THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

Case No: 113/08

SAMUEL AFRICA MAZIBUKO **1st Appellant**
ANNA JEANNETTE MAZIBUKO **2nd Appellant**

and

THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS **Respondent**

Neutral citation: *Mazibuko v The National Director of Public Prosecutions* (113/08) [2009] ZASCA 52 (26 May 2009)

Coram: **MTHIYANE, NUGENT, CACHALIA JJA, HURT and BOSIELO AJJA**

Heard: **12 MARCH 2009**

Delivered: **26 MAY 2009**

Summary: **Prevention of Organised Crime Act – forfeiture of immovable property – property owned by spouses married in community of property – whether interest of one spouse capable of being excluded.**

THE ORDER APPEARS FROM THE JUDGMENT OF NUGENT JA AT PARA [59].

ORDER

On appeal from: **KwaZulu-Natal High Court, Pietermaritzburg (Nicholson J sitting as court of first instance).**

The appeal by the first appellant fails. The appeal by the second appellant succeeds. The order of the court below is substituted by the following orders:

1. The property known as Portion 11 (of 4) of the farm Spitskop 92, Registration Division HT, province of KwaZulu-Natal, is declared forfeit to the state in terms of s 50(1) of the Prevention of Organised Crime Act 121 of 1998.
2. Upon the disposal of the property as contemplated by s 57(1) of the Act the curator bonis shall pay to the respondent one half of the net proceeds of the property. The said proceeds shall be the separate property of the second respondent and excluded from the joint estate of the respondents.
3. The respondents are ordered to pay the costs.

JUDGMENT

BOSIELO AJA:

Introduction

[1] On 2 November 2005 the respondent obtained a preservation order in terms of s 38(2) of the Prevention of Organised Crime Act, 121 of 1998 (POCA)[1] from the KwaZulu-Natal High Court, Durban, in respect of a farm known as portion 11 (of 4) of the farm Spitskop 92, registration HT, province of KwaZulu-Natal ('the farm') and a Venter trailer bearing registration letters and numbers RCY 126 GP ('the trailer'). The farm is jointly owned by the two appellants who are married in community of property.

[2] On 14 December 2007, Nicholson J granted a forfeiture order in terms of s 50(1)(a) of POCA[2] in respect of the farm on the basis that the farm was an instrumentality of an offence, namely the unlawful manufacture of drugs. The appellants are appealing against that order with the leave of the court *a quo*.[3]

[1] S 38(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'.
[2] S 50(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'.
[3] The judgment is reported as *National Director of Public Prosecutions v Mazibuko and Others* 2008 (2) SACR 611 (N).

The facts

Respondent's version

[3] As the facts of this case are to a large extent common cause, I will only refer to the most salient facts which serve to elucidate this judgment. On 22 June 2004 Inspector Van Heerden of the South African Police Service (SAPS) discovered a huge amount of methaqualone at the farm. In addition, he found an assortment of equipment which included some pots, gas cylinders, heaters, rakes, laboratory equipment, gloves and masks. In addition some anthrillic acid, o-toluidine and some finished product of methaqualone were also found at the farm. Inspector Moripe, a forensic analyst attached to the Chemistry Unit, State Forensic Laboratory asserted that all these are used in the manufacture or synthesis of methaqualone. Furthermore, according to Moripe, methaqualone is listed in Part III of Schedule 2, o-toluidine in Part I of Schedule 1 and anthrillic acid in Part I of Schedule 1 of the Drugs and Drug Trafficking Act 140 of 1992. Both anthrallic acid and o-toluidine are essential in the manufacture of methaqualone.

Appellant's version

[4] The first appellant denied that he knew or had any reasonable grounds to suspect that such illegal activities were carried on at the farm. He asserted that he purchased the farm lawfully (which fact was not disputed by the respondent) and further that he purchased it to conduct some lawful farming operations (which fact was disputed by the respondent).

[5] The first appellant stated further that he had sub-let the farm to one Thanyani Justice Makhunga for the grazing of his cattle and the manufacture

of fertilizer. It is common cause that Makhunga never brought his cattle to the farm, nor did he commence to manufacture fertilizer. The first appellant stated that he stayed some 70km away from this farm with his family. He only visited the farm once in a month or once in two months. The last time he had visited the farm before the drugs were discovered was at the end of May 2004.

[6] The second appellant did not testify in opposition to the application for the forfeiture as the respondent had conceded that they had no evidence to prove either that she had knowledge or reasonable grounds to suspect that the farm was used as an instrumentality of an offence. In essence both the first and second appellant relied on the 'innocent owner' defence as contemplated by s 52(2A)(a) of POCA.[4]

[7] I interpose to state that on appeal two crucial concessions were made on behalf of the two appellants. First, that the farm was in fact used as an instrumentality of an offence, and secondly, that the requirement of proportionality was in respondent's favour. What remained therefore was for the appellants to prove, on a balance of probabilities, that they neither knew nor had reasonable grounds to suspect that the farm was used as an instrumentality of an offence in terms of s 52(2A) of POCA.

[4] S 52(2A): 'The High Court may make an order under subsection (1), in relation to the forfeiture of an instrumentality of an offence referred to in Schedule 1 or property associated with terrorist and related activities, if it finds on a balance of probabilities that the applicant for the order had acquired the interest concerned legally, and –
(*a*) neither knew nor had reasonable grounds to suspect that the property in which the interest is held is an instrumentality of an offence referred to in Schedule 1 or property associated with terrorist and related activities'.

Judgment of the court *a quo*

[8] After analysing the evidence, the learned judge found the first appellant's version to be grossly improbable. He found that the illegal activities which were carried out at the farm were of such a nature and magnitude that, if the first appellant had acted like a reasonably diligent and vigilant owner, he would have known of their existence and, unless he was a party thereto, would have stopped them. Furthermore, the learned judge made adverse credibility findings against the first appellant. In fact he found that the first appellant 'told a most improbable story badly'. Based on this reasoning, the learned judge concluded that the first appellant knew of the unlawful manufacture of drugs at the farm.

[9] It is clear from the judgment of the court below that the second appellant's position gave the learned judge serious problems, mainly because it was conceded by the respondent that she was an 'innocent owner'. However, what made the problem rather intractable was that, by virtue of her marriage in community of property to the first appellant, she had no interest which could be separated from the joint estate. This is because her interest in the farm formed an undivided and indivisible part of their joint estate which, the learned judge correctly described as a species of what is known as 'tied ownership'. Based on the finding that it was legally impossible if not impracticable to excise her interest from the joint estate, innocent though she is, the learned judge declared the proceeds of the farm forfeit to the state.

Appellant's submissions

[10] At the hearing of the appeal, Mr Engelbrecht SC appearing for both appellants raised two crisp issues for argument. The first issue was whether the court below was correct in its credibility findings against the first appellant. The second was whether the court below was correct in declaring the second appellant's undivided and vested interest in the farm forfeit to the state.

[11] Regarding the first issue, Mr Engelbrecht submitted that the court below erred in finding that the first appellant knew of the illegal activities at the farm as the evidence is clear that he did not visit his farm regularly and further that no evidence was led that, at the time when he had visited the farm, the substances and equipment found by Van Heerden and his colleagues, were present on the farm. He described this as a big lacuna in the respondent's case.

[12] However, when it was pointed out to him that it had been conceded on behalf of the two applicants at the hearing of the application that the farm was used as an instrumentality of an offence and further that proportionality was in the respondent's favour, Mr Engelbrecht capitulated. Quite importantly, Mr Engelbrecht further conceded that, based on *R v Dhlumayo* 1948 (2) SA 677 (A), he could not argue against the adverse credibility findings made by the court below against the first appellant. No further submissions were made on behalf of the first appellant.

[13] Concerning the second appellant's case, Mr Engelbrecht argued that, because the respondent admitted that she had no knowledge of the illegal

activities which took place at the farm which made her an ‘innocent owner’, it was unfair to declare her interest in the farm forfeit to the state. He argued further that the court below erred in finding as a basis for its decision, that it could not make an order excluding the second appellant’s interest in the property from the forfeiture order as it would be impossible to give effect to such an order. In conclusion, he submitted that as a court considering possible forfeiture of property has a discretion in terms of s 52(1) to exclude certain interests from forfeiture, Nicholson J should have exercised his discretion in favour of the second appellant as she is an innocent owner.

Respondent’s submissions

[14] Mr Govindasamy SC, appearing for the respondent together with Ms Naidoo and Mr Molelle, argued firstly that the evidence against the first appellant was overwhelming and further that the judgment of the court below was unassailable.

[15] Concerning the issue of the second appellant’s interest in the farm, he submitted that it was not feasible that her interest in the farm could be exempted from the order of forfeiture. He based this submission on the fact that the appellants are married to each other in community of property in terms whereof they are both joint owners of the farm. As a result, she merely holds an undivided and indivisible interest in the farm. In developing his argument further, Mr Govindasamy submitted that allowing her to retain a half share of the property would actually defeat the purpose of POCA, as the first appellant, would, by virtue of the marriage in community of property, be automatically entitled to a half-share in her share of the farm. This, so he submitted, would be tantamount to allowing the first appellant to enjoy the

proceeds of his illegal activities which is inimical to the spirit and purpose of POCA. To avoid this situation, Mr Govindasamy argued that the second appellant's remedy lies in her right to claim against the joint estate in the event where she can prove that she suffered some loss as a result of the first appellant's unlawful conduct.

Discussion

[16] It is common cause that the criminal operations that were going on at the farm were extensive. That this was a factory for the manufacture of drugs admits of no doubt. Quite importantly even the first appellant was unable to dispute this fact. It follows in my view, that if indeed the first appellant did not have actual knowledge of these operations as he claimed, it is because he did not act like a reasonably diligent and vigilant property owner as envisaged by s 1(3)(a) and (b) of POCA.[5]

[17] The first appellant cannot abdicate responsibility over his farm. Given the magnitude of the illegal activities at the farm, there is no way in which the first appellant could not realistically have become aware of what was happening on the farm. The activities on the farm were carried out brazenly and without any attempt to hide them. The conclusion that the first appellant was either complicit in these illegal activities or that he deliberately turned a blind eye to them is justified.

[5] S 1(3): 'For the purposes of this Act a person ought reasonably to have known or suspected a fact if the conclusions that he or she ought to have reached are those which would have been reached by a reasonably diligent and viligant person having both-
(a) the general knowledge, skill, training and experience that may reasonably be expected of a person in his or her position; and
(b) the general knowledge, skill, training and experience that he or she in fact has'.

[18] As the owners of the property, the appellants had the responsibility to ensure that the farm was not used for unlawful purposes. The first appellant explained that he had sub-let the farm to Makhunga. However, on his own version, he showed no interest in supervising the farm. Worse still he showed no interest in what Makhunga was doing at the farm. It makes perfect sense that where a property owner allows his or her property to be used to conduct criminal activities, the law should take its course. As this Court observed in *NDPP v R O Cook Properties (Pty) Ltd, NDPP v 37 Gillespie Street Durban (Pty) Ltd; NDPP v Seevnarayan*[6] at para [28].

'. . . We agree that property owners cannot be supine. In particular, we endorse the notion that the State is constitutionally permitted to use forfeiture, in addition to the criminal law, to induce members of the public to act vigilantly in relation to goods they own or possess so as to inhibit crime. In a constitutional State law-abiding property-owners and possessors must, where reasonably possible, take steps to discourage criminal conduct and to refrain from implicating themselves or their possessions in its ambit. And the State is entitled to use criminal sanctions and civil forfeitures to encourage this. Here constitutional principle recognises individual moral agency and encourages citizens to embrace the responsibilities that flow from it.'

I am in respectful agreement with this dictum.

[19] The appellants having conceded the two cardinal issues of instrumentality of an offence and proportionality, coupled with the exposition set out above, I am of the view that the order of forfeiture against the first appellant by the court below is correct.

[20] I now turn to deal with the second appellant's case. I must confess that I find the position of the second appellant rather complex and highly

[6] 2004 (2) SACR 208; 2004 (8) BCLR 844; [2004] 2 All SA 491 (SCA) para 28.

controversial. There are two aspects which compound her position. Firstly it is because the respondent had accepted that she had no knowledge of the illegal activities which were conducted at the farm. Undoubtedly she is an innocent owner. However what compounded the problem further is the fact that the farm in issue formed part of the joint estate between the appellants and that it was therefore, impracticable to divide and exclude her interest from forfeiture.

[21] In terms of s 52(1) of POCA[7] a court before which an application for forfeiture is made has a discretion whether to grant the order or not. If an applicant satisfies the requirements set out in s 52(2A), the court may exclude his or her interest in the property from being declared forfeit to the State. In terms of the section such an applicant has to prove that he or she acquired the property lawfully and further that he or she did not know or did not have reasonable grounds to suspect that the property was used as an instrumentality of an offence referred to in Schedule 1. As the respondent had accepted that the second appellant is an 'innocent owner' I am of the view that the forfeiture of her interest brings the constitutionality of such an order to the fore.

[22] It is generally acknowledged that the effects of forfeiture are draconian and potentially invasive of the rights of people to their properties. There is an ever-present threat of a serious conflict between the right to property as provided for in s 25(1) of the Constitution and an order for the

[7] S 52(1): 'The High Court may, on application-
(a) under section 48 (3); or
(b) by a person referred to in section 49 (1),
and when it makes a forfeiture order, make an order excluding certain interests in property which is subject to the order, from the operation thereof'.

forfeiture of property under s 50(1) of POCA which can result in far-reaching consequences if not managed with care. I agree with Nkabinde J in *Prophet v National Director of Public Prosecutions*[8] where she expressed the following caution:

'While the purpose and object of Ch 6 must be considered when a forfeiture order is sought, one should be mindful of the fact that unrestrained application of Ch 6 may violate constitutional rights, in particular the protection against arbitrary deprivation of property particularly within the meaning of s 25(1) of the Constitution, which requires that "no law may permit arbitrary deprivation of property". In *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance ("FNB")*[9] this Court held that "arbitrary" in s 25(1) means that the law allowing for the deprivation does not provide sufficient reason for the deprivation or allows deprivation that is procedurally unfair. The Court said:

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

In my view, the second appellant's position required such care and circumspection in maintaining a judicious balance between the purpose of POCA and the rights of the second appellant who is an 'innocent owner'. With respect it seems to me that the learned judge failed to strike such a balance.

[23] Given the fact that the second appellant is innocent of any wrongdoing, the forfeiture of her interest in the farm, in my view, raises a number of critical constitutional questions, i.e. how would forfeiture of her interest advance the main purposes of POCA? What public interest

[8] 2007 (6) SA 169 (CC) para 61.
[9] 2002 (4) SA 768 (CC); 2002 (7) BCLR 702 para 100.

would the forfeiture of her interest in the farm serve? How is the forfeiture of her interest in the farm rationally connected to the purpose to be attained by POCA? What justification is there for depriving her of her interest in the farm? It seems that these issues were not properly considered by the court below. Clearly the deprivation of her interest in the farm is constitutionally indefensible and therefore arbitrary as there is no sufficient reason for the deprivation as stated in *First National Bank v Minister of Finance* at para 100 where Ackerman J set out the criteria for sufficient reason to be as follows:

‘(a) It is to be determined by evaluating the relationship between means employed, namely the deprivation in question and ends sought to be achieved, namely the purpose of the law in question.

(b) A complexity of relationships has to be considered.

(c) In evaluating the deprivation in question, regard must be had to the relationship between the purpose for the deprivation and the person whose property is affected.

(d) In addition, regard must be had to the relationship between the purpose of the deprivation and the nature of the property as well as the extent of the deprivation in respect of such property.

(e) Generally speaking, where the property in question is ownership of land or a corporeal moveable, a more compelling purpose will have to be established in order for the depriving law to constitute sufficient reason for the deprivation than in the case when the property is something different and the property right something less extensive. This judgment is not concerned at all with incorporeal property.

(f) Generally speaking, when the deprivation in question embraces all the incidents of ownership, the purpose for the deprivation will have to be more compelling than when the deprivation embraces only some incidents of ownership and those incidents only partially.

(g) Depending on such interplay between variable means and ends, the nature of the property in question and the extent of its deprivation, there may be circumstances when sufficient reason is established by, in effect, no more than a mere rational

relationship between means and ends; in others this might only be established by a proportionality evaluation closer to that required by s 36(1) of the Constitution.

(h) Whether there is sufficient reason to warrant the deprivation is a matter to be decided on all the relevant facts of each particular case, always bearing in mind that the enquiry is concerned with "arbitrary" in relation to the deprivation of property under s 25.'

Regrettably, I find that the deprivation of the second appellant's interest in the farm does not pass the test enunciated in *First National Bank*.

[24] It is trite that the right to property is a fundamental right deeply ensconced in the Bill of Rights. Section 25(1) of the Constitution[10] prohibits, in clear terms, any arbitrary deprivation of property. On the other hand s 7(2) of the Constitution[11] obliges the state to respect, protect, promote and fulfil the rights in the Bill of Rights. In addition s 39(1) of the Constitution requires our courts, when interpreting the Bill of Rights, to promote the values that underlie an open and democratic society based on human dignity, equality and freedom. Undoubtedly this places a duty on every court which has to consider possible forfeiture of property to be careful not to make orders which may exceed the proper and legitimate objectives striven for by POCA. A failure to do so may result in orders which may be unduly invasive of the rights of innocent owners and which may amount to an abuse which is not constitutionally defensible. This salutary approach was enunciated as follows in *NDPP v R O Cook Properties* in para 29:

'We therefore agree that the Act requires property owners to exercise responsibility for their property and to account for their stewardship of it in relation to its possible criminal

[10] S 25(1): 'No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property'.
[11] S 7(2): 'The state must respect, protect, promote and fulfil the rights in the Bill of Rights'.

utilisation. But the pursuit of those statutory objectives cannot exceed what is constitutionally permissible. *Forfeitures that do not rationally advance the inter-related purposes of ch 6 are unconstitutional. Deprivations going beyond those that remove incentives, deter the use of property in crime, eliminate or incapacitate the means by which crime may be committed and at the same time advance the ends of justice are, in our view, not contemplated by or permitted under the Act.*' (My emphasis.)

[25] I have no doubt that, based on the admitted fact that the second appellant is an 'innocent owner', who has committed no wrong, whether intentional or negligent, the forfeiture order in so far as it affects her does not pass constitutional muster. It offends society's notions of what is fair and just. What is worse it goes beyond the core purpose of POCA. It is clear from the judgment of the court below that the learned judge was mindful of the fact that the forfeiture of the whole farm might be offensive to the constitutional values of equality and dignity and quite importantly might also breach a fundamental principle of our criminal law that the innocent should not be punished. This notwithstanding, the learned judge proceeded to declare the proceeds of the farm, including the second appellant's interest, forfeit to the state. It appears to me that to deprive second appellant of her interest constitutes a breach of the constitutional principle of equality. (See *Mohunram and Another v National Director of Public Prosecutions* (Law Review Project as *Amicus Curiae*).[12]

[26] In declining to exclude the second appellant's interest in the farm from forfeiture, the learned judge in the court below was of the view that it would deprive the respondent of its redress as stipulated in the statute or

[12] 2007 (2) SACR 145 (CC) para 146.

common law. To my mind, the learned judge misconstrued the real and main purpose underpinning POCA. The primary purpose of POCA is to prevent organised crime. In cases where property is used as an instrumentality of an offence, this can be achieved by having such property declared forfeit to the State. The intention underpinning such forfeiture is not necessarily to punish the offender, but to deprive him or her of the instrument used to facilitate or commit the offence. Such a forfeiture is intended mainly to cripple or paralyse the illegal activities which are carried on. Once this has happened, the objects of POCA will have been satisfied.

[27] However, the pertinent question now remains: once the property is declared forfeit to the state, what is its ultimate fate? As POCA was never intended to enrich the state, it follows that the state cannot own the farm. The state through the curator bonis is obliged by s 57(1)(c) of POCA to 'dispose of property forfeited under s 56(2) by sale or any other means and deposit the proceeds of the sale or disposition into the Account.' Once the farm has been sold by the curator bonis, nothing prevents him from paying to the second appellant her half share from such proceeds once all legitimate claims against the farm have been settled. This is because the forfeiture is aimed at the instrumentality and not the proceeds. Self-evidently such proceeds can never be equated with an instrumentality of an offence.

[28] Given the peculiar circumstances of this case I do not agree that the order sought by the second appellant is a legal impossibility as the respondent's counsel submitted. What the court below should have done was to grant the order of forfeiture of the farm subject to the second appellant's entitlement to a half share of the proceeds upon sale of the farm. To my

mind this is legally permissible because the forfeiture order is primarily against the farm as an instrumentality of an offence and not the proceeds from the sale of the farm. Undoubtedly such an order would have struck the delicate balance between the second appellant's interest and the main purposes of POCA.

[29] Although there is not much judicial authority for the above proposition, there is some considerable support from some academic writers that even during the existence of the marriage in community of property, parties can be allowed to keep separate property which does not form part of the joint estate eg donations between spouses, gifts and bequests made to one spouse with the express condition that such be excluded from the joint estate; damages for non-patrimonial loss resulting from delict committed by a third party or one spouse against the other; instances where one spouse has despoiled the other spouse of a thing over which such spouse had peaceful and undisturbed possession, property excluded by ante nuptial-contract, and certain life insurance policies effected by the husband in favour of his wife or ceded by him to her, or effected by the wife on her own life or that of her husband, as also the proceeds of such policies.[13]

[30] More importantly, the Matrimonial Property Act 88 of 1984 makes provision for separate property to be owned separately by one spouse to

[13] HR Hahlo, *The South African Law of Husband and Wife*, 5ed (1985) pp 164-169; *Schäfer*, Family Law Service Issue 49, p 20(1); Dale Hutchison, Belinda Van Heerden, DP Visser and CG Van der Merwe, Wille's Principles of South African Law, 8ed; *Van den Berg v Van den Berg* 2003 (6) SA 229 (T)) 232G-233D.

the exclusion of the other.[14] That the Matrimonial Property Act has ushered in drastic changes regarding the inviolability of the joint estate was acknowledged by Moseneke DCJ in *Van der Merwe v Road Accident Fund (Women's Legal Centre Trust as Amicus Curiae)*[15] where he stated the following at para 30:

> '. . . On 1 November 1984, chs 2 and 3 of the Act jettisoned much of the gender differentiation found in the common law of marriage in community of property. The legislation made drastic inroads into the theoretical unity and inviolability of the joint estate and recast the common law of marriage irreversibly . . .'.

It should be clear from the above exposition that the learned judge could have made an order that the second appellant's share of the proceeds after the sale of the farm be paid to her to form her separate property. To my mind, this would have ensured that the forfeiture order does not go beyond the legitimate limits of the objects of POCA. Quite importantly such an order would not compromise the main objects of POCA.

[31] Based on the exposition set out above, I am of the view that there is no legal impediment to making an order that the second appellant be paid her half share of the proceeds after the sale of the farm as a failure to do so would inevitably result in punishing the innocent party. In order to avoid her half share falling back into the joint estate in respect whereof

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[14] S 17(1)(a): 'A spouse married in community of property shall not without the written consent of the other spouse institute legal proceedings against another person or defend legal proceedings instituted by other person, except legal proceedings-
(a) in respect of his separate property;
. . . .'
S 18: 'Notwithstanding the fact that a spouse is married in community of property-
(a) any amount recovered by him by way of damages, other than damages for patrimonial loss, by reason of a delict committed against him, does not fall into the joint estate but becomes his separate property;
. . . .'

[15] 2006 (4) SA 230 (CC).

the first appellant remains a joint owner, her half share of the nett proceeds from the sale of the farm will have to be paid into her separate account thus making it her separate property. To my mind, this will ensure that the second appellant who is an innocent owner is not unduly punished by a deprivation of her interest where there is no legal or rational justification.

[32] There is a further comment I wish to make about the order of the court below. Instead of making an order for the forfeiture of the property in terms of s 50(1) of POCA, Nicholson J made an order 'declaring forfeit to the State the proceeds of the property . . .'. It is clear that this order is erroneous and was made *per incuriam*. Chapter 6 of POCA which is the one relevant to these proceedings is headed 'Civil Recovery of Property'. Moreover, all the relevant sections ie ss 38 to 60 under Chapter 6 refer to property or interest in property and not the proceeds of the property. It follows that the order by the learned judge has to be corrected.

[33] I now have to deal with the question of costs. The fact that the first appellant has failed whilst the second appellant succeeded in the appeal makes it difficult to apportion the costs of the appeal. However it does not appear to me to be fair and just to mulct the first appellant with all the costs of appeal, particularly as he has already had to pay the costs of the application to exclude his interest from forfeiture (albeit that such costs are to be paid from the joint estate). To my mind fairness and justice require that each party should bear its own costs.

[34] In the circumstances, I would make the following order:

1. The appeal by the first appellant is dismissed.

2. The appeal by the second appellant succeeds to the extent that the order by the court below is varied to read as follows:

2.1 An order is hereby granted in terms of s 50(1) of the Prevention of Organised Crime Act 121 of 1998 ('the Act') declaring forfeit to the State the whole of the farm belonging to the first and second appellants described as: 'Portion 11 (of 4) of Spitskop No 92 Registration Division HT, Province of KwaZulu Natal in extent 124, 2096 (one two four thousand comma two zero nine six) hectares', subject to the following conditions:

(a) The curator bonis appointed in terms of the preservation order made on 2 November 2005 shall continue to act in such capacity.

(b) The curator bonis shall, as at the date on which the forfeiture order shall take effect, be empowered to perform the following functions:

(i) to dispose of the property by sale or other means;

(ii) to settle all legitimate claims against the property, including the balance, if any, on the mortgage bond registered over the immovable property in favour of one Anthony Perreira Jones and Susara Johanna Elizabeth Jones held under bond No 17313/03;

(iii) to pay one half of the balance of the nett proceeds of the farm to the second appellant. The said proceeds shall constitute the second appellant's separate property which shall be excluded from the parties' joint estate;

(iv) to pay the balance of the proceeds into the Criminal Asset Recovery Account.

3. The Registrar of the KwaZulu Natal High Court, Durban is directed to publish a notice of this order in the Government Gazette as soon as possible.

4. Each party is to pay its own costs.

L O BOSIELO
ACTING JUDGE OF APPEAL

NUGENT JA (MTHIYANE, CACHALIA and HURT AJA CONCURRING)

[35] I do not think the judgment of my colleague Bosielo AJA adequately addresses what I consider to be the central difficulty that presents itself in this case and I am also not in full agreement with the order that he proposes. For those reasons I set out briefly the reasons that found my conclusion.

[36] The National Director of Public Prosecutions (NDPP) applied to the court below under s 48 of the Prevention of Organised Crime Act 121 of 1998 (POCA) for an order forfeiting to the state portion 11 of the farm Spitskop 92 (I will refer to it as the farm). The farm was owned by the appellants, who are married in community of property.

[37] Section 50(1) authorised that court, 'subject to section 52', to make a forfeiture order if it found, as a matter of probability, that the farm was an 'instrumentality' of an offence referred to in Schedule 1. In this case it was not disputed that the farm was an instrumentality of the offence of manufacturing drugs in contravention of s 3 of the Drugs and Drug Trafficking Act 140 of 1992 (a Schedule 1 offence). It was also not in dispute that a forfeiture order would (in ordinary circumstances) be

proportionate to the purposes of the statute and thus constitutionally permissible.[16] The court accordingly granted a forfeiture order.

[38] There is an observation that I need to make concerning the form of the order before I turn to the issues that arise in this appeal. The court below (Nicholson J) declared forfeit to the state 'the proceeds' of the farm and not the farm itself. (Further orders authorised the curator bonis to dispose of the farm; deduct his fees and expenses; pay the balance outstanding on a mortgage bond; and pay the proceeds into the Criminal Asset Recovery Account.[17]) A forfeiture order in those terms was not strictly correct. The 'instrumentality' of the offence that was liable to forfeiture was the farm. If a forfeiture order was to be made it ought to have ordered forfeiture of the farm and not its proceeds (which were not the instrumentality of the offence). Once such an order is made then by operation of law the farm vests in the curator bonis on behalf of the state,[18] who is required to dispose of the property, and to deposit the proceeds to the Account.[19] (I think it is implicit that the moneys so deposited accrue to the state.) To that extent the order of forfeiture falls to be corrected.

[39] Apart from the terms in which the order was granted, as I mentioned above, Nicholson J cannot be faulted for granting a forfeiture order and the appeal is not directed to his order in that respect. The appeal is confined to

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[16] *National Director of Public Prosecutions v R O Cook Properties (Pty) Ltd*; *National Director of Public Prosecutions v 37 Gillespie Street Durban (Pty) Ltd*; *National Director of Public Prosecutions v Seevnarayan* 2004 (2) SACR 208 (SCA) para 74; *Prophet v National Director of Public Prosecutions* 2006 (1) SA 38 (SCA) paras 30 and 37; *Prophet v National Director of Public Prosecutions* 2007 (6) SA 169 (CC) paras 61 and 62.
[17] Established by s 63 of POCA.
[18] Section 56(2).
[19] Section 57(1).

his order to exclude from the order the appellants' interests in the property. (Needless to say, the effect of such an order would have been to nullify the forfeiture.)

[40] Section 52 of POCA provides what has loosely been called an 'innocent owner' defence to a person whose interests are affected by a forfeiture order (though that is a misnomer because, as pointed out in *Cook Properties*, 'innocence [of the offence] is not enough').[20] That section permits a court to exclude 'from the operation of [a forfeiture order]' what are called 'certain interests' in the property concerned, if it is shown by the applicant for such an exclusion that the interest was legally acquired, and that he or she 'neither knew nor had reasonable grounds to suspect' that the property in which the interest is held is an instrumentality of the offence.[21]

[41] Both appellants applied for orders excluding from the operation of the forfeiture order such interests as they each had in the farm. The court below heard oral evidence on the question whether the appellants either knew or had reasonable grounds to suspect that the farm was an instrumentality of the offence.

[42] It found that Mr Mazibuko must have been aware that the farm was being used for the manufacture of drugs. On that basis Mr Mazibuko did not fall within the terms of the section and the court below declined to exclude his interest. The appeal by Mr Mazibuko was confined to challenging that factual finding. I do not think it is necessary to repeat the evidence that was

[20] Para 24.
[21] Section 52(2A).

before the learned judge on that issue, some of which appears from the judgment of my colleague. It is sufficient to say that there was ample evidence to support that finding and the appeal by Mr Mazibuko must fail.

[43] The position with regard to Mrs Mazibuko is different and it is to that issue that most of the argument in this appeal was directed. It is not in dispute that Mrs Mazibuko was neither aware, nor had grounds to suspect, that the property was an instrumentality of an offence and that she fell within the provisions of the section. The court thus had a discretion to order the exclusion of her interest. There can be no question that she would have ordinarily been entitled to such an order, because there were simply no grounds for refusing it. The effect of a refusal would have been to deprive her of property arbitrarily in conflict with s 25(1) of the Bill of Rights (see the discussion on that issue in *National Director of Public Prosecutions v R O Cook Properties (Pty) Ltd et al*).[22]

[44] I have no doubt that Nicholson J fully appreciated the implications of the Bill of Rights in that regard, and would have ordered the exclusion of Mrs Mazibuko's interest had he considered it possible to do so, and I do not think criticism of the learned judge on that score is merited. I think it is apparent from his judgment that he declined to make an exclusion order only because he considered himself unable to do so as a matter of law.

[45] The argument that was presented before him on behalf of the NDPP, and repeated in this court, was that the interests in the property enjoyed respectively by Mr and Mrs Mazibuko were not capable in law of separation.

[22] 2004 (2) SACR 208 (SCA).

That being so, it was argued, Mrs Mazibuko's interest in the property (more correctly, in the rights of ownership in the property), which was not liable to forfeiture, could not in law be excised from the interest of Mr Mazibuko, which was liable to forfeiture. Accepting that argument the learned judge, reluctantly, declined to make an exclusion order.

[46] I agree with the argument that was presented on behalf of the NDPP (and accepted by the court below) so far as it goes.

[47] Ordinary rights of co-ownership (sometimes called 'free' co-ownership) would be capable of being separated from one another because they are held separately by the co-owners. As Professor CG Van der Merwe has expressed it (my translation):[23]

'Although the property belongs to the co-owners communally, each co-owner can dispose of his or her undivided share independently. Because each co-owned share is viewed as separate property, each co-owner may deal with his or her undivided share or a part thereof without the co-operation of his associates, and even against their will.'[24]

[48] But we are not concerned in this case with the ordinary rights of co-owners. The appellants were married in community of property and the farm belonged to their joint estate. The rights of spouses who are married in community of property – sometimes called 'tied' co-ownership – are not

[23] CG Van der Merwe *Sakereg* 2ed (1989) p 384-5. Also *Silberberg and Schoeman's The Law of Property* 5ed (2006) by PJ Badenhorst, Juanita M Pienaar and Hanri Mostert p 135.

[24] Hoewel die saak gemeenskaplik aan die mede-eienaars behoort, kan elke mede-eienaar selfstandig oor sy onverdeelde aandeel in die saak beskik. Omdat elke mede-eiendomsaandeel as 'n selfstandige vermoënsobjek beskou word, kan elke mede-eienaar vryelik met sy onverdeelde aandeel of 'n gedeelte daarvan sonder die medewerking van sy deelgenote, en selfs teen hulle wil, handel. Hierdie kenmerk onderskei, soos reeds vermeld, vrye mede-eiendom van gebonde mede-eiendom.

divisible. As King J expressed it in his thorough analysis of the nature of such rights in *Ex parte Menzies et Uxor:*[25]

'[T]he co-ownership of their joint estate by spouses married in community of property is a species of 'tied' co-ownership, in which the shares of the spouses are not only undivided but also indivisible.'

He relied in reaching that conclusion on, amongst other writers, Lee and Honoré *Family, Things and Succession,*[26] in which the authors describe that form of co-ownership as follows:

'However, this co-ownership is not the normal Roman "free" co-ownership (*communio pro partibus indivisis*) with freely disposable shares and the possibility to demand a division at any time, but can be described as "tied up" co-ownership ("*gebonde mede-eindom",* the "*Miteigentum zu gesamter Hand*" of German law)'.

[49] That being so it seems to me that an order that purported to excise a portion of indivisible rights that were to vest in the curator bonis would have been a nonsense. One might ask how the curator bonis would have been capable of alienating only part of the indivisible rights of ownership while at the same time retaining the balance. In that respect I think that the conclusion reached by Nicholson J was correct.

[50] But I do not think the matter ends there. While the court below was not capable of ordering the exclusion of Mrs Mazibuko's interest from the rights that would vest in the curator bonis I agree with Bosielo AJA that it was capable of ordering a division of the proceeds once the property was sold. My difficulty with the judgment of my colleague is that it does not dispose of the argument raised by the NDPP and disclose what construction

[25] 1993 (3) SA 799 (C) 811E-G. See, too, *Sakereg,* above, 378-9, HR Hahlo *The South African Law of Husband and Wife* 5ed (1985).
[26] Page 810H-I.

he places on the section to yield that result. I do not think it is sufficient merely to point to the fact that the argument of the NDPP would yield a result that is constitutionally offensive and take the matter no further. If a proper construction of the section would yield an unconstitutional result, that would mean that the section is invalid. The question that arises in this case is whether the section is capable of a construction that avoids that result.

[51] Having found that the rights in the property itself were not capable of separation in my view the learned judge might have gone a step further, though I do not fault the learned judge for not having done so because that was not raised before him in argument.

[52] I do not think that an exclusion order need be confined to excluding the interest from the rights that vest in the curator bonis immediately upon a forfeiture order being made. The section allows for the interest to be excluded from the 'operation of [the forfeiture order]'. As I see it a forfeiture order does not operate only to vest the property in the state. It operates as much to trigger the authority that is conferred upon the curator bonis to alienate the property, to require the curator bonis to deposit the proceeds to the Account, and to entitle the state to retain those proceeds. I think that all those consequences are capable of being said to arise from the 'operation of the [forfeiture order]'.

[53] It seems to me in those circumstances that it falls within the power of a court to exclude the interest of a party from any stage of its operation and not only from the immediate effect of the order, which is to vest the rights in the property in the curator bonis. I think it might equally exclude the interest

from the operation of the order so far as the order operates to require the curator bonis to deposit the proceeds to the Account.

[54] I think that Mrs Mazibuko has as much interest in the proceeds of the property as she has in the property itself, albeit that the accrual of that interest might be contingent on its sale, and I see no reason why that contingent interest does not fall within the wide definition of the term in the statute. Clearly the proceeds of the sale are susceptible to separation. It seems to me in the circumstances that Mrs Mazibuko's contingent interest in the proceeds of a sale is capable of being excluded from the operation of the order so far as the order operates to require the curator bonis to deposit the proceeds to the Account. Indeed, s 57(1) seems to me to contemplate precisely that, in that it requires the curator bonis to deposit the proceeds to the Account, but only 'subject to any order for the exclusion of interests … under s 52'.

[55] The decided cases on POCA have all been conscious of the potential that the statute has to invade constitutionally protected rights – in this case the right against arbitrary deprivation of property[27] – and have been careful to avoid that occurring when construing the meaning of its provisions. As this court said in *Cook Properties*:

'[The provisions of POCA] must be construed consistently with the Constitution of the Republic of South Africa Act 108 of 1996. The Bill of Rights provides that "no law may permit arbitrary deprivation of property"… The Constitutional Court has held that a deprivation of property is arbitrary when the statute in question does not provide sufficient reason for the deprivation or is procedurally unfair. What 'sufficient reason' is

[27] Section 25(1) of the Constiution.

may vary from statute to statute… But the Court held that non-arbitrariness at any event requires a rational relationship between the deprivation and the legislative ends sought to be attained through it:'(At para 15).

I think that the section is at least capable of the construction that I have given and it is a construction that we should adopt so as to avoid unconstitutionality.

[56] There remains one difficulty. While the joint estate persists any moneys that are paid to Mrs Mazibuko will fall into the joint estate and accrue as much to her husband, who has forfeited his interest in the property, as it will accrue to her. It is well recognised, however, that property is capable of being excluded from a joint estate that arises from the community, as, for example, when property is bequeathed or donated on condition that it is excluded.[28] That being so I think it falls within the capacity of a court that makes an exclusion order to order as well that the excluded interest is to accrue only to the spouse concerned, and to be excluded from the joint estate.

[57] There are some further matters that arise from the ancillary orders that were made. The court below ordered that the curator bonis who had been appointed earlier should continue in office. The continuation in office of the curator bonis follows as a matter of law[29] and I see no necessity for such an order. It also directed the curator bonis to settle any outstanding balance on a mortgage bond that was registered against the property before paying the proceeds to the Account. The rights that vest in the curator bonis are necessarily subject to other real rights in the property and will be accounted

[28] Hahlo, above, pp.164-9.
[29] Section 56(1).

for in the ordinary course upon transfer of the property. Once more I do not think that an order to that effect is necessary. The court below also directed that the fees and expenditure of the curator bonis must be deducted from the proceeds of the property. I do not think that order was competent. The incidence of the costs and expenses arising from a forfeiture order is regulated by s 57(5), which requires those costs and expenses to be defrayed from moneys appropriated for that purpose by Parliament.

[58] There remains the question of costs. The costs of the appeal are not capable of being divided as between Mr Mazibuko (who has failed) and Mrs Mazibuko (who has succeeded). In my view it would be just in the circumstances to make no order in relation to those costs. As for the costs in the court below they were attributable almost solely to Mr Mazibuko's failed attempt to exclude his interest and I see no reason to alter the order of the court below (which has the effect that the costs will fall upon the joint estate).

[59] The appeal by the first appellant fails. The appeal by the second appellant succeeds. The order of the court below is substituted by the following orders:

1. The property known as Portion 11 (of 4) of the farm Spitskop 92, Registration Division HT, province of KwaZulu-Natal, is declared forfeit to the state in terms of s 50(1) of the Prevention of Organised Crime Act 121 of 1998.
2. Upon the disposal of the property as contemplated by s 57(1) of the Act the curator bonis shall pay to the respondent one half of the net

proceeds of the property. The said proceeds shall be the separate property of the second respondent and excluded from the joint estate of the respondents.

3. The respondents are ordered to pay the costs.

R W NUGENT
JUDGE OF APPEAL

Appearances:

For appellants:	J Engelbrecht SC
	Instructed by: Jasat & Jasat Attorneys, Pietermaritzburg c/o Du Toit Louw Botha Inc, Bloemfontein
For respondent:	M Govindasamy SC A Naidoo K Molelle
	Instructed by: The State Attorney [Kwazulu-Natal], Durban c/o The State Attorney, Bloemfontein