (Land Bank),² which compete for the exclusion of interests from the operation of a forfeiture order under the POCA, should be resolved.

Factual background

[2] The background facts are largely common cause. The Department of Rural Development and Land Reform (Department), for which the Minister is responsible, controls, inter alia, land tenure reform, land development and land redistribution in terms of which it redistributes productive commercial land to previously disadvantaged individuals. It does so in execution of the constitutionally mandated programme of land redistribution and reform. To achieve the objects of this programme, the Department provides funds and grants,³ one of which is the Land Redistribution and Agricultural Development Grant (LRAD grant),⁴ to beneficiaries⁵ for the acquisition of agricultural land and shares in agricultural enterprises.

¹ 121 of 1998.

² Established in terms of section 2 of the Land and Agricultural Development Bank Act 15 of 2002 in terms of which it is a legal person in which the State is the sole shareholder.

³ In terms of the Land Reform: Provision of Land and Assistance Act 126 of 1993; the Land Reform (Labour Tenants) Act 3 of 1996; the Restitution of Land Rights Act 22 of 1994; and the Extension of Security of Tenure Act 62 of 1997.

⁴ Provided in terms of the Grants and Services Policy of the Department of Land Affairs Version 7 approved by the Minister on 16 July 2001.

⁵ A beneficiary must be a black South African citizen of 18 years or older who is willing to live on or near the land, operate or work on it and is committed to using the grant to purchase land for agricultural activities.

[3] On 2 August 2006, the Minister provided a sum of R2 617 100 under the LRAD grant for the acquisition of the following immovable properties: Portion 1 and the Remaining Extent of the farm Poplar Grove No. 303, as well as the farm Honeyville No. 302 in the Kouga Municipality in the Eastern Cape (collectively the property). The property would be registered in the name of a trust to be formed comprising 39 beneficiaries, who were previously disadvantaged individuals identified under the land redistribution and reform programme to receive such transfer.

[4] Transfer of the property, supposedly in pursuance of the above scheme, was registered on 13 April 2007. However, as a result of fraudulent misrepresentations, the property was transferred to and registered in the name of a private company, CPAD Farm Holdings (Pty) Limited (CPAD Farm), of which Mr Mongezi Alfred Mde was a sole director, rather than a trust. Simultaneously with transfer, a mortgage bond over the property was registered in favour of the Land Bank which provided security for amounts advanced to CPAD Farm by the Land Bank, namely a capital sum of R5 082 900, and an additional sum of R1 016 580 in respect of legal costs, interest and other fees under the bond.

[5] CPAD Farm soon fell into arrears in respect of its loan repayments to the Land Bank. In 2008, the Land Bank instituted proceedings against CPAD Farm to recover the outstanding amounts due, owing and payable to it. The Land Bank also sought an order declaring the property executable. On 8 September 2008, the Land Bank obtained default judgment against CPAD Farm for the capital sum advanced, accrued interest and costs, and the property was declared executable. On 14 October 2009, following the issue and service of a warrant of execution in respect of the property, the Sheriff attached the property in execution of the default judgment.

[6] In October 2014, charges of fraud, alternatively theft, relating to the property were brought in the Specialised Commercial Crime Court, Port Elizabeth against Mr Mde and Mr Mzoli Pakade, a former Senior Planner and Project Officer in the Department. The National Director of Public Prosecutions (NDPP) also launched an

ex parte application for the preservation of the property in terms of section 38 of the POCA⁶ against them in the Eastern Cape Local Division of the High Court, Port Elizabeth. On 28 October 2014, the High Court (Chetty J) granted a preservation order. Mr Michael Timkoe of Timkoe Trustees CC was appointed as curator bonis in terms of section 42 of the POCA to assume control of the property and do anything necessary to preserve it whilst the order remained extant.

[7] A copy of the preservation order was duly served on the Land Bank whereupon it instructed an attorney, Mr Gregory Parker, to represent its interest. In November 2014, Mr Parker wrote to Mr Warren Myburgh, an attorney in the State Attorney's office attached to the Asset Forfeiture Unit who represented the NDPP in the preservation proceedings. He indicated that the Land Bank held a first mortgage bond over the property and that he had instructions to enter an appearance to exclude the Land Bank's interest in the property from the forfeiture.

[8] Thereafter, Mr Parker held a meeting with Mr Myburgh and Ms Freda Hack, an employee of the Asset Forfeiture Unit. Mr Myburgh and Ms Hack assured Mr Parker that the Land Bank's interest as mortgage holder would be excluded from the forfeiture order to be obtained and this was further confirmed in an email dated 19 November 2014. Mr Parker advised Mr Myburgh that service of the forfeiture

⁶ Section 38 makes provision for preservation of property orders and reads:

- “(1) The National Director may by way of an ex parte application apply to a High Court for an order prohibiting any person, subject to such conditions and exceptions as may be specified in the order, from dealing in any manner with any property.
- (2) The High Court shall make an order referred to in subsection (1) if there are reasonable grounds to believe 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.
- (3) A High Court making a preservation of property order shall at the same time make an order authorising the seizure of the property concerned by a police official, and any other ancillary orders that the court considers appropriate for the proper, fair and effective execution of the order.
- (4) Property seized under subsection (3) shall be dealt with in accordance with the directions of the High Court which made the relevant preservation of property order.”

application papers could be effected on his office. On 21 November 2014, Mr Parker dispatched an email to Mr Myburgh enclosing statements which reflected the amounts owed by CPAD Farm to the Land Bank. On 11 December 2014, Mr Parker asked Mr Myburgh when the forfeiture application might be expected. No reply was received and no application for a forfeiture order was served on the Land Bank.

[9] On 13 January 2015, the High Court (Majiki J) granted an order by default for the forfeiture of the property in terms of section 53(1)(a) of the POCA.⁷ The forfeiture order said nothing about the interest of the Land Bank. It reads:

- “1. An order be and is hereby granted in terms of section 53(1)(a) of the Prevention of Organised Crime Act 121 of 1998 (POCA), declaring forfeit to the State the Honeyville Farm measuring 1 218,9797 hectares in the district of Humansdorp (the property).
2. In terms of section 50(6) of POCA paragraph 5 below shall take effect 45 days after publication of a notice thereof in the Government Gazette unless an appeal is instituted before this time in which case this order will take effect on the finalisation of such appeal.
3. Michael Timkoe (Timkoe) who was appointed as curator in the preservation order, be and is hereby directed to continue acting as such for the purpose of this order.
4. Pending the taking effect of this order the property shall remain under the control of Timkoe.
5. On the date on which this order takes effect, to wit 45 weekdays after publication in the Government Gazette, Timkoe shall cause the property to be handed back to the Department of Rural Development and Land Reform for re-allocation in terms of all applicable procedures, and as such to sign all

⁷ Section 53(1)(a) reads:

“If the National Director applies for a forfeiture order by default and the High Court is satisfied that no person has appeared on the date upon which an application under section 48(1) is to be heard and, on the grounds of sufficient proof or otherwise, that all persons who entered appearances in terms of section 39(3) have knowledge of notices given under section 48(2), the Court may—

- (a) make any order by default which the Court could have made under sections 50 (1) and (2).”

necessary documents in regard thereto. This will be regarded as payment to the State.

6. The applicant [(the National Director of Public Prosecutions)] is directed to cause notice of this order to be served on the respondent [(CPAD Farm Holdings (Pty) Ltd)].
7. The applicant [(the National Director of Public Prosecutions)] is further directed to publish a notice of this order in the Government Gazette as soon as it is practicable.”

[10] On 20 January 2015, Mr Parker wrote to Mr Myburgh expressing concern at the terms of the order. Mr Myburgh replied providing assurances that the Land Bank’s claims would be protected. At a further meeting, on 3 February 2015, Mr Myburgh and Ms Hack represented to the Land Bank that its secured debt would be paid from the proceeds of the sale of the property. Following Mr Timkoe’s endeavours to sell the property, on 25 March 2015, one of its occupiers made an offer to purchase it for the sum of R7,5 million. After obtaining a valuation of the property, the Land Bank advised that it required a revised offer of R8 million to recoup its losses. On 25 May 2015, Mr Timkoe entered into a deed of sale in terms of which the property was sold to Mr Willem Jansen van Vuuren for R8 million.

[11] The execution of the deed of sale would entitle the Land Bank to the full payment of the proceeds of the sale as the outstanding secured debt owed to it stood at R10 309 493.75 as at 12 November 2015. The Minister would receive nothing and she rejected this prospect. Consequently, the parties entered into a series of negotiations to resolve the impasse, but this proved unsuccessful.

Statutory framework

[12] The provisions of the POCA, in terms of which the preservation of property and forfeiture orders sought by the NDPP were granted and which are relevant for the determination of the issues in this matter, are set out in Chapter 6, comprising sections 37 to 62 of the POCA. These provisions govern the civil recovery of property which is defined in section 1 of the POCA as meaning “money or any other movable,

immovable, corporeal or incorporeal thing and includes any rights, privileges, claims and securities and any interest therein and all proceeds thereof”. And as the heading of the Chapter suggests, the High Court proceedings it prescribes are, in terms of section 37, civil in nature and the rules of evidence applicable in civil proceedings apply thereto.

[13] Sections 38 to 47 govern applications by the NDPP for the preservation of property pending potential forfeiture. Section 48 governs the process for an application for a forfeiture order once a preservation of property order is in force. The NDPP may, in terms of section 48(1), “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”. Section 48(2) entitles a person who entered an appearance in terms of section 39(3)⁸ in respect of the preservation application to be served with a notice of the application for a forfeiture order by the NDPP. In terms of section 48(4)(b)(i), that person may appear in the application “to apply for an order excluding his or her interest in that property from the operation of the order”. “Interest” is tersely defined in section 1 and “includes any right”.

[14] Section 49(3) allows the late entry of an appearance by a person who did not enter an appearance in terms of section 39(3) upon application to the High Court within the period deemed appropriate by the Court. Such a late entry may be granted by the High Court if it is satisfied that good cause is shown by the person that he or she has, for sufficient reason, failed to enter an appearance and has an interest in the property which is subject to the preservation of property order.

[15] Section 50 deals with the making of a forfeiture order and provides in relevant part:

⁸ Section 39(3) provides that “[a]ny person who has an interest in the property which is subject to the preservation of property order may enter an appearance giving notice of his or her intention to oppose the making of a forfeiture order or to apply for an order excluding his or her interest in the property concerned from the operation thereof”.

- “(1) The High Court shall, 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.”

[16] Section 1 of the POCA defines the classes of property envisaged in subsection 1 above. “‘Instrumentality of an offence’ means 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”. “‘Unlawful activity’ means any conduct which constitutes a crime or which contravenes any law whether such conduct occurred before or after the commencement of this Act and whether such conduct occurred in the Republic or elsewhere”.

[17] Section 52 provides in subsection (1) for the exclusion of interests in property from the operation of a forfeiture order by the High Court under section 48(3) or by a person referred to in section 49(1). Section 52(2) empowers the High Court to make such an order—

- “in relation to the forfeiture of the proceeds of unlawful activities, if it finds on a balance of probabilities that the applicant for the order—
- (a) had acquired the interest concerned legally and for a consideration, the value of which is not significantly less than the value of that interest; and
 - (b) where the applicant had acquired the interest concerned after the commencement of [the POCA], that he or she neither knew nor had reasonable grounds to suspect that the property in which the interest is held is the proceeds of unlawful activities.”

[18] Section 54 governs the exclusion of interests in forfeited property where a person is affected by a forfeiture order and was entitled to receive notice of the application for the order, but did not receive such a notice. Section 54(1) entitles any such person to apply for an order excluding his or her interest in the property concerned from the

operation of the order, or varying the operation of the order in respect of such property. The rest of the section sets out the procedural requirements for the application and the manner in which it must be adjudicated by the High Court.

[19] In particular, section 54(2) requires the application to be accompanied by an affidavit setting forth, inter alia, the nature and extent of the applicant's right, title or interest in the property concerned, the time and circumstances of the applicant's acquisition of such right, title or interest and any additional facts supporting the application. In terms of section 54(8), the High Court may make a forfeiture order—

“in relation to the forfeiture of the proceeds of unlawful activities, if it finds on a balance of probabilities that the applicant for the order—

- (a) had acquired the interest concerned legally and for a consideration, the value of which is not significantly less than the value of that interest; and
- (b) where the applicant had acquired the interest after the commencement of [the POCA], that he or she neither knew nor had reasonable grounds to suspect that the property in which the interest is held is the proceeds of unlawful activities.”

Litigation history

High Court

[20] The Land Bank approached the High Court for an order amending the forfeiture order to subject it to the full extent of its rights in terms of the mortgage bond on the basis that the order failed to safeguard the interests and rights of bondholders over the property.⁹ It sought the exclusion of its interests from forfeiture in terms of section 53(1)(a) of the POCA by a variation of paragraph 1 of the forfeiture order to include at the end of the paragraph the words “subject to interests of bondholders”. The Land Bank also sought a declaratory order that entitled Mr Timkoe to proceed with the sale of the property subject to the rights of bondholders. To this end, it sought the deletion and substitution of paragraph 5 of the forfeiture order.

⁹ *Land and Agricultural Bank of South Africa v CPAD Farm Holdings* [2020] ZALCPE 9 (High Court judgment).

[21] It was not in dispute that the Land Bank had an “interest” in the property as defined in the POCA. It was also common cause that it did not join the proceedings for forfeiture to secure its interest as a bondholder, as it was required to do in terms of section 39 of the POCA, as a result of the failure of the NDPP officials to serve it with the application for the forfeiture order. The Minister accepted that the forfeiture order had to be varied to protect the Land Bank’s interest as a bondholder. However, relying on *Levy*,¹⁰ she argued that the Land Bank had no stronger right than the Department. In her submission, both parties were victims of fraud and, as such, were entitled to benefit from the proceeds of the forfeiture in proportion to the capital losses each had incurred.

[22] The Land Bank’s stance, on the other hand, was that the Department was not a victim of the unlawful activity. It sought to distinguish *Levy* on the basis that there, unlike in the present case, the respondents held no security, either in a form of a mortgage bond or as a judgment creditor. The proposed proportional sharing in the proceeds thus did not apply, so it argued.

[23] The High Court (Goosen J) determined two issues. First was whether the forfeiture order ought to have recognised the rights of the Land Bank as a mortgage holder. Second was whether the sale of the property ought to proceed as envisaged by the declarator sought. The High Court adopted the reasoning in *Levy*, which highlighted the wide definition of the term “interest” in section 52 of the POCA. It held that the Act seeks to protect the interests of innocent third parties who have become the victims of fraudulent activity. The High Court reasoned that there is no reason in principle why an organ of state cannot rank or qualify as a victim of fraudulent activity and that it is therefore not precluded from being a holder of a recognisable interest in the property which is worthy of protection. It concluded that both parties had established defined interests in the property and that such interests ought to be excluded from the forfeited property.

¹⁰ *National Director of Public Prosecution v Levy* [2004] 4 All SA 103 (W).

[24] The High Court, however, rejected the Minister's submission that the parties should share the sale proceeds according to their respective capital losses in the property. In its view, that argument ignored the fact that the Land Bank holds security in the form of a mortgage bond, which it perfected by obtaining a judgment in its favour covering both the capital debt and the interest owed to it by CPAD Farm. It also held that the order for the return of the property to the Department by the curator bonis in paragraph 5, in lieu of payment to the State, was made in error because it was not consonant with the forfeiture order in paragraph 1. Thus, effect could not be given to it.

[25] In conclusion, the High Court held that because the forfeiture order was granted in ignorance of the default judgment and the order which declared the property executable, both paragraphs 1 and 5 could not stand in their present form. The High Court therefore varied paragraph 1 of the original order as prayed by the Land Bank. It set aside and replaced paragraph 5 with an order which authorised (a) the disposal of the property by the curator bonis, (b) payment to the Land Bank of an amount equal to the value of its judgment debt as at the date of disposal of the property, and (c) payment to the Minister of an amount equal to the value of the grant funds paid to facilitate the acquisition of the property.

[26] In terms of a new paragraph 5A, it was provided that if the property was disposed of for a price less than the aggregate of the sums contemplated in (b) and (c), the amounts payable to the Land Bank and the Minister should be in proportion to the said sums. In other words, the proceeds were to be shared pro rata. But, contrary to the Minister's contention, the apportionment was to be done on the basis that the Land Bank's claim included interest in accordance with the default judgment it had obtained. Included in the replacement order was a raft of directions to the curator bonis relating to the implementation of processes such as the manner of disposal of the property and the deduction of fees, expenditure, incidental costs and charges relating to the said disposal.

Full Court

[27] The Minister appealed the decision of the High Court in the Full Court of the Division.¹¹ She still sought an apportionment of the proceeds of the sale of property between the Department and the Land Bank according to the capital losses they respectively sustained. In addition, the Minister sought an order for the handing over of the property to the Department for land redistribution to deserving beneficiaries. The Land Bank, on the other hand, lodged a cross-appeal. It sought orders amending the forfeiture order as it had asked the High Court for the proceeds of the sale of the property to be first apportioned to it and, in the event of any free residue after payment of its judgment debt and interest, for such residue to be paid to the Minister.

[28] The issues before the Full Court (Rugunanan and Beshe JJ and Krüger AJ) were framed as follows – whether (a) the Land Bank’s interest or loss should be confined to the capital advanced by it or whether it should include interest on such capital; (b) the High Court erred in deleting and substituting paragraph 5 of the forfeiture order; (c) the High Court erred in awarding proportional apportionment between the Minister and the Land Bank; (d) the High Court should have found that the Land Bank’s judgment, which predated the forfeiture order and remained extant, took precedence; and (e) the finding of the High Court constituted an arbitrary deprivation of a portion of the Land Bank’s constitutional right to property.

[29] The Full Court upheld the appeal and dismissed the cross-appeal, both with costs. It found that the Land Bank’s asserted secured entitlement to the property, upon which it relied for its contention that it enjoys a prior and stronger right than any rights which may have accrued to the Minister, was offset by section 57(2) of the POCA.¹² It further endorsed the approach in *Levy*, as the High Court had done, and held that the decision suggested that the respective interests in the property of the Minister and the Land Bank,

¹¹ *Minister of Rural Development and Land Reform v Land Agriculture Bank of South Africa* [2021] ZAECHC 61 (Full Court judgment).

¹² In terms of section 57(2) “[a]ny right or interest in forfeited property not exercisable by or transferable to the State, shall expire and shall not revert to the person who has possession, or was entitled to possession, of the property immediately before the forfeiture order took effect”.

as victims of unlawful activity, should be limited to the equivalent of their capital loss without ranking in status or prior position. The parties would thus be entitled to share in the proceeds of the disposal of the property in accordance with the ratio of their respective capital losses – a 2:1 participation quota in favour of the Land Bank. The Full Court declined to reinstate the original paragraph 5 of the order, which ordered the handing over of the property to the Minister for the purpose of distributing it to deserving beneficiaries. This was on the basis that the interests of those beneficiaries would not be precluded by the administration of the property in the hands of the curator bonis as section 57 of the POCA does not preclude its disposal to the Minister by other means.

Supreme Court of Appeal

[30] The Land Bank successfully challenged the judgment of the Full Court on appeal in the Supreme Court of Appeal.¹³ There, the issues were the same as those now raised, namely, whether the Minister has an interest in the property as defined in the POCA and, if so, how the competing claims of the parties for the exclusion of their interests from the operation of the forfeiture order should be determined.

[31] The Supreme Court of Appeal, in a unanimous judgment penned by Van der Merwe JA, held that the definition of the term “interest” in section 1 of the POCA, to “include any right”, renders the word “includes” a term of exhaustive denotation. It said that although it is generally a term of extension, in some cases the word “includes” is used where the primary meaning of the term that is defined is well-known and introduces a meaning or meanings that go beyond the primary meaning. It can, however, also signify that what follows constitutes a complete or exhaustive definition of the relevant term. In the context of the POCA, the purpose of the words “includes any right” is to define “interest”, which has wide and vague import and is used in provisions dealing with the acquisition of rights to property, more precisely. For this

¹³ *Land and Agricultural Bank of South Africa v Minister of Rural Development and Land Reform* [2022] ZASCA 133; 2023 (1) SACR 1 (SCA) (Supreme Court of Appeal judgment).

view, the Supreme Court of Appeal relied on sections 52(2) and 54(8) of the POCA, which provide for the exclusion of interests in forfeited property and the protection of an interest acquired legally. It also referenced the purpose of Chapter 6 of the POCA which, it held, would be undermined if the forfeiture it contemplates was subjected to “vague and flimsy” interests, as opposed to legal rights. Therefore, “includes” is equivalent to the word “means” and “interest” means “any right”, which is an expression of wide import and may include a contingent right to property.

[32] The Supreme Court of Appeal rejected the Minister’s reliance on *Levy*, which, it held, was wrongly decided. The purpose of Chapter 6 of the POCA, it said, is not to protect the interests of victims of crime by compensation for their losses but rather to forfeit the proceeds of unlawful activities, instrumentalities of offences and property associated with terrorist and related activities to the State. The Supreme Court of Appeal stated that it was open to the Minister to invoke section 300 of the Criminal Procedure Act,¹⁴ which outlines the provisions for a court to award compensation for damage or loss of property caused by a criminal offence with the object of ensuring that victims can receive compensation directly through the criminal process while limiting double recovery through subsequent civil suits which provides for compensation for losses. It also held that the POCA is saved from unconstitutionality by the “protection of the pre-existing interests of innocent citizens” in property subject to forfeiture and that whether such a person was a victim of crime is irrelevant.

[33] The Supreme Court of Appeal concluded by holding that Chapter 6 of the POCA neither rendered common law principles inapplicable nor varied them. Therefore, whether an interest in property was legally acquired must be determined under existing law, including the common law. The principle that real rights generally prevail over personal rights and the maxim *qui prior tempore potior est iure* (he who is earlier in

¹⁴ 51 of 1977.

time is stronger in law),¹⁵ which applies to the ranking of rights that are equal in hierarchy, apply in the matter. Accordingly, there was no legal basis for depriving the Land Bank of the preference provided by its real right or its secured claims for interest and costs. The Minister neither has a right to nor interest in the property on the facts of this case. And even if she did, the exclusion of such an interest from the forfeiture order would not constitute an efficacious remedy and the Land Bank's interest would have to be afforded precedence over hers. Thus, the appeal was upheld with the result that only the Land Bank's interest "consisting of the debt secured by its mortgage bond over the property" was excluded from the operation of the forfeiture order. It is this decision which the Minister seeks to challenge in this Court.

In this Court

Applicant's submissions

[34] The Minister contends that the application raises an arguable point of law of general public importance. She further contends that it is in the interests of justice to grant leave to appeal because there are reasonable prospects of success as evidenced by the fundamentally different conclusions of the three judgments in the High Court, the Full Court and the Supreme Court of Appeal, respectively, with regard to the meaning to be ascribed to the relevant statutory provisions.

[35] As in the courts a quo, the Minister accepts that the Land Bank has a legally recognisable interest in the property which must be excluded from the operation of the forfeiture order in terms of section 54 and argues only that she has also established an interest in the property similarly worthy of protection. She supports the judgment of the Full Court and submits that the Supreme Court of Appeal erred in its findings that the Minister had no interest in the property or the proceeds of any sale thereof and that even if she had an interest in the property, the interest of the Land Bank would prevail. She argues that the Supreme Court of Appeal erred by contrasting the provisions of

¹⁵ Where there are two or more competing equitable interests, the first in time prevails over the others.

Chapter 6 of the POCA with section 300 of the Criminal Procedure Act because these provisions are compatible and can be read together.

[36] The Minister submits that the POCA neither recognises nor creates a hierarchy of victims, as was found by the Full Court, and that the principles of common law relied upon by the Supreme Court of Appeal should not trump the intention of the Legislature to recognise and preserve the rights of all victims of crime. She contends that if the parties are to be treated equally as innocent victims of crime, they should, in principle, be entitled to share in the sale proceeds of the property in accordance with their respective capital losses.

[37] The Minister also challenges the meaning ascribed to the words “interest in the property” by the Supreme Court of Appeal and its rejection of *Levy*. She submits that “interest includes any right”, “proceeds of unlawful activities” and “property” are other relevant definitions in section 1 of the POCA. She argues that the Supreme Court of Appeal confused the right to recover public funds with the right to property and deprived her of the right to pursue unlawfully and fraudulently diverted public funds. She challenges the finding that the Land Bank is entitled to recover its full capital, interest and costs, which, she argues, will result in the entire proceeds of the sale accruing to the Land Bank and leave the State with no return despite the declaration of forfeiture of the property to it.

Respondent’s submissions

[38] The Land Bank denies that the matter engages the jurisdiction of this Court and argues that although there are three differing judgments, the Minister must still establish that there is a measure of plausibility or substance in the argument she advances.

[39] The Land Bank argues that the Supreme Court of Appeal’s judgment is sound. It contends that the Minister’s stance that the parties should share in the proceeds according to their respective capital losses ignores its secured real right under the bond and the judgment in its favour, which predates the forfeiture order, and an attachment

order which remains in force. It argues that this has an effect of arbitrarily depriving it of its secured property rights in breach of section 25(1) of the Constitution.¹⁶ It contends that there is no connection between the deprivation of the Minister's property rights and the means sought to be achieved by the POCA as it has not committed any crime and owes no debt to the Minister. The interpretation of the Supreme Court of Appeal is consistent with section 39(2) of the Constitution,¹⁷ so it argues.

[40] The Land Bank further contends that *Levy* is distinguishable from this case. It makes the points that unlike in its case, none of the victims in *Levy* had secured rights or preferential claims over the property in issue which was purchased, without their knowledge, with investments made by the respondents in a pyramid scheme in the form of funds they paid into an attorney's trust account. The Land Bank contends for a narrow interpretation of "interest" which, it argues, accords with the well-settled approach to interpretation set out in *Endumeni*¹⁸ and *Fidelity Security Services*.¹⁹

[41] The Land Bank argues further that Chapter 6 of the POCA should not be applied without restraint as civil forfeiture rests on the legal fiction similar to an action *in rem* (an action against a thing) in admiralty law, that the property in issue and not the owner has contravened the law. It contends that the effect is excessively harsh on the parties and may infringe constitutional rights such as section 25(1) of the Constitution. It submits that the Minister failed to meet the jurisdictional requirements of section 52(2) of the POCA and that her claim is only a monetary one, against the person who perpetuated the fraud. It argues that if the parties are ordered to share on an equal footing, in terms of their respective capital losses only, it would suffer a greater loss than the Minister.

¹⁶ Section 25(1) of the Constitution provides that "[n]o one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property".

¹⁷ In terms of which every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights when interpreting any legislation and when developing the common law or customary law.

¹⁸ *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; 2012 (4) SA 593 (SCA) at para 18.

¹⁹ *Minister of Police v Fidelity Security Services (Pty) Limited* [2022] ZACC 16; 2022 (2) SACR 519 (CC); 2023 (3) BCLR 270 (CC) at para 34.

Issues

[42] The issues for this Court’s determination are—

- (a) whether it has the jurisdiction to adjudicate this application for leave to appeal and whether it is in the interests of justice to grant leave to appeal;
- (b) whether the Minister has an “interest” in the property as defined in section 1 of the POCA, which is capable of exclusion in terms of section 52(2) of the POCA; and, if so,
- (c) how the competing claims of the parties for the exclusion of their “interests” from the operation of the forfeiture order under the POCA should be determined.

Jurisdiction and leave to appeal

[43] This Court has jurisdiction to decide matters that raise constitutional issues if the interests of justice so require²⁰ and any other matter that raises an arguable point of law of general public importance which ought to be considered by it under section 167(3)(b)(ii) of the Constitution. However, “a holding that a matter raises an arguable point of law of general public importance does not inexorably lead to a conclusion that the matter must be entertained” and whether the matter warrants this Court’s attention will depend on the interests of justice.²¹

[44] I agree with the Minister’s contention that this Court’s extended jurisdiction is engaged in light of the conflicting judgments of the High Court, the Full Court and the Supreme Court of Appeal regarding the interpretation to be ascribed to the applicable provisions of the POCA. There is indeed dissension in these judgments which requires this Court to make a definitive pronouncement on the relevant issues. This conflict has a material bearing on the Minister’s prospects of success on appeal in this Court, which

²⁰ In terms of section 167(3)(b)(i) read with section 167(6) of the Constitution. See also *Kubyana v Standard Bank of South Africa* [2014] ZACC 1; 2014 (3) SA 56 (CC); 2014 (4) BCLR 400 (CC) at paras 16-7.

²¹ *Paulsen v Slip Knot Investments 777 (Pty) Limited* [2015] ZACC 5; 2015 (3) SA 479 (CC); 2015 (5) BCLR 509 (CC) (*Paulsen*) at para 18.

is an important factor in determining whether it is in the interests of justice to grant leave. In *Booyesen*,²² this Court reiterated a principle it established in *NEHAWU*²³ that “when there are different judicial opinions that have been expressed in a lower court or in lower courts in a matter in respect of which leave is sought, that means that there are, *prima facie*, reasonable prospects of success”.

[45] The extent of the application of the legal principles set out in *Levy* and *Mazibuko*,²⁴ including the meaning to be accorded to the words “interest in the property” in Chapter 6 of the POCA, and whether the protection it affords extends to a state organ where state funds allocated to discharge a constitutional obligation are misappropriated through unlawful activities, are clearly matters of fundamental importance which transcend the narrow interests of the present litigants and implicate the interests of the general public.²⁵ I hold the view, therefore, that there is substance in the Minister’s contention that the matter raises arguable points of law of general public importance and that it is in the interests of justice to grant leave to appeal.

Does the Minister have an interest in the property in terms of the POCA?

[46] The meaning of the word “interest” is pivotal in these proceedings. If the parties have an interest in the property as contemplated in the POCA, then they are each entitled to have their respective interests excluded in the forfeiture order. To that end, each party must, in terms of section 54(1) and (2), establish the nature and extent of its right, title or interest in the property and the time and circumstances of its acquisition. The interest will then be excluded from the forfeiture order under section 54(8), if it is found on a balance of probabilities that it was acquired legally and for a consideration and that

²² *Booyesen v Minister of Safety and Security* [2018] ZACC 18; 2018 (9) BCLR 1029 (CC); 2018 (6) SA 1 (CC) at para 93. See also *National Education Health and Allied Workers Union v University of Cape Town* [2002] ZACC 27; 2003 (3) SA 1 (CC); 2003 (2) BCLR 154 (CC) (*NEHAWU*) at para 26 and *Areva NP Incorporated v Eskom Holdings SOC Limited* [2016] ZACC 51; 2017 (6) BCLR 675 (CC); 2017 (6) SA 621 (CC) at para 28.

²³ *NEHAWU* above n 22 at para 26.

²⁴ *Mazibuko v National Director of Public Prosecutions* [2009] ZASCA 52; 2009 (6) SA 479 (SCA) at para 57.

²⁵ *Paulsen* above n 21 at para 26.

its holder neither knew nor had reasonable grounds to suspect that the property in which it is held is the proceeds of unlawful activities – the innocent owner defence.²⁶

[47] In *Fidelity Security Services*,²⁷ this Court laid down the following guidelines to statutory interpretation:

- “(a) Words in a statute must be given their ordinary grammatical meaning, unless to do so would result in an absurdity.
- (b) This general principle is subject to three interrelated riders: a statute must be interpreted purposively; the relevant provision must be properly contextualised; and the statute must be construed consistently with the Constitution, meaning in such a way as to preserve its constitutional validity.
- (c) Various propositions flow from this general principle and its riders. Among others, in the case of ambiguity, a meaning that frustrates the apparent purpose of the statute or leads to results which are not businesslike or sensible results should not be preferred where an interpretation which avoids these unfortunate consequences is reasonably possible. The qualification ‘reasonably possible’ is a reminder that Judges must guard against the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used.
- (d) If reasonably possible, a statute should be interpreted so as to avoid a *lacuna* (gap) in the legislative scheme.”

[48] So, with the aid of the above guidelines, what meaning is to be ascribed to the words “interest includes any right”? The first step is to determine what the Legislature intended “includes” to denote. This Court in *New Clicks SA*²⁸ described it thus:

²⁶ *National Director of Public Prosecutions v Mohamed NO* 2003 (1) SACR 561 (CC); 2003 (5) BCLR 476; 2003 (4) SA 1 (CC) (*Mohamed II*) at para 19.

²⁷ *Fidelity Security Services* above n 19 at para 34. See also *Shiva Uranium (Pty) Limited (In Business Rescue) v Tayob* [2021] ZACC 40; 2022 (3) SA 432 (CC); 2022 (2) BCLR 197 (CC) at para 38; *Road Traffic Management Corporation v Waymark Infotech (Pty) Limited* [2019] ZACC 12; 2019 (5) SA 29 (CC); 2019 (6) BCLR 749 (CC) at paras 30-2 and *Cool Ideas 1186 CC v Hubbard* [2014] ZACC 16; 2014 (4) SA 474 (CC); 2014 (8) BCLR 869 (CC) (*Cool Ideas*) at para 28.

²⁸ *Minister of Health v New Clicks SA (Pty) Limited* [2005] ZACC 14; 2006 (2) SA 311 (CC); 2006 (1) BCLR 1 (CC) at paras 455-6.

“As a general rule the terms ‘including’ or ‘includes’ are not terms of exhaustive definition but terms of extension. However, they may, depending on the context, be used as terms of exhaustive definition. As the court put it in *Dilworth v Commissioner of Stamps*:

‘The word “include” is very generally used in interpretation clauses in order to enlarge the meaning of words or phrases occurring in the body of the statute; and when it is so used these words or phrases must be used as comprehending, not only such things as they signify according to their natural import, but also those things which the interpretation clause declares that they shall include. But the word “include” is susceptible of another construction, which may become imperative, if the context of the Act is sufficient to show that it was not merely employed for the purpose of adding to the natural significance of the words or expressions defined. It may be equivalent to “mean and include”, and in that case it may afford an exhaustive explanation of the meaning which, for the purposes of the Act, must invariably be attached to these words or expressions’.

...

The sense in which the term ‘including’ is used must be ascertained from the context in which it is used.”

[49] The Court, quoting from *De Reuck*,²⁹ continued:

“The correct sense of ‘includes’ in a statute must be ascertained from the context in which it is used. . . . If the primary meaning of the term is well known and not in need of definition and the items in the list introduced by ‘includes’ go beyond that primary meaning, the purpose of that list is then usually taken to be to add to the primary meaning so that ‘includes’ is non-exhaustive. If . . . the primary meaning already encompasses all the items in the list, then the purpose of the list is to make the definition more precise. In such a case ‘includes’ is used exhaustively.”

[50] The Supreme Court of Appeal’s interpretive exercise in this regard resulted in a conclusion that “although ambiguity may have been avoided by the employment of the

²⁹ *De Reuck v Director of Public Prosecutions*, WLD [2003] ZACC 19; 2004 (1) SA 406 (CC); 2003 (12) BCLR 1333 (CC) (*De Reuck*) at para 18 and *New Clicks* above n 28 at para 456.

word “means”, “includes” in the context of this matter is equivalent to “means” and that “interest”, therefore, means any right. This finding is, however, not without difficulty. Section 1 of the POCA appears to distinguish between the words “means” and “includes” as it repeatedly uses both variably in its list of definitions. This raises the question as to why the Legislature used the word “includes” instead of “means” to define “interest”, as it did elsewhere, if that is what it intended.

[51] Additional to this challenge is the fact that the POCA seems to distinguish between “rights” and “interests” as it employs the words distinctly in various provisions. The definition of “property”, which is couched in the widest terms, lists any rights, privileges, claims and securities and any interest in money or any movable, immovable, corporeal or incorporeal thing, and all proceeds thereof. Section 57(2) also refers to “[a]ny right or interest in forfeited property”. There is another example on which I expand below.

[52] Unfortunately, the POCA is not exactly a model of clarity or precision in this regard. A majority of the provisions in Chapter 6, including those which exclude interests in property subject to preservation or forfeiture orders – sections 39(3) and (5)(b); 48(4)(b); 50(3); 52(1), (2), (2A), and (4); and 54(1) – refer only to “interest in the property” and make no mention of “right in the property”. However, although section 54(1) merely refers to an applicant’s “interest in the property”, section 54(2)(a) and (b), which flows directly from it, is worded differently. These provisions set out the requirements for the affidavit accompanying the application for the exclusion of interests in property contemplated in subsection (1). Significantly, instead of using the words “interest in the property” employed in section 54(1), subsections (2)(a) and (b) refer to the applicant’s “right, title or interest in the property”, the nature and extent of which must be explained in the relevant affidavit.

[53] “Interest” is defined in Merriam-Webster’s Law Dictionary as “a right, title, claim or share in property”. The Oxford English Dictionary describes the term as “the relation of being objectively concerned in something, by having a right or title to, a

claim upon, or a share in; the fact or relation of being legally concerned; legal concern in a thing; especially right or title to property, or to some of the uses or benefits pertaining to property”. According to Black’s Law Dictionary, the word means “a right to have the advantage accruing from anything; any right in the nature of property, but less than title; a partial or undivided right; a title to a share”. The latter definition then makes the point that “[t]he terms ‘interest’ and ‘title’ are not synonymous” which is, indeed, correct.³⁰

[54] A plain reading of subsections 54(1) and 54(2)(a) and (b) ineluctably leads to the conclusion that the Legislature’s reference to the applicant’s “interest in the property” in section 54(1) was intended to mean a right, title or interest in the property concerned, that is, a right, a title or an interest would suffice in providing the jurisdictional fact for the bringing of the application. Needless to say, this interpretation does not only distinguish “title” but also differentiates between the words “right” and “interest”, which are used separately in the same sentence, as the POCA does elsewhere in the manner indicated above.

[55] A reading of the judgment of the Supreme Court of Appeal shows that in its interpretive exercise it dealt with the definition of “interest” only as found in the POCA and did not undertake any examination of section 54, in particular, the reference to “right, title or interest” as being applicable to the facts at hand. Had it done so, it would have realised the flaw in its interpretation that “interest means right”. On the application of this interpretation to section 54(2), the words “right, title or interest” would have to be read as referring to a “right, title or *right*” as “interest” and “right” could be used interchangeably. This would partially render the section meaningless. Such an interpretation must, therefore, be wrong. The Legislature clearly distinguished between a right and an interest.

³⁰ The distinction is supported by the definition of the word “title” in the Oxford English Dictionary – “a legal right to the possession of property (especially real property); the evidence of such rights; title deeds” – which has been adopted by our courts. See, for example, *Melcorp SA (Pty) Limited v Joint Municipal Pension Fund (Transvaal)* 1980 (2) SA 214 (W) at 218F; [1980] 1 All SA 49 (W) at 501-2.

[56] It must also be pointed out that the Supreme Court of Appeal’s reliance on *De Reuck* was misguided. That matter involved the interpretation of the words “child pornography”. Section 1 of the Films and Publications Act³¹ defines these words to include “any images” and then lists a range of images. This Court held that the use of “includes” in the definition was consistent with an intention that the list should refine, and thus be coloured by, the primary meaning of “child pornography”.³² Unlike here, the list in *De Reuck* and the descriptions which were given in the other cases referenced by the Supreme Court of Appeal,³³ where the context in which “includes” was employed, clearly indicated that “what follows thereafter constitute[d] a complete or exhaustive definition of the relevant term” and actually gave meaning to the vague expression.

[57] A question which arises in the circumstances is whether the words “interest in the property” are to be read to mean “right, title and interest in the property” in the rest of the provisions of the POCA which govern the exclusion of interests from a forfeiture or preservation order. In our law, the Legislature is presumed to use language consistently.³⁴ Therefore, the same words or expressions in a statute are presumed to bear the same meaning unless to do so would result in manifest absurdity or would clearly frustrate the manifest intention of the lawgiver.³⁵ To my mind, it would be quite odd for the words “interest in the property” to have a certain meaning in section 54(2)(a) and (b) and a different one in the other provisions dealing with the same subject matter, namely, the exclusion of interests from forfeiture or preservation. I cannot fathom any reason to deviate from the presumption in the present context.

³¹ 65 of 1996 (read with section 1 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007).

³² *De Reuck* above n 30 at para 19.

³³ *Union Government v Rosenberg Limited* 1946 AD 120 at 127; *R v Debele* [1956] 4 All SA 251 (A) at 251-3; 1956 (4) SA 570 (A) at 572H-573A and 575A-576A and *Stauffer Chemical Co v Sasfan Marketing and Distribution Co (Pty) Limited* 1987 (2) SA 331 (A) at 350H-351E.

³⁴ Du Plessis “Statute Law and Interpretation” in *LAWSA* 2 ed (2011) vol 25(1) at para 333 and *Principal Immigration Officer v Hawabu* 1936 AD 26 at 33.

³⁵ *South African Transport Services v Olgar* 1986 (2) SA 684 (A) at 688 and *S v Dlamini*; *S v Dladla*; *S v Joubert*; *S v Schietekat* [1999] ZACC 8; 1999 (4) SA 623; 1999 (7) BCLR 771 (CC) at para 47.

[58] All the indicia, in my view, point to the conclusion that the word “includes” in the definition of “interest” was intended to be non-exhaustive and that the Legislature meant to give the word “interest” a wide meaning. Interestingly, the Supreme Court of Appeal readily adopted this view in *R O Cook Properties (Pty) Limited*,³⁶ albeit in a different context, where it sought to interpret the phrase “instrumentality of an offence”. In their consideration of the forfeiture provisions, Mpati DP and Cameron JA, writing for a unanimous court, stated that the POCA “defines ‘interest’ very widely as including ‘any right’”. Thus, the approach of the Supreme Court of Appeal in this matter and its interpretation of the term is also contrary to its own precedent. “Interest” does not mean “right” and *Levy*’s expansive approach to the interpretation of the expression “interest in the property” and its endorsement by the High Court and the Full Court was justified.³⁷

[59] The Supreme Court of Appeal’s reliance on *Mazibuko* to justify its finding that “interest” means “any right” was, therefore, misplaced. There, the Court considered whether the interest of one spouse in a farm belonging to the joint estate of a couple married in community of property, which was found to be an instrumentality of an offence, was capable of being excluded from forfeiture as she was unaware and had no reasonable grounds to suspect that the property was an instrumentality of an offence. The Supreme Court of Appeal accepted that the couple’s interests in the property, in the rights of ownership in it, were indivisible by reason of their marriage regime, but held that a division of the proceeds was possible once the property was sold. Thus, Ms Mazibuko not only had an interest in the property, which was indivisible from that of her husband, but she also had a divisible interest in the proceeds thereof, albeit that the accrual of the latter interest was contingent on the property’s sale. And that

³⁶ *National Director of Public Prosecutions v R O Cook Properties (Pty) Limited* [2004] ZASCA 38; [2004] 2 All SA 491 (SCA); 2004 (2) SACR 208 (SCA) at paras 22-3.

³⁷ This decision, which is distinguished from the present matter by its facts, concerned an application for a forfeiture order under section 48 of the POCA. The respondents, who were induced by a fraudulent misrepresentation to invest substantial funds in an investment pyramid scheme used to purchase the residential property sought to be forfeited, successfully applied to have their interest excluded from the forfeiture order. The court held that they were entitled to be compensated for their losses.

contingent interest, held the Supreme Court of Appeal, fell within the wide definition of the term in the POCA. Contrary to the Supreme Court of Appeal's understanding, the latter holding, in my view, merely bolsters the expansive approach that accords "interest" a wide interpretation. It was by no means a statement by the Supreme Court of Appeal that "interest" is equivalent to "right".

[60] This approach does not conflict with the overarching purpose of the POCA, which must be taken into account in the interpretive exercise. This purpose was explained by this Court as follows in *Mohamed I*:³⁸

"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.

...

Various international instruments deal with the problem of international crime in this regard and it is widely accepted in the international community that *criminals should stripped of the proceeds of their crimes, the purpose being to remove the incentive for crime.*" (Emphasis added.)

[61] Indeed, the central purpose of the POCA to combat organised crime, money laundering and criminal gang activities, gives effect to South Africa's international obligation to ensure that criminals do not benefit from their crimes. But there is another

³⁸ *National Director of Public Prosecutions v Mohamed NO* [2002] ZACC 9; 2002 (9) BCLR 970 (CC); 2002 (4) SA 843 (CC) (*Mohamed I*) at paras 14-5.

important purpose found in the forfeiture provisions in Chapter 6 – to protect the interests of parties who legally, for consideration and innocently acquired a right or interest in the property concerned.

[62] The question is whether the Minister’s claim amounts to such an interest, that is one acquired innocently, legally and for consideration (a payment or reward)³⁹ in the context of this matter, particularly the wide ambit of the word “interest”. And the answer must be yes. The Minister’s claim is a personal right in the form of the LRAD grant allocated by her Department for the property’s acquisition, which paid part of the purchase price. Ordinarily, such a personal right would merely be an amount advanced by a loaner to a loanee, but this is not the case here. As mentioned above, the LRAD grant is intrinsically linked to land reform. It is given to previously disadvantaged individuals or groups, who must make a contribution either in cash or labour, to acquire land for agricultural purposes as part of the Land Redistribution and Agricultural Development Programme, to which the Minister’s personal right is also linked. This programme is run in the execution of the State’s obligation under section 25(5) of the Constitution to “foster conditions which enable citizens to gain access to land on an equitable basis” and undo the legacy of apartheid of racialised land inequity. Needless to say, this programme benefits poor citizens who, incidentally, bear the brunt of corruption the most,⁴⁰ as is evidenced by the misfortune which befell the would-be beneficiaries in this very case.

[63] An interest of the nature of the Minister’s claim is clearly not a “vague and flimsy interest”, which diminishes rights, of the ilk adverted to by the Supreme Court of Appeal when it expressed a concern that the purpose of the POCA would be undermined if the forfeiture is subjected to “such interests”, as opposed to legal rights. It is an interest in the forfeited property which, while it may not be a real right in the sense of the Land Bank’s mortgage bond over the property that can be used

³⁹ As the words “for consideration” are defined in the Oxford English Dictionary.

⁴⁰ *National Director of Public Prosecution v Botha NO* [2020] ZACC 6; 2020 (1) SACR 599 (CC); 2020 (6) BCLR 693 (CC) at para 3.

to assert a preferential right to the property, is nonetheless an interest acquired lawfully and innocently by the Minister in the manner contemplated in section 54(8). While the Supreme Court of Appeal may be correct in the view that the language of sections 52(2) and 54(8) is that of the acquisition of property rights, it erred in not considering the remainder of the provisions governing the exclusion of interests in property, the use of “interest” in defining “property”, and the constitutional implication of its interpretation.

[64] I cannot conceive a reason why an organ of state in the Minister’s position, which manages and disburses public resources in the exercise of a constitutional mandate to provide state grants for the purchase of the very property that is in contention in this matter, would be precluded from having its interest in that property excluded from forfeiture. While there may be an alternative remedy available to the Minister in the form of section 300 of the Criminal Procedure Act,⁴¹ which she can invoke against the person or persons who misappropriated the grant funds, no reason has been advanced why these provisions should preclude her interest in the property from the protection offered by the POCA. In *Mohamed I*, this Court explained that the remedies provided in the POCA exist because “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 the occasions when they are brought to justice”.⁴² Considering this, it is difficult to believe that the intention of the POCA is to only protect parties who have a right to property, requiring those with an “interest” to pursue criminal proceedings.

⁴¹ In terms of this section she may be awarded compensation—

“[w]here a person is convicted by a superior court, a regional court or a magistrates’ court of an offence which has caused damage to or loss of property (including money) belonging to some other person, the court in question may, upon the application of the injured person or of the prosecutor acting on the instructions of the injured person, forthwith award the injured person compensation for such damage or loss.”

⁴² *Mohamed I* above n 39 at para 15.

The competing claims

[65] Having established that the Minister has an interest in the property, the second leg of the enquiry is how the competing claims of the parties for the exclusion of the parties' interests from the operation of a forfeiture order under the POCA should be determined. Should they be ranked according to the common law principles set out in the judgment of the Supreme Court of Appeal? Or should they be treated equally under the POCA on the premise that both the Minister and the Land Bank are innocent victims of fraud, whose protection is the purpose of the POCA, and should be compensated in the amount of their respective capital losses, as the Minister contends?

[66] It was argued for the Minister that unlike in the case of the common law maxim *qui prior est tempore potior est iure* (he who is earlier in time is stronger in law) applied by the Supreme Court of Appeal, the POCA does not provide for a hierarchy of claims and there is no basis to favour one victim over the other. It was further argued that the common law principle that a real right generally prevails over a personal right does not apply because legislation takes precedence and the parties should be treated equally as victims under the POCA, which has no specific mechanism for compensation. The Land Bank, on the other hand, contended for the application of the common law principles.

[67] The presumption that legislation does not alter the common law unless expressly stated is well-established,⁴³ and the Minister properly conceded that the POCA gives no indication of an intention to do so. The Land Bank's real right in the property, as the mortgagee, entitles it to the reservation of the proceeds of the mortgaged property for the principal obligation owed to it to the exclusion of claims against the property at the

⁴³ *Mader v Mallin Diamond Mines Limited* [1964] 2 All SA 92 (T).

instance of other creditors.⁴⁴ It has a preferential right to secure the sale of the property under an order of court for the purpose of satisfying the debt owed to it.⁴⁵

[68] Accordingly, the common law principles and a ranking of the claims must apply in this matter. In light of the Land Bank's status as a secured creditor, its full claim, i.e., the capital sum, interest and costs, enjoy priority and rank first in respect of the apportionment of any sale proceeds of the property. The consequence of this apportionment is that because the outstanding debt to the Land Bank exceeds the amount of the sale proceeds, the Minister will receive nothing. However, at the hearing, the Minister's counsel expressed her reconciliation with that eventuality, in line with her alternative prayer in her application papers for the reinstatement of the High Court order. The Minister's view was that such an order would not be an empty one, as the recognition of her interest would create an important binding legal precedent in the State's favour.

[69] The finding that the Minister has an interest in the property constitutes some success in her favour and the appeal must be upheld to that extent. In view of that partial success, I am not inclined to make an order of costs. The Land Bank was mulcted with all the costs, both in the High Court and in the Full Court, and the Minister was ordered to pay the costs of both the appeal and the cross-appeal in the Supreme Court of Appeal. These costs orders were wrong, having regard to the decision I reach in these proceedings, and should be set aside.

[70] In the result, the following order is made:

1. Leave to appeal is granted.
2. The appeal is partly upheld to the extent set out in paragraph 3 below

⁴⁴ Dendy "Mortgage and Pledge" *LAWSA* 3 ed (2020) vol 29 at para 326. See also *Lief v Dettman* 1964 (2) SA 252 (A) at 259, where it was held that the purpose of registering a mortgage bond is to ensure that—

“the world should have knowledge of the fact that there is a charge against the mortgagor's property; that the object is not to notify the world that the mortgagor owes the mortgagee a specific sum of money . . . that the real rights under a bond are immovable but the debt is a movable.”

⁴⁵ *Roodepoort United Main Reef GM Co Limited v Du Toit* 1928 AD 66 at 71.

3. The order of the Supreme Court of Appeal is amended as follows:
 - “1. The appeal is upheld with no order as to costs.
 2. The order of the Full Court is set aside and replaced with the following:
 - (a) The appeal is dismissed with costs.
 - (b) The cross-appeal is upheld with costs.
 - (c) Paragraphs 2, 3 and 5 of the order of Goosen J are set aside and replaced with the following:
 - “2. The interest of the first applicant, the Land and Agricultural Development Bank of South Africa, consisting of the debt secured by its mortgage bond over the property concerned is excluded from the operation of the forfeiture order.
 3. The interest of the first respondent, the Minister of Rural Development and Land Reform, consisting of a grant allocated for the purchase of the property concerned, is excluded from the operation of the forfeiture order.”
4. There shall be no order as to costs.

ROGERS J (Schippers AJ and Van Zyl AJ concurring):

Introduction

[71] I have had the pleasure of reading the Deputy Chief Justice’s judgment (first judgment). I shall adopt the abbreviations used in the first judgment. I agree that our jurisdiction is engaged and that leave to appeal should be granted. I agree that if the Department has an “interest” in the property for purposes of section 54 of the POCA, the Land Bank’s mortgage bond enjoys priority. On the evidence, this means that the entire proceeds of the property will go to the Land Bank. I disagree, however, that the

Department has an “interest” in the property. And so I disagree with the first judgment’s proposed amendment to the order granted by the Supreme Court of Appeal. I would dismiss the appeal with costs.

[72] In its definition section, the POCA states that “‘interest’ includes any right”. The first judgment holds that “includes” here is not exhaustive, so that an “interest” in property may be something other than a “right” in property. That is an important question, but it may not be dispositive. Even if the definition is not exhaustive, there is a further question, namely whether the Department’s claim, which is admittedly not a “right” in the property, is nevertheless an “interest” in the property, having regard to whatever residual meaning “interest” may have.

Is the definition of “interest” exhaustive?

[73] The first judgment attaches significance to the fact that in section 1 of the POCA the lawmaker has distinguished between “means” and “includes”,⁴⁶ the inference being that the former is exhaustive while the latter is not. This would be a weighty factor if section 1 displayed a careful distinction between the two words, but in my view it does not. The definitions of “criminal gang”⁴⁷ and “pattern of criminal gang activity”⁴⁸ are introduced by “includes”, yet both are clearly exhaustive. Without apparent distinction,

⁴⁶ At [50].

⁴⁷ This term is defined thus:

“‘criminal gang’ includes any formal or informal ongoing organisation, association, or group of three or more persons, which has as one of its activities the commission of one or more criminal offences, which has an identifiable name or identifying sign or symbol, and whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity;”

⁴⁸ This term is defined thus:

“‘pattern of criminal gang activity’ includes the commission of two or more criminal offences referred to in Schedule 1: Provided that at least one of those offences occurred after the date of commencement of Chapter 4 and the last of those offences occurred within three years after a prior offence and the offences were committed—

- (a) on separate occasions; or
- (b) on the same occasion, by two or more persons who are members of, or belong to, the same criminal gang;”

the definition of “pattern of criminal gang activity” uses “includes” while the definition of “pattern of racketeering activity”⁴⁹ uses “means”.

[74] The first judgment considers that it would make a nonsense of the expression “right, title or interest” in section 54(2) to interpret “interest” as meaning only a “right”, because if one plugged the definition into that expression, it would read “right, title or right”.⁵⁰ The first point to note is that section 54(2) is the only place where “right title or interest” appears in the POCA. Elsewhere in the POCA, the lawmaker sensibly has used just the defined word “interest”. Sections 52 and 54 perform similar functions. Section 52 applies where a person seeks to have its interest excluded from forfeiture before a forfeiture order is granted. Section 54 gives an opportunity for an exclusion to be made after the forfeiture order has been granted. There is no discernible reason for the lawmaker, in the isolated instance of section 54(2), to have used the expression “right, title or interest” where “interest” sufficed in section 52 and throughout the rest of the Act.

[75] The isolated expression “right, title or interest” in section 54(2) should thus not be given undue prominence. It seems to have been used with insufficient thought. It is an omnibus expression often encountered in commercial contracts to cover every legal interest which a person may hold in property. There is self-evident superfluity within the expression itself. “Title” is already embraced within “right”, title (ownership) being the most complete right that a person can hold in property.

[76] On any reckoning, reformulating the omnibus expression by importing the definition of “interest” into it gives rise to disjuncture. The first judgment’s interpretation of the definition of “interest” is that it means “interests, including rights”.

⁴⁹ This term is defined thus:

“‘pattern of racketeering activity’ means the planned, ongoing, continuous or repeated participation or involvement in any offence referred to in Schedule 1 and includes at least two offences referred to in Schedule 1, of which one of the offences occurred after the commencement of this Act and the last offence occurred within 10 years (excluding any period of imprisonment) after the commission of such prior offence referred to in Schedule 1;”

⁵⁰ At [55].

On that basis, “right, title or interest” becomes “right, title or interest including a right”. Just as one may ask why, in this isolated omnibus expression, the lawmaker used the word “interest” if an interest were confined to a “right”, so one may ask why the lawmaker used the word “right” if an “interest” as defined already includes a “right”.

[77] In regard to “includes” in statutory definitions, the first judgment has quoted⁵¹ the relevant part of this Court’s judgment in *De Reuck*,⁵² which in turn paraphrased *Debele*.⁵³ The definition of “interest” in the POCA falls most readily into the second or third class mentioned in *De Reuck*, i.e. classes where an exhaustive definition is usually meant. In relation to an interest held in property, the expression “any right” falls within the natural meaning of “interest”. Indeed, “right” is the most obvious example of an interest in property. That is the primary meaning of “interest”, for example, in the definition of “land” contained in the Alienation of Land Act.⁵⁴ There was no need for the lawmaker to say that an “interest” included “any right” if this was not intended to be exhaustive.

[78] Nevertheless, the word “any” in the POCA definition serves the important purpose of emphasising that there is no limitation on the “rights” in property that qualify as an “interest” – “any” right in property qualifies. It is this very point that was emphasised in *R O Cook Properties (Pty) Ltd*,⁵⁵ to which reference is made in the first judgment.⁵⁶ The Supreme Court of Appeal in that case was not suggesting that an “interest” could be something other than a “right” but rather that “any” (rather than only

⁵¹ At [49].

⁵² Above n 29.

⁵³ Above n 33 at 575H-576C.

⁵⁴ 68 of 1981. In terms of paragraph (b) of the definition of “land” in that Act, “land” includes, in relation to Chapters I and III, “any interest in land, other than a right or interest registered capable of being registered in terms of the Mining Titles Registration Act, 1967 (Act No. 16 of 1967)”. The expression “any interest in land” is not itself defined, but the relationships that have been held to be “interests in land” have all been rights in land: see Christie *The Law of Contract in South Africa* 8 ed (LexisNexis, 2022) at 145. See also *Brink v Stadler* 1963 (2) SA 427 (C) at 429A-E; *Cowley v Hahn* 1987 (1) SA 440 (E) (*Cowley*) at 445I-446A. In other legislation, the expression “limited interest in land” has been held to be confined to real rights that diminish ownership: *Van der Hoven v Cutting* 1903 TS 299 at 306; *Pretoria Town Council v Receiver of Inland Revenue* 1931 AD 178 at 186.

⁵⁵ Above n 36.

⁵⁶ At [58].

some) rights qualified for potential exclusion. I thus cannot agree with the first judgment that the decision of the Supreme Court of Appeal in the case now before us was in any way inconsistent with its own precedent.

[79] The first class of case mentioned in *De Reuck* – the class where a non-inclusive meaning is usually meant – is where “the primary meaning of the term is well known and not in need of definition and the items in the list . . . go beyond that primary meaning”. In the POCA, the definition of “interest” does not comprise a list and the only thing mentioned – “any right” – is within the primary meaning of “interest”. If the word “interest” were intended to go beyond “right”, it is that residual content of “interest” that one would have expected to see in the definition, yet it is absent.

[80] For these reasons, the Supreme Court of Appeal was right to conclude that the definition is exhaustive. That being so, the Department fails at the first hurdle. I should make it clear that this conclusion does not mean that a right in property, for purposes of the POCA, has to be a real right. It is unnecessary to decide whether personal rights in respect of property, e.g. an ordinary lease or (if it is not a real right) a usufruct,⁵⁷ qualify. If they do, it is because the right, although personal, is still a right in respect of the use or exploitation of the property in question.⁵⁸

“Interest” falling short of a “right”

[81] However, even if the definition is not exhaustive, the Department’s claim does not fall within the residual content of “interest”, i.e. an “interest” in property falling short of a “right” in property. The Department was defrauded out of money. It made a financial grant on the basis that the money would go towards purchasing farms in the name of a trust of which the beneficiaries would be previously disadvantaged individuals. Because it was defrauded, the Department has a personal monetary claim

⁵⁷ In *Cowley*, above n 54, it was held that a usufruct is a personal right and that the provisions of the Alienation of Land Act thus do not apply to it. The correctness of this view has been questioned: See *Christie* above n 54 at 145.

⁵⁸ In the context of the Death Duties Act 29 of 1922, it was held in *Hansen’s Estate v Commissioner for Inland Revenue* 1956(1) SA 398 (A) that “any interest” included a personal right to property: at 405 *in fine*.

for delictual damages, or perhaps for unjustified enrichment, against the fraudsters. Such a claim cannot be regarded as an “interest” in the farming properties for purposes of the POCA.

[82] The POCA conceives of an “interest” as being an interest “in” property. The word “in” connotes a direct relationship between the interest and the property. It is not enough that a creditor with a monetary claim against the debtor would find it useful to levy execution against the property. That would give all creditors with monetary claims against a debtor an “interest” in all the property of the debtor, since it is always to their advantage to levy execution against all the debtor’s property.

[83] An “interest” for purposes of the POCA is something that is capable of being “acquired”⁵⁹ and is then “held”⁶⁰ in property. When a person is defrauded out of money, its personal monetary claim for recovery arises, i.e. is acquired, immediately. The very nature of a personal claim so acquired is that it lies against a person and is not “held in” any particular property.

[84] If the fraud related to a proposed acquisition of property, the defrauded party would have an immediate claim on parting with its money, whether or not the fraudster thereafter used the money to acquire the envisaged (or any other) property. What the fraudster does with the money does not affect the legal nature of the defrauded party’s claim, which remains personal against the fraudster and has no legal link with the uses to which the fraudster puts the money.

[85] Assuming that the fraudster does later use the money to acquire property, it cannot be said that at that point the defrauded party’s claim, which until then has been a personal monetary claim, becomes an “interest in property”. The acquisition of the property by the fraudster brings about no change in the legal character of the defrauded

⁵⁹ See, for example, sections 2(1)(a)(iii), 2(1)(c)(i), 2(1)(d), 52(2)(a), 54(8) and 54(8A).

⁶⁰ See, for example, sections 15(1), 20(5), 22(1), 44(1)(a), 52(2)(b), 52(3)(a) and 54(8A)(a).

party's right, which is a personal right against the fraudster. In the present case, for example, it appears that the Department parted with the grant funding in 2006. According to the charge sheet, that is when it was defrauded or its money stolen. Yet CPAD Farm only took transfer of the property in April 2007, simultaneously with the registration of the Land Bank's mortgage bond.

[86] An "interest" for purposes of the POCA is something capable of reducing the value of full ownership. Where A holds property, but B "holds an interest" in the property, section 15(1)⁶¹ provides that the value of A's property for purposes of the POCA is the market value of A's property less "the amount required to discharge any encumbrance on the property". Where no other person "holds an interest in the property", the value of A's property is simply its market value. A personal claim such as that of the Department is not something that diminishes the value of full ownership or that can be regarded as an encumbrance on the property.

[87] It is also necessary to reflect on the concept of excluding interests from forfeiture in terms of the POCA. Take the Land Bank. It has a personal monetary claim against the mortgagor, CPAD Farm, secured by a mortgage bond, which is a real right. It is the Land Bank's mortgage bond, not its personal claim, that is its "interest in" the property. If the mortgage bond is excluded from the forfeiture, the Land Bank continues to hold the mortgage bond and the curator takes the forfeited property subject to the mortgage bond, which then secures the full personal claim that the Land Bank has against CPAD Farm.

⁶¹ Section 15 is headed "Value of property". Subsection (1) reads:

"For the purposes of this Chapter, the value of property, other than money, in relation to any person holding the property, shall be—

- (a) where any other person holds an interest in the property—
 - (i) the market value of the property; less
 - (ii) the amount required to discharge any encumbrance on the property;
- and
- (b) where no other person holds an interest in the property, the market value of the property."

[88] If the mortgage bond were not excluded from the forfeiture, it would be lost and subsumed into the full ownership of the curator. The Land Bank would continue to enjoy a personal monetary claim against CPAD Farm. If CPAD Farm owned any property that was not subject to forfeiture, the Land Bank could, with the judgment it has on its personal claim, levy execution against the non-forfeited property. The personal claim exists independently of the mortgage bond.

[89] On the first judgment's interpretation, one would have to conclude, however, that the Land Bank has two "interests" in the property, its mortgage bond (which is a real right) and its monetary claim (which is a personal right). Excluding the mortgage bond from the forfeiture would not be enough, because unless the Land Bank's personal claim were also excluded from forfeiture, the Land Bank would lose the personal claim and there would then be no claim which the mortgage bond could secure.

[90] The Department's interpretation thus gives rise to peculiar results. To treat personal monetary claims as "interests in property" effectively means that those personal claims are lost unless they are excluded from the forfeiture order. This turns the POCA into an instrument for expropriating the personal claims not of criminals but of third parties. That is not among the POCA's purposes. There is no reason for a creditor's monetary claim to be in any way affected by a forfeiture order. Although the forfeiture order means that the forfeited property no longer forms part of the assets against which the creditor can levy execution, the creditor's monetary claim should be unaffected and the creditor should still be entitled to proceed against non-forfeited assets.

[91] The Department is in the same position as the Land Bank, except that it has only a personal claim and not also a mortgage bond or other interest in the property. There is no need to exclude its personal monetary claim against CPAD Farm from the forfeiture order because the forfeiture order has had no effect on its personal claim. If the amendment to the order that the first judgment proposes were not made, the Department would still have its personal claim and it could still obtain judgment against

CPAD Farm and levy execution against any non-forfeited property of CPAD Farm. In truth, the exclusion of the Department's supposed "interest" in the property is an attempt to elevate the Department's personal claim into something it is not, namely a claim conferring a special right to levy execution against the property.

[92] Revealingly, the forfeiture order initially granted by the High Court (per Majiki J) did not treat the Department's claim in respect of the grant funding as an interest in the property that fell to be excluded in terms of section 52 of the POCA. No reference was made to an interest held by the Department in the property. The whole property was simply forfeited to the state. To this day, the Department has not applied to have its supposed interest excluded. Perhaps as a result, there is a dearth of evidence as to what the Department's grant funding was actually spent on.⁶²

[93] The first judgment⁶³ endorses the wide view of "interest" taken by Van Oosten J in *Levy*⁶⁴ and holds that this wide view "does not conflict with the overarching purpose of the POCA".⁶⁵ I respectfully disagree. The crucial reasoning in *Levy* is contained in the following passage from that judgment:

"Section 52 of the Act permits a person with an 'interest in the property' to intervene in the forfeiture proceedings and the Court may then 'exclude certain interests in property which is the subject of the order from the operation thereof'. It was clearly the intention of the Legislature to protect the interests of innocent third parties who have become the victims of a fraudulent activity. The measures provided for in the Act, i.e. preservation and forfeiture, are in the nature of execution in an ordinary civil action. Ordinarily a plaintiff in a civil action, having a claim sounding in money against the defendant would only be entitled to payment of his or her claim once judgment has been entered in his or her favour and following upon the execution process. In granting

⁶² CPAD Farm bought the immovable property for R5.5 million and movable assets for R2.2 million. The Land Bank provided a capital sum of R5 082 900 and an additional sum of R1 016 580 and took security over the immovable property by way of its mortgage bond. It may well be that most of the Department's grant funding went towards CPAD Farm's purchase of the movables. The movables were not the subject of the forfeiture order.

⁶³ At [58].

⁶⁴ Above n 10.

⁶⁵ At [60].

the forfeiture order in terms of the Act, the court, in effect, pronounces judgment declaring the property to be executable. It is then that the rights of interested parties become relevant. In casu the monies of the second and third respondent were used to pay the purchase price of the property. Their interest in the property accordingly is the equivalent of those amounts.”⁶⁶

[94] There are several misconceptions in this passage. The first is the proposition that one of the purposes of the POCA is to protect the victims of crime – in that case, the second and third respondents who had lost money in a pyramid scheme. While the POCA has provisions that are concerned with the welfare of the victims of crime, the provisions dealing with exclusions from forfeiture are not among them. The purpose of the exclusion provisions is clear from the requirements that have to be met in order to achieve an exclusion. It is irrelevant whether the person seeking the exclusion was a victim of a crime. What is important is that such person acquired the interest in good faith and for fair value. In the present case, for example, the Land Bank, unlike the Department, was not the victim of any crime.

[95] In short, the purpose of the exclusion provisions is to protect innocent parties who have acquired an interest in forfeited property at fair value. Advancing the interests of the victims of crime is thus not a reason to give “interest” an unnaturally wide meaning. To the contrary, the purposes of the POCA instead militate against giving “interest” too wide a meaning. In terms of section 57 of the POCA, and subject to any order for the exclusion of interests in forfeited property, such property must be deposited into or delivered to the Criminal Assets Recovery Account (Account). Section 69A(1) identifies the purposes for which funds in the Account may be used.⁶⁷

⁶⁶ *Levy* above n 10 at para 21.

⁶⁷ Section 69A(1) provides:

“The property and money allocated to, or standing to the credit of, the Account may be utilised by Cabinet, after considering the recommendations of the [Criminal Assets Recovery] Committee, for—

- (a) the allocation of property and amounts of money from the Account to specific law enforcement agencies;
- (b) the allocation of property and amounts of money from the Account to any institution, organisation or fund contemplated in section 68(c); and
- (c) the administration of the Account.”

The wider the meaning of “interest”, the more exclusions there will be in respect of forfeited property. This will reduce the net funds received by the Account, in turn reducing the amounts available to be spent on the beneficial purposes identified in section 69A(1).

[96] Innocent persons who take the trouble to ensure that their outlay is matched by legally recognised interests in property are quite rightly protected. The purposes of the POCA are not advanced by affording a similar protection to creditors with purely personal monetary claims.

[97] The second misconception in the passage I have quoted from *Levy* is its description of forfeiture as being in the nature of execution in a civil action. By way of forfeiture, the property is supposedly declared executable, thus bringing the rights of persons such as the second and third respondents in that case to the fore. I have some difficulty in understanding what the Judge meant by this. Forfeiture in terms of the POCA is not a form of execution pursuant to a civil action. The National Director of Public Prosecutions does not have a civil claim against the criminal. Forfeiture in terms of the POCA is a punitive measure designed to strip criminals of their tools of illicit trade and their ill-gotten gains. The proceeds of the forfeiture go to the Account, and must be used for the purposes identified in section 69A(1). Forfeiture in a particular case does not create a fund against which the victims of that particular crime can claim.

[98] Extending protection to creditors with personal claims is likely to create confusion in the operation of the POCA. Just by way of example:

- a. The first judgment refers to the link between the Department’s outlay and land reform. Does this mean that a personal claim will only amount to an “interest” if the state was defrauded of money earmarked for land reform?

Section 68(c) provides that one of the objects of the Criminal Assets Recovery Committee is—

“to advise Cabinet in connection with the rendering of financial assistance to any other institution, organisation or fund established with the object to render assistance in any manner to victims of crime.”

If not, what objectives other than land reform qualify? Does the creditor have to be an organ of state?

- b. How direct must the link be between the money lost by the creditor and the forfeited asset? For example, what if, in this very case, the fraudsters had used the money not to buy a farm but luxury cars? Would the Department then have had an “interest” in the cars?
- c. If the fraudsters had used only R500 000 towards buying the farm and squandered the rest on an extravagant lifestyle, would the Department’s “interest” in the property be R500 000 or the full amount of R2 617 100?

[99] Finally, the question may be asked what interests falling short of rights would, on my approach, qualify as “interests” for purposes of the POCA. Of course, my primary position is that the definition of “interest” is exhaustive so that it is not necessary to look beyond legal rights in property. However, if the definition of “interest” is not exhaustive, this might be because the lawmaker, out of an abundance of caution, retained a residual category of “interests” to avoid technical arguments as to whether certain recognised legal interests in land were or were not “rights in land”.

[100] I would thus dismiss the appeal with costs, including the costs of two counsel.

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