Criminal Law

The Proportionality Inquiry in Civil Asset Forfeiture Cases under POCA

Johan Le Grange
jlegrange@diazreus.com

Odette Coetzee
ocoetzee@diazreus.com

Organized crime poses a very serious threat to the security and stability of any country. It is common cause that conventional criminal penalties are inadequate as measures of deterrence when organized crime leaders can retain the considerable gains derived from organized crime. It is widely accepted in the international community that criminals should be stripped of the proceeds of their crimes, the purpose being to remove the incentive for crime, not to punish them.

The passing of the Prevention of Organized Crime Act (POCA) was part of South Africa's strategy to introduce into our legal system the more sophisticated legal weapons developed in other democracies to deal more effectively with organized crime in a human-rights dispensation.

Section 48(1) of POCA provides that if a preservation of property order is in force the National Director of Public Prosecutions (NDPP) may apply for an order forfeiting to the State the property that is subject to a preservation order. Forfeiture proceedings under POCA are proceedings in rem. The focus is not on the wrongdoer but on the property used to commit an offense, or property which constitutes the proceeds of crime. Forfeiture proceedings are not conviction-based, they may be instituted even when there is no prosecution.

Where a forfeiture order is sought, the court undertakes a two-stage inquiry. The first is whether the property in issue was an instrumentality of an offense. The second stage arises after finding that the property was an instrumentality of the offense, in which the court considers whether certain interests should be excluded from forfeiture.

In terms of s 50(1) and (2) of POCA, and subject to s 52 (which deals with the exclusion of interests in property), a high court is obliged to make a forfeiture order if it finds on a balance of probabilities that the property concerned is a) an instrumentality of an offense, b) the proceeds of unlawful activities or c) associated with terrorist and related activities.

However, before granting a forfeiture order under POCA, a court must inquire as to whether such an order would amount to an arbitrary deprivation of property in violation of s 25(1) of the Constitution.

Albeit not a statutory requirement, proportionality is a constitutional imperative. It is an equitable requirement that has been developed by our courts to curb the excesses of civil forfeiture.

In Mohunram and Another v NDPP and Another and Brooks v NDPP (855/16) [2017] ZASCA 42 Van Heerden AJ and Ponnan JA (Willis and Zondi JJA concurring) stated that:

'It is the task of the court to ensure that the deprivation of property that will result from a forfeiture order is not arbitrary. The proportionality assessment is a legal one, based on an evaluation of all the relevant factors in the full factual matrix of the particular case. The onus of establishing that all the requirements for a forfeiture order in terms of s 50 of POCA - including that of proportionality - have been met, rests on the NDPP throughout. However, as some of the factual material relevant to the proportionality analysis will often be peculiarly within the knowledge of the owner of the property concerned, the owner who is faced with a prima facie case established by the NDPP would in the usual course be well-advised to place this material before the court. This does not, however, shift the onus of proof to the owner in question, it merely places on the owner an evidentiary burden or, as it is sometimes called, a burden of adducing evidence in rebuttal.'

To avoid an order for forfeiture being arbitrary, and thus unconstitutional, a court must be satisfied that the deprivation is not disproportionate to the ends that the deprivation seeks to achieve.

The proportionality inquiry in civil asset forfeiture cases under POCA is therefore aimed at balancing the constitutional imperative of law enforcement and combating crime, against the right not to be arbitrarily deprived of property.

Practice Area News

Admissibility of Hearsay Evidence: Law of Evidence Amendment Act 45 of 1988 — application of section 3(1)(c) — admission of hearsay evidence — interests of justice.

In the matter of Kapa v S 2023 (4) BCLR 370 (CC) the Constitutional Court (CC) judgment handed down on 24 January 2023 marks a ground-breaking departure from the approach and treatment of hearsay evidence that has so far been standard practice. Read more **HERE**.

Inquests: In Todd v Magistrate, Clanwilliam and Others 2023 (1) SACR 481 (WCC) the WCC (per Lekhuleni J, Allie J concurring), agreed that the magistrate's decision to hold an informal inquest was wrong and that inquest magistrates were ordinarily under an obligation to call for oral evidence. The WCC was nevertheless of the view that this did not mean that the magistrate's decision had to be reviewed. More was required. The applicant had to satisfy the court that the exercise of the magistrate's discretion was so unreasonable and capricious that it infringed his fundamental rights. Read more **HERE**.

Murder - Premeditation: Murder – a finding of premeditation does not require that death was premeditated or planned: In S v Dube 2023 (1) SACR 513 (MM) the accused was convicted of housebreaking with the intent to assault and murder. Intention in the form of dolus eventualis was found to be present. The only remaining issue to be considered was whether the murder could be considered premeditated in circumstances where the accused had only intended to inflict bodily harm on the deceased. If so, the matter fell within the ambit of s 51(1) of the Criminal Law Amendment Act 105 of 1997 and the accused faced the prospects of a prescribed sentence of life imprisonment. Read more **HERE**.

In the Firm

• **GLOBAL REACH. LOCAL GRASP.**

The Diaz Reus South Africa office (DRT SA INC) is part of a global network of international law offices ("DRT Alliance") that provides clients seamless access to legal services throughout the U.S., Canada, Latin America, Eastern and Western Europe, Asia, Africa, and the Middle East.

Diaz Reus attorneys are well known for helping companies, government entities and individuals transact business and resolve legal disputes at home and abroad.

Diaz Reus South Africa recognized by Leaders League 2019 for Business Law.