PREVENTION OF ORGANIZED CRIME ACT 121 OF 1998 : A CONSTITUTIONAL ANALYSIS OF SECTION 2,4,5,6, CHAPTER 5 AND CHAPTER 6

by

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ACKNOWLEDGEMENT
A special acknowledgement to my wife, Juanita, my friend Alastair Mcthomas, and family who kept me motivated during this journey and also Supervisor, Professor Z.N.Jobodwana assisted me during the writing of my thesis.

DECLARATION
I declare that Prevention of Organised Crime Act 121 of 1998: A Constitutional Analysis of Section 2, 4, 5, 6 and Chapter 5 and 6 is my own work and that all sources that I have used or quoted have been indicated and acknowledged by means of complete reference.

Peter-John Damon
SUMMARY

Since the advent of the new democratic order established under the 1996 Constitution, South Africa has been plagued with many new challenges. One of the facts that our new democratic state could not ignore was the rapid increase in both national and international, organized criminal activity. The South African Legislature realizing the desire to combat serious criminal activities, introduced into South African Law, the Prevention of Organized Crime Act 121 of 1998. The Act recognizes that conventional criminal penalties are inadequate as measures of deterrence when organized crime leaders are able to retain the considerable gains derived from organized crime, even on those occasions when they are brought to justice. It strives to strip sophisticated criminals of the proceeds of their criminal conduct. The Courts, in applying this legislation, has also created a new field of law that had until the advent of the Act, not existed in South African Law, namely organized crime law. A field, distinct from the ordinary principles of criminal law. The bulk of jurisprudence created over the past decade or more, however seems to be threatened to be undone by the recent judgment concerning the constitutionality of certain provisions of the Act. The confirmation of this judgment is being considered by the Constitutional Court and the purpose of this thesis is to argue against the confirmation of this judgment.

Title of thesis:
PREVENTION OF ORGANIZED CRIME ACT 121 OF 1998 : A CONSTITUTIONAL ANALYSIS OF SECTION 2,4,5,6, CHAPTER 5 AND CHAPTER 6

Key terms:
Organized Crime, Common Law Constitutional Court case law proportionality test forfeiture, racketeering, money laundering norms Bill of Rights, Chapter 5 and Chapter 6
LIST OF ABBREVIATIONS
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ALL SA All South African Law Reports
BCLR Butterworths Criminal Law Reports
CC Constitutional Court
E Eastern Cape Provincial Division
JOL Justice On Line
KZNP KwaZulu Natal Provincial Division
N Natal Provincial Division
S Section
SA South African Law Reports
SACR South African Criminal Reports
SCA Supreme Court of Appeal
RICO Racketeer Influenced and Corrupt Organisations Statute
W Witwatersrand Local Division
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CHAPTER 1

GENERAL INTRODUCTION

1.1. Introduction

The purpose of this research is to examine the current substantive approach that exist in adjudicating matters, secondly to examine the jurisprudence that exist in respect of selected sections and chapters of the Prevention of Organized Crime Act\(^1\) and argue convincingly that the judgment in Savoi and others v National Director of Public Prosecutions and another\(^2\), from an interpretative viewpoint is flawed. This Chapter briefly deals with a few general aspects regarding the dissertation itself.

1.2. Summary of the Problem

The first applicant was the chairman of the various companies in a group of companies, while the first respondent was the National Director of Public Prosecutions (“NDPP”).

The applicants were charged with racketeering, fraud, corruption, money laundering and infringement of the Public Management Act in various courts in the country. In the KwaZulu-Natal High Court, 54 charges had been preferred against the applicants.

It was alleged that the first and second applicants conspired in different ways with highly placed officials within provincial administration, so to secure contracts by unlawful means for the provision of water purification and oxygen plants.

In the present proceedings, the applicants sought an order declaring the definitions of “pattern of racketeering activity” and “enterprise” in section 1 and Chapter 2 of the POCA unconstitutional and invalid on various grounds. Essentially it was argued that the definition of “pattern of racketeering activity” was vague and therefore void for vagueness and, that the definition of “enterprise” was overbroad, and as a consequence both definitions were in breach of the principle of legality and hence unconstitutional

\(^1\) Prevention of Organized Crime Act 121 of 1998, POCA
\(^2\) [2013] JOL 30466 (KZP)
The court found that the doctrine of vagueness is founded on the rule of law, particularly on the principles of fair notice to citizens and limitation of enforcement discretion. Void for vagueness simply means that criminal responsibility should not attach where one could not reasonably understand that his contemplated conduct is proscribed. It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. In the present case, upon proper construction the definition of “pattern of racketeering activity” in section 1 of the Prevention of Organised Crime Act is not vague, but clear and precise, instead. It adequately warns an accused that an ongoing and continuous or repeated commission of more than one criminal act listed in Schedule 1 will expose him to conviction on a charge of a more serious offence of racketeering.

Over breadth refers to a principle that “governmental purpose to control or prevent activities constitutionally subject to State regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of constitutionally protected freedom”. Over breadth requires that the means used to achieve a State object is too sweeping to attain the object and thereby infringe some protected right. The court found that section 2(1)(a)(ii); (b)(ii); (c)(ii) and (f)(ii) of the Act did fall foul of the over breadth doctrine, and had to be declared unconstitutional.

The problem with the judgment of Savoi, is the drastic repercussions it has, in respect of not only Chapter 2, but Chapter 3, 4, 5 and 6 of POCA. POCA’s preamble recognizes that South African criminal common law and statutory law, fails to deal effectively with organized crime, etc. If the illogical reasoning of the Savoi judgment is to be accepted, it would not only be contrary to the jurisprudence that exists in respect of POCA, but also seriously hamper the effective combating of crime.

The state is required to firstly prove knowledge as defined in Section 1 (2) of POCA. The state will have to tender, firstly evidence that the accused had actual conscious knowledge. Alternatively, if the state fails to prove that the accused had actual conscious knowledge of a fact, the state will have to prove to the court satisfaction that-

(i) The person believes that there is a reasonable possibility of the existence of that fact; and

3 Savoi(n 2)
4 Savoi(n 2)
(ii) He or she fails to obtain information to confirm the existence of that fact.

For purposes of POCA, if the state proves the above, this will also suffice as knowledge. If the state fails to prove knowledge, in either forms, the provisions of POCA assists the state with the presumption of “ought reasonably to have known”. Should the state be able to prove the requirements of Section 1(3) of POCA, the rebuttable legal presumption that the accused ought reasonably to have known will apply, until the accused rebuts.

I submit that in all these scenarios the state still bears the burden to prove beyond a reasonable doubt the elements of the offence and that each of these concepts which the state may be able to rely on in proving the offence of racketeering, still require that judicial findings be made.

If the reasoning of the Savoi\(^5\)-judgment is confirmed it will undo the objectives of the POCA, contained in the Preamble, which provides:

"WHEREAS the Bill of Rights in the Constitution of the Republic of South Africa, 1996 (Act 108 of 1996), enshrines the rights of all people in the Republic and affirms the democratic values of human dignity, equality and freedom;
AND WHEREAS the Constitution places a duty on the State to respect, protect, promote and fulfil the rights in the Bill of Rights;
AND WHEREAS there is a rapid growth of organised crime, money laundering and criminal gang activities nationally and internationally and since organised crime has internationally been identified as an international security threat;
AND WHEREAS organised crime, money laundering and criminal gang activities infringe on the rights of the people as enshrined in the Bill of Rights;
AND WHEREAS it is the right of every person to be protected from fear, intimidation and physical harm caused by the criminal activities of violent gangs and individuals;
AND WHEREAS organised crime, money laundering and criminal gang activities, both individually and collectively, present a danger to public order and safety and economic stability, and have the potential to inflict social damage;
AND WHEREAS the South African common law and statutory law fail to deal effectively with organised crime, money laundering and criminal gang activities, and also fail to keep pace with international measures aimed at dealing effectively with organised crime, money laundering and criminal gang activities;
AND BEARING IN MIND that it is usually very difficult to prove the direct involvement of organised crime leaders in particular cases, because they do not perform the actual criminal activities themselves, it is necessary to criminalise the management of, and related conduct in connection with enterprises which are involved in a pattern of racketeering activity;"

\(^5\) Savoi (n 2)
AND WHEREAS no person convicted of an offence should benefit from the fruits of that or any related offence, whether such offence took place before or after the commencement of this Act, legislation is necessary to provide for a civil remedy for the restraint and seizure, and confiscation of property which forms the benefits derived from such offence;
AND WHEREAS no person should benefit from the fruits of unlawful activities, nor is any person entitled to use property for the commission of an offence, whether such activities or offence took place before or after the commencement of this Act, legislation is necessary to provide for a civil remedy for the preservation and seizure, and forfeiture of property which is derived from unlawful activities or is concerned in the commission or suspected commission of an offence;
AND WHEREAS effective legislative measures are necessary to prevent and combat the financing of terrorist and related activities and to effect the preservation, seizure and forfeiture of property owned or controlled by, or on behalf of, an entity involved in terrorist and related activities;
AND WHEREAS there is a need to devote such forfeited assets and proceeds to the combating of organised crime, money laundering and the financing of terrorist and related activities;
AND WHEREAS the pervasive presence of criminal gangs in many communities is harmful to the well being of those communities, it is necessary to criminalise participation in or promotion of criminal gang activities;
BE IT THEREFORE ENACTED by the Parliament of the Republic of South Africa,“

Lastly, should the reasoning of the Savoi\(^6\)-judgment be confirmed, the normal principles of criminal law will have to be utilized in matters for which the common law has not developed or provides for. Many criminals will escape serious liability based on the approach, adopted by the court, in this judgment. I intend to argue that substantive reasoning be utilized by the Constitutional Court to ensure that the defectiveness of the Savoi\(^7\)-judgment does not become part of jurisprudence of POCA and that the declaration of constitutional invalidity not be confirmed.

1.3. Purpose of the study

There is a need to address the growing and ever expanding phenomenon of organized crime. The purpose of the study is to study the threats that organized crime poses to our new democratic state founded on human dignity, equality and freedom. Further, to examine the intricacies of POCA as the state’s legislative response and measure in combating organized crime. Lastly, the purpose of the study is to examine the development of constitutional and ordinary interpretation and how the mechanism of the legal interpretative process may be utilized by the judiciary to rid the democratic state of organized crime. Applying a value-laden

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\(^6\) Savoi(n 2)
\(^7\) Savoi (n 2)
approach towards interpretation, avoids illogical judgments, like Savoi, advances protection of democratic principles.

1.4. Point of Departure and Hypothesis

1.4.1. Point of departure

The point of departure is that since the advent of our new democratic state, interpretation of statutes and the constitution, has been and continues to shape our democratic society based on human dignity, equality and freedom. The development of the interpretative methodology to statutes by the Constitutional Court has been key in redefining and determining our values, freedoms and rights. It is also the legal process which the CC has utilized to not only settle, but also clarify with legal certainty, legal disputes

In its very first case dealing with the issue of interpretation the CC remarked in S v Zuma and others:

“South African courts are indeed enjoined by section 35 of the Constitution to interpret Chapter 3 so as “to promote the values which underlie an open and democratic society based on freedom and equality”, and, where applicable, to have regard to relevant public international law. That section also permits our courts to have regard to comparable foreign case law.

I am, however, sure that Froneman J, in his reference to the fundamental “mischief” to be remedied, did not intend to say that all the principles of law which have hitherto governed our courts are to be ignored. Those principles obviously contain much of lasting value. Nor, I am equally sure, did the learned Judge intend to suggest that we should neglect the language of the Constitution. While we must always be conscious of the values underlying the Constitution, it is nonetheless our task to interpret a written instrument. I am well aware of the fallacy of supposing that general language must have a single “objective” meaning. Nor is it easy to avoid the influence of one’s personal

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8 1995(4) BCLR 401 (CC)
intellectual and moral preconceptions. But it cannot be too strongly stressed that the Constitution does not mean whatever we might wish it to.

We must heed Lord Wilberforce’s reminder that even a Constitution is a legal instrument, the language of which must be respected. If the language used by the lawgiver is ignored in favour of a general resort to “values” the result is not interpretation but divination…

This dissertation seeks to find is exactly the practical and democratic approach to constitutional and ordinary interpretation, which not only the constitution, but the CC has mandated. Furthermore, the practical and democratic approach should utilized to undo the potential harm the Savoi-judgment threatens to the CC’s jurisprudence by the CC. The dissertation concentrates on the proper approach to be taken, to effectively achieve the purpose and context of POCA.

1.4.2. Hypothesis

The main hypothesis of this research is that a value-based theory of interpretation which must, in terms of section 39(2) “promote the spirit, purport and objects of “the fundamental rights encapsulated in Chapter 2 of the Constitution; be utilized to remedy the flaws of the Savoi-judgment. Thus, it makes recommendations on how POCA should be interpreted to determine the values underpinning the legislation.

From this main hypothesis, it can be further postulated that such a reform will lead to:
1. Achievement of POCA principles.
2. Complying with democratic international obligations.
3. Effective combating of organized crime.
4. Protection of the fundamental rights and freedoms of the members of our democratic society against the threat of organized crime.

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9 Zuma, (n 8) 412
1.4.3. Framework of dissertation

Chapter 2 focuses on the distinction between substantive reasoning as opposed to formal reasoning; the distinction between constitutional and ordinary interpretation and the importance of the distinctions. Chapter 3 focuses on the direct and indirect application of the Bill of Rights in the interpretative process. Chapter 4 focuses on the importance of POCA legislation i.e. by examining two factual examples and how POCA can be utilized as opposed to the inadequacies of ordinary principles of criminal law. Chapter 5 examines the jurisprudence that has developed under POCA in the Supreme Court of Appeal. Chapter 6 examines the jurisprudence that has developed under POCA in the Constitutional Court. Chapter 7 examines the international position regarding organised crime, as well as some academic views on this topic. Chapter 8 critically discusses the Savoi\textsuperscript{10}-judgment, while recommending the approach that should be adopted against this judgment.

1.5 METHODOLOGY

This is a descriptive research whereby the South African legal field for organised crime will be analysed. The point of departure will be to examine the interpretative methodology that exists under the current democratic dispensation, the legislative framework in respect of South Africa, international treaties. Writings and research by academics regarding interpretation will also be studied and their different views are analysed and compared. The aim is to draw a full comprehensive conclusion by examining the existing literature, inclusive of text books, cases and legislation that exists in this field of study.

1.5.1 History

It has been considered useful to examine the historical evolution of organized crime law for better understanding. Quite useful is the jurisprudential position regarding POCA that has evolved within the two most superior forums in South Africa. Similarly, the rich case

\textsuperscript{10} Savoi (n 2)
history of case law, within the United States, provides valuable insights on how other jurisdictions approach organised crime.

1.5.2 Examples

A number of practical examples is presented to give insights into how POCA is applied to factual situations, to effectively combat organized crime. It focuses on the criminal prosecution of offenders and simultaneously the use of asset forfeiture as a measure of prevention and deterrence.

**EXAMPLE 1**

This example is an example containing a broad set of facts. It is specifically used to illustrate the many useful ways POCA can be utilized to hold offenders accountable, both civil and criminal. Each criminal section and sanction can be employed to achieve the purpose of the Act. The civil remedies can be used by the State to seize assets and profits of organized crime. Various syndicates operate in these set of facts and the example shows how the State deals with these types of operations.

**EXAMPLE 2**

This example is an example containing set of facts of two primary offenders. It is specifically used to illustrate the many useful ways POCA can be utilized to hold offenders accountable, who though not directly involved in the initial crimes, somehow profits from it. It illustrates how the State can deter other potential offenders from reaping the benefits of organized crime, through the application of POCA.

1.6 ACADEMIC VIEWS

The viewpoints of various academic writers are reflected throughout the research. In chapter 2, the academic writings of various constitutional law writers are used to adequately explain the distinction between substantive reasoning as opposed to formal reasoning; the distinction between constitutional and ordinary interpretation and the importance of the distinctions.
The second chapter discusses the direct application of the Bill of Rights and the distinct, indirect application of the Bill of Rights and the various legal opinions regarding the distinction as well as the values to be promoted and that underlie an open and democratic society based on human dignity, equality and freedom. The various writers’ opinions regarding these aspects, illustrate the distinction and the various approaches regarding the distinctions.

In Chapter 7, the academic viewpoints provide valuable insights into the jurisprudence of organized crime law. The writer's opinions give context to both POCA as well as other international legislative measures aimed at combating this transnational phenomenon.

1.7 POCA LEGISLATION

For purposes of the dissertation, the context of the legislative measure itself is an important factor that must be taken into consideration.

The Act consists of a Preamble and 181 provisions. The Act is divided into 8 chapters and 3 schedules. Chapter 1: Definitions and interpretation, provision 1; Chapter 2: Offences relating to racketeering, provision 2 and 3; Chapter 3: Offences relating to proceeds of unlawful activities, provision 4 to 8; Chapter 4: Offences relating to criminal gang activities, provision 9 to 11; Chapter 5: Proceeds of unlawful activities, provision 12 to 36; Chapter 6: Civil recovery of property, provision 37 to 62; Chapter 7: Criminal assets recovery account, provision 63 to 70; Chapter 8: General Provisions, provision 71 to 81. Schedule 1 contains list of predicate offences relevant to POCA, Schedule 2 contains amendments to the Drug and Drug Trafficking Act 140 of 1992, and Schedule 3 contains amendments to International Co-Operation in Criminal Matters Act. Chapter 5 consists of 4 parts, i.e. part 1: Application of the chapter, provision 12 to 17; part 2: Confiscation orders, provision 18 to 24; part 3: Restraint order, provision 24A to 29 and part 4: Realisation of property, provision 30 to 36. Chapter 6 consists of 4 parts, i.e. part 1: Introduction, provision 37, part 2: preservation of property orders, provision 38 to 47; part 3: Forfeiture of property, provision 48 to 57 and part 4: General provisions relating to preservation and forfeiture property, 58 to 62.
POCA is generally, divided into two parts. The first part of the Act, Chapter 2 to 4 are provisions that are exclusively concerned with the criminal prosecution and sanctions of the various forms organized crime, namely racketeering, money laundering and gangs. The second part of the Act, chapter 5 to 6 is concerned with the civil recovery of property concerned with crime, namely chapter 5 with the recovery of proceeds of criminal activities and chapter 6 with forfeiture of property that operates as instrumentality of crime. The first part generally referred to as POCA prosecutions and the second part as asset forfeiture law.

1.8 CONCLUSION

Bearing the general introductory aspects of this chapter in mind, I submit that the context for this research and remainder of the dissertation has been set. Chapter 2 focuses on the distinction between substantive reasoning as opposed to formal reasoning; the distinction between constitutional and ordinary interpretation and the importance of the distinctions. Chapter 3 briefly focuses on the direct and indirect application of the Bill of Rights in the interpretative process. Chapter 4 focuses on the importance of POCA legislation i.e. by examining two factual examples and how POCA can be utilized as opposed to the inadequacies of ordinary principles of criminal law. Chapter 5 examines the jurisprudence that has developed under POCA in the Supreme Court of Appeal. Chapter 6 examines the jurisprudence that has developed under POCA in the Constitutional Court. Chapter 7 examines the international position regarding organized crime, as well as some academic views on this topic. Chapter 8 critically discusses the Savoi\(^{11}\)-judgment, and concludes as to the approach that should be adopted against this judgment.

\(^{11}\text{Savoi (n 2)}\)
CHAPTER 2

INTERPRETATIVE REASONINGS

2.1. Introduction

In this chapter I will focuses on the distinction between substantive reasoning as opposed to formal reasoning; the distinction between constitutional and ordinary interpretation and the importance of the distinctions.

2.2. Substantive reasoning vs. Formal Reasoning

“At the outset of our democracy, Alfred Cockrell explained that constitutional adjudication demanded a new style of substantive reasoning (in contrast to the formal reasoning typically associated with law).”

Upon critical analysis of this statement, Cockrell advocates the idea that since the advent of the new South African constitutional dispensation, the focal point of adjudication within this dispensation, requires a more dynamic and substantive approach as opposed to the formalistic reasoning which was the previous approach to adjudicating matters. However to fully understand the idea which Cockrell advocates, analysis of Cockrell’s article itself is needed to understand the context of this distinction between substantive and formal reasoning and why the distinction between the two approaches are important to adjudication. Adjudication in general, but more importantly constitutional adjudication, which is the main focus of this assignment. If clarity exist about the distinction between the approaches, as well as the views which exist pertaining to constitutional adjudication, whether or not one agrees with Cockrell’s view is a question simplified.

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13 Cockrell (n 12)
14 Cockrell (n 12)
15 Cockrell (n 12)
16 Cockrell (n 12)
It is to be noted from the outset that the purpose of this entire analysis is to determine whether to agree or disagree with Cockrell\(^{17}\) in respect of the approaches regarding constitutional adjudication and what the basis is for either viewpoint.

In this respect I submit that this analysis of constitutional adjudication will originate from the Constitution\(^{18}\) itself, placed in context by the Preamble, Section 2 and specifically section 39 of the Constitution. Section 2 provides:

“This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid and the obligations imposed by it must be fulfilled.” Section 39(1) states “(1) When interpreting the Bill of Rights, a court, tribunal or forum- (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom; (b) must consider international law; and (c) may consider foreign law.”

I submit that the Constitution requires, as the supreme law of the Republic, that when constitutional adjudication is being exercised by the court, tribunal or forum must do so in terms of section 39 of the Constitution.

Cockrell\(^{19}\) states his views as follow “My aim in this article is a more general one, inasmuch as I hope to provide an assessment of the jurisprudence of the Constitutional Court as contained in the judgments which were handed down in the course of 1995.\(^{20}\) He furthers his aim with the distinction between substantive and formal reasoning by stating “A substantive reason is a moral, economic, political, institutional or other social consideration\(^{21}\) … A formal reason, in contrast, is a legal authoritative reason on which judges are required to base a decision and which overrides any countervailing substantive reason arising at the point of application\(^{22}\). He sums up his view and contentions by stating “..prior to the coming into operation of the interim bill of rights, the South African legal tradition was dominated by a formal vision of law in which the hard edges of legal rules were seen to screen off consideration of substantive reasons.

Chapter 3 of the 1993 Constitution effectively ‘opens up’ the judicial role, since the

\(^{17}\) Cockrell (n 12)
\(^{18}\) 108 of 1996
\(^{19}\) Cockrell (n 12)
\(^{20}\) Cockrell (n 12)5
\(^{21}\) Cockrell (n 12)5
\(^{22}\) Cockrell (n 12)5
validity of legal rules is now made to depend in part on compliance with substantive criteria. Those who seek to interpret Chapter 3 of the Constitution must of necessity go behind the textual rule and engage with the substantive reasons which are incorporated therein. This is no cosmetic change, but a paradigm shift with profound implications."23

If one analyses the verbatim of the text of section 39 of the Constitution, one is inclined to agree with the view as advanced by Cockrell. It is quite clear that an adjudicator will have to make determinations, as to what the values of that underlie an open and democratic society based on human dignity, equality and freedom are, must consider international law; and may consider foreign law. These considerations require moral, economic, political, etc. in order to fully comply with the requirements of Section 39.

However, I submit that a full analysis also entails the distinction between constitutional interpretation and ordinary interpretation and the views regarding these aspects.

2.3. Constitutional interpretation vs. ordinary interpretation

The analysis starts with the position regarding the interpretive measures that currently exist, in our constitutional state, in respect of the Constitution, its provisions as well as all other law. In light of requirements of section 2 and the Preamble24, the relevant constitutional provision is section 3925, as already stated above

Botha26 distinguishes between constitutional interpretation and ordinary statutory interpretation as follow “Section 39(2) of the Constitution prescribes the ‘filtering’ of legislation through the fundamental rights during the ‘ordinary’ interpretation process. Constitutional interpretation refers to the authoritative interpretation of the supreme Constitution by the judiciary during the judicial review of the constitutionality of legislation and government action. Du Plessis & Corder(1994:88) point out that the differences between constitutional and ordinary interpretation must not be over-emphasized. Both deal with the interpretation of legislative instruments. Because both forms of legislative interpretation are interrelated, it is preferable that both are members of the same broad

23 Cockrell (n 12)10
24 The Constitution of 1996
25 The Constitution of 1996
interpretive family\textsuperscript{27}....further that “The difference between constitutional and ordinary interpretation was explained by Froneman J in Matiso v Commanding Officer, Port Elizabeth Prison (above)\textsuperscript{597G-H}

‘The interpretation of the Constitution will be directed at ascertaining the foundational values inherent in the Constitution, whilst the interpretation of the particular legislation will be directed at ascertaining whether that legislation is capable of an interpretation which conforms with the fundamental values or principles of the Constitution\textsuperscript{28}.’”

Botha\textsuperscript{29} then states that “What does the Constitution say about its own interpretation? Section 39(1) of the Constitution provides the following with regard to interpretation of the Bill of Rights....The first part is peremptory: when interpreting the Bill of Rights, a court, tribunal or forum must make value judgments ...and must have regard to international law...Furthermore, a court, tribunal or forum may also refer to foreign law when interpreting the Bill of Rights...The interpretation clause must be read with the supremacy clause as well as section 1. Section 1 is arguably one of the most important provisions in the Supreme Constitution The Republic of South Africa is one, sovereign, democratic state founded on the following values: (a) Human dignity, the achievement of equality and the advancement of human rights and freedoms. (b) Non-racialism and non-sexism. (c) Supremacy of the constitution and the rule of law. (d) Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness.\textsuperscript{30}

I submit that it is quite clear from Botha’s view not only the distinction between constitutional interpretation and ordinary interpretation, but also that the values contained in section 1 of the Constitution, are to be promoted, as required by section 39. The values are also contained in section 1 of the Constitution, thus guidance as to which values are to be promoted in our democracy are prescribed by the legislative text of the Constitution itself.

\textsuperscript{27}Botha(n 26)114
\textsuperscript{28}Botha(n 26)114
\textsuperscript{29}Botha(n 26)
\textsuperscript{30}Botha(n 26)116-117
Devenish\textsuperscript{31} contends that “The Constitution mandates a value-based theory of interpretation, as set out in section 39(2) of the 1996 Constitution, which specifically addresses the complex issue of constitutional interpretation. In so doing, it must develop, according to section 39(1) of the Constitution, the values that underpin an open and democratic society, based on human dignity, equality and freedom; must consider international law and may consider foreign law. However it is important to note that the principles of international human rights law and foreign law must be interpreted and applied with due regard for the South African context and the values found in our Constitution. The process of interpretation, although taking into account both international and foreign law must start and end with the South African Constitution….The emphasis is therefore on certain cardinal values, which the Constitution requires must be given expression to in the process of interpretation. It is in these values that the methodology and jurisprudence of interpretation find their inspiration and application .It should be noted that the ambit of section 39 is not restricted to the interpretation of Chapter 2 of the Constitution. This is manifestly clear from section 39(2)….Interpretation giving expression to fundamental values requires the following methodology as set out by Langa J in the Hyundai case: ‘ The Constitution requires that the judicial officers read legislation, where possible, in ways which give effect to its fundamental values. Consistent with this, when the constitutionality of legislation is in issue, they are under a duty to examine the objects and purport of an Act and to read the provisions of the legislation, so far as is possible, in conformity with the Constitution’.\textsuperscript{32} He states further that “…it is submitted that “purposivism” or the purposive approach in a narrow sense, should not be accepted as a general theory of interpretation in South Africa because it can neglect certain critically important values. What is required is a values-based theory of interpretation which must, in terms of section 39(2) ‘promote the spirit, purport and objects’ of the fundamental rights encapsulated in Chapter 2 of the Constitution. The word ‘spirit’ which is used in conjunction with the words ‘purport and objects’ clearly indicates that we are dealing with a method of interpretation that is wider and more comprehensive than that of the purposive approach….What is required is a disciplined process of teleological and moral evaluation, bearing in mind that the function of a judge in a system involving

\textsuperscript{31}Devenish GE “The theory and Methodology of Constitutional Interpretation in South Africa”(2006) THRHR) 238-258
\textsuperscript{32} Devenish(n 19)238-240
fundamental values must inevitably be an essentially moral one. Therefore it is clear that the curial interpretation in many circumstances of human rights, which are broadly conceived and formulated with a high degree of abstraction must involve ‘an overt value judgment, amounting to an act of creation and imagination’, making use of deontic as well as inductive and deductive reasoning.

...Therefore in an interpretative conflict the core values of, inter alia, equality, freedom and dignity, should triumph over a particular purpose inferred from a specific provision of the Constitution, thereby rendering the interpretation compatible with the overall purpose of the Constitution as a whole, as a constitution of liberty. This does not mean that the language is unimportant, but that the language of the text must be balanced and qualified by the contextual and jurisprudential considerations. What is required is an open-ended process of elucidation and commentary which explores and attaches significance to every word, section or clause in relation to the whole context and ethos of the Constitution.

The use of a values-based approach does not mean that a particular purpose of a section of the Constitution is irrelevant, but that it should not be regarded as necessarily determinant, and therefore that it should be considered as one factor, albeit an important one, in the process of teleological evaluation, used in the methodology of interpretation, which should be dynamic and involve an unqualified contextual approach to both the language and jurisprudence of the Constitution.

....Finally there is another important reason why a value-based interpretation is preferable to a purposive one. The 1996 Constitution itself mandates such interpretation, as indicated as above. This is clear from; inter alia, first, the preamble...Furthermore section 1...Lastly in this regard section 39(1).

A generous interpretation may in certain circumstances prove to be too wide, and a purposive one too narrow. Both these methods of interpretation can be defective in that they tend to be one-dimensional. Furthermore, the Bill of Rights includes universal moral and ethical values and therefore has in its application and its interpretation and important moral dimension to it. It is for this reason, it is submitted, that a values-based theory of interpretation is the most satisfactory one..."33 The learned author then continues to discuss an approach taking cognizance of various factors such as the language, context,

33 Devenish(n 31)240-242
history of the Constitution, in a liberal manner, irrespective of whether it is constitutional interpretation or ordinary interpretation.

**De Waal, et al** defines constitutional interpretation as well as its stages. They submit that “Constitutional interpretation is the process of determining the meaning of a constitutional provision. More narrowly, for the purposes of Bill of Rights cases, the aim of interpretation is to ascertain the meaning of a provision in the Bill of Rights in order to establish whether law or conduct is inconsistent with that provision the aim of interpretation is to ascertain the meaning of a provision in the Bill of Rights in order to establish whether law or conduct is inconsistent with that provision. Interpretation therefore involves two enquiries: first the meaning or scope of a right must be determined, and then it must be determined whether the challenged law or conduct conflicts with the right. This chapter is principally concerned with the first of these enquiries-determining the meaning of the rights in the Bill of Rights…..The second enquiry-whether law or conduct is in conflict with a right-involves the interpretation of the challenged law or determination of what the challenged conduct amounts to or what its effects are. Thereafter one must determine whether there is a conflict between the law and the Bill of Rights.

…What then are the rules, principles and methods that apply to the interpretation of the Constitution? The Constitution itself does not prescribe how it should be interpreted. Section 39 contains an interpretation clause which pertains to the Bill of Rights and s239 contains certain definitions which apply to the interpretation of the Constitution as a whole. However these instructions contained in s39, important as they may be, are themselves sufficiently abstract to require a great deal of interpretation. As for s239, it defines only three terms: ‘national legislation’, ‘organ of state’ and ‘provincial legislation’. Because the interpretation, application and limitation of fundamental rights is not (indeed cannot be) regulated completely by the text of the Constitution, the Constitutional Court has laid down guidelines as to how the Constitution in general and the Bill of Rights in particular should be interpreted.”

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35 *Ibid* 145-147
Although not stating it pertinently, the learned authors discuss the various approaches the Constitutional Court has taken in constitutional interpretation, with the objective of determining the values underlying the Constitution. This is quite obvious from the heading under which the discussion of the topic takes place, namely "THE POINT OF INTERPRETATION: A GENEROUS AND PURPOSIVE INTERPRETATION THAT GIVES EXPRESSION TO THE UNDERLYING VALUES OF THE CONSTITUTION"

This objective is exactly what section 39(1)(a) requires. They continue to discuss the various cases decided by the Constitutional Court, with reference to the role of the text, purposive interpretation, generous interpretation, a contextual approach.

The learned authors then continue to briefly discuss their views about the interpretation clause. To be noted is the following: “Section 39(1) requires an interpretation that promotes the values which underlie an open and democratic society based on human dignity, equality and freedom. It seems that the society referred to is not necessarily the current South African is analogous to that of ascertaining the boni mores or legal convictions of the community in the law of delict. Despite the importance of the context, the everyday realities of South African society will therefore not feature as much in the interpretative stage of fundamental rights analysis, when the scope of the right is determined. They may prove to be decisive at the stage when the constitutionality of limitations of the rights is considered.”36

In respect of section 39(2) they remark “Section 39(2) has little to do with the interpretation of the Constitution, but concerns the interpretation of the statutes and the development of the common law and customary law. While the section does not concern the ‘interpretation’ of the Constitution, it is crucial to the ‘application’ of the Constitution. Section 39(2) should therefore be read with s8-the application clause-since it provides for indirect application (sometimes called ‘the permeating effect’) of the Bill of Rights to the law.”37

36 Ibid 159
37 Ibid 161
2.4. Conclusion

These authors all are *ad idem* that since the advent of the Constitution, interpretation of the constitution cannot be based on legislative intent. Quite clearly the interpretation clause itself requires that when adjudicating a matter, the adjudicator must promote the values that underlie an open and democratic society based on human dignity, equality and freedom. Further the values of the Republic of South Africa are spelled out in section 1 of the Constitution. The correct approach and manner of interpretation is not prescribed, but principles and guidelines as to interpretation whether it applies directly or indirectly is to be sought from the Constitutional Courts approach to interpretation in the case law dealing with constitutional issues. It is however, quite clear that more than legislative intent is required if an adjudicator is not only required to promote the values of a society when adjudicating, but also to observe foreign law and international law. This aspect of interpretation is important for support of the argument that the Savoi-judgment is legally flawed. The point of departure is Section 39 of the Constitution, directing the approach to be taken. Irrespective of whether the Bill of Rights is interpreted in terms of Section 39(1) or ordinary legislation in terms of Section 39(2), I agree with the approach advanced by Devenish and submit that the value-laden approach is not only reflected in the jurisprudence of POCA, but is exactly the approach that is mandated by our Constitution in respect of both itself and ordinary legislation, as well as the CC. Having regard to what is set out above, this approach adequately takes cognizance that our system of justice is underpinned by constitutional values and principles which has fairness, as their objective. Apparent from the chapters that follow is the underlying aim of the POCA legislation is to protect and preserve our democratic society from the scourge of criminal elements which are seeking to use and manipulate these rights and freedoms for criminal gains. These fundamental rights and freedoms are highly prized and it is of the utmost importance that they be protected. It cannot be ignored or wished away that criminals will devise ingenious methods to circumvent the protection of these rights. The normal principles of ordinary criminal law is ill-equip to deal with the new forms of crime and are too far under developed to address these injustices. The legislature has recognized this threat and responded with POCA as the means to combat these threats. I submit it is therefore of the utmost importance that the correct interpretation in respect of this valuable legislation is adopted, so that the juristic

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38 Zuma(n 8) at Paras [15]-[16] at 651H-I and 651J-652A
community can contribute meaningfully to the eradication of the phenomenon of organized crime. This can only be done if the approach adopted is that POCA states its objective in its preamble, i.e. that POCA is the state’s means to fulfil its constitutional obligation protect, promote and fulfil the rights in the Bill of Rights. The Bill of Rights in the Constitution of the Republic of South Africa, 1996 (Act 108 of 1996), which enshrines the rights of all people in the Republic and affirms the democratic values of human dignity, equality and freedom.
CHAPTER 3

APPLICATION OF THE BILL OF RIGHTS

3.1. Introduction

In this chapter I will briefly discuss the direct application of the Bill of Rights and the distinct, indirect application of the Bill of Rights and the various legal opinions regarding the distinction, as well as the values to be promoted and that underlie an open and democratic society based on human dignity, equality and freedom.

3.2. Direct application

The direct application of the Bill of Rights, as is quite clear from above requires, that an adjudicator must promote the values that underlie an open and democratic society based on human dignity, equality and freedom. Further the values of the Republic of South Africa are spelled out in section 1 of the Constitution. However there exist quite a number of views as to what these values that underlie an open and democratic society based on human dignity, equality and freedom, are and how they are to be promoted.

I submit that in respect of interpretation, with regards to direct application, I am inclined to agree with the submissions advanced by Devenish\(^39\) as the correct approach. In respect of interpretation seeking to advance the values, spirit and objectives of the Bill of Rights, various academic writers have divergent theories as to the values and manner in which these values are to be determined and advanced. I submit a proper analysis requires that one look at some of these views.

Bohler-Muller\(^40\) argues that one of the fundamental shortcomings of the legal system under the current democratic state is the inability to adopt an ethical responsibility which would lead to more informed decision-making. She advocates the idea of storytelling,

\(^{39}\)Devenish (, n 31)
\(^{40}\)Narnia Bohler-Muller “Beyond Legal Narratives: the interrelationship between storytelling, ubuntu and care”(2005) Stellenbosch Law Review 133
ubantu and care as an alternative of fostering an ethical responsibility, an idea she argues, which is lacking in our legal system.

She argues for the adoption of a "jurisprudence of care", which potentially shifts the emphasis towards context and away from concerns about precedents of universal application. The importance should be focusing on life stories before the courts. A jurisprudence of care demands that all circumstances be considered and all be heard before making a judgment that is the least harmful to the most vulnerable entity.41 It is quite clear that Bohler-Muller42 advances the argument that in our legal system, legal adjudication is inadequate. She submits that by contributing ubantu and storytelling to courts in the interpretive process, courts will in a jurisprudence of care listen to all circumstances before reaching conclusions which are the least damaging to the most vulnerable of parties. In this manner values such as equity will become more real concepts than static universal abstracts. The values that she advances as values that underlie an open and democratic society based on human dignity, equality and freedom, are ubantu, storytelling to courts and jurisprudence of care.

Botha H43 states “I argue that the reflective use of metaphors can help South African lawyers to break with the essentialism and reductionism of apartheid legal thought, transform legal theory and practice, and imagine more humane futures. I analyze some of the metaphors which structured apartheid legal thought, as well as a number of metaphors which have been used to describe rights, constitutionalism and interpretation under the new constitutional order. I argue that these examples suggest both the persistence of old ways of seeing and thinking, and the possibility of using metaphors reflectively, of transforming legal thought, of imagining alternative worlds.44”

Botha H45 states “The South African constitution requires lawyers to abandon the formalism, objectivism and reductionism which characterized law under apartheid. It requires them to reconceive notions like individual rights, the rule of law, democracy,
intergovernmental relations and the separation of powers in less essentialist terms; to reconceptualise the relationship between law and politics, the individual and society, private and public law, and common law and legislation in ways that transcend the dichotomies and hierarchies which characterized apartheid law. The constitution, in my understanding, seeks to uphold the rule of law without postulating a rigid division between law and politics. It entrenches fundamental individual rights, but does not entrench an abstract individualism which sees the individual as prior to and detached from the society in which she lives. It is committed to the separation of powers, but not to the idea of strict boundaries between the legislature, executive and judiciary. It provides for a division of authority among the national, provincial and local spheres of government, but characterizes the relationship between the different spheres as one of co-operation, rather than a strict division or hierarchy. The constitution also relativises the distinction between private law and public law and between common law and legislation.46 Further the learned author state: “The constitution does not seek to entrench rigid boundaries between the individual and collective, but requires us to structure social relationships in a way that is conducive to the dignity, equality and freedom of all. It stresses the importance of co-operation and dialogue in the relationship among different organs of state, and requires the entire legal system to be harmonised with the constitution.”47 The learned author then continues to advocates the notion that if the legal profession utilizes the idea of rights as relationships and dialogue, while metaphors of balancing and rights as categories far more transformation can be achieved. Metaphors can be constantly re-interpreted and thus advance constitutional adjudication.

From Botha H48 point of view, it seems the legal concepts of the rule of law, the separation of powers, the spirit of co-operative government, as well as the entrenchment of fundamental individual rights are the values, that underlie an open and democratic society based on human dignity, equality and freedom. Further utilizing metaphors is a means to advance constitutional adjudication.

46 Ibid 20-21
47 Ibid 21
48 Botha H (n 43)
Currie\textsuperscript{49} while referring to Cockrell's\textsuperscript{50} view, points out that a herculean model at its extreme, as advocated by Cockrell\textsuperscript{51} would not be realistic and practical. He points out the advantages of "judicial avoidance" by the Constitutional Court of certain issues. He states "Two observations can be made about the Constitutional Court's 1998 output. The first is that, for a full-time multi-member court, its caseload is not onerous. A second observation is that a substantial proportion of the judgments that were handed down in 1998 involved procedural issues...a sparse roll is a luxury. It allows for a depth of research and reflection on a decision that a more pressed courts do not have. These are the ideal conditions for the style and method of adjudication practiced by Ronald Dworkin's ideal type of the judge- Hercules... Time and talent, according to Dworkin, combine to make Hercules judgments masterpieces of comprehensiveness, synthesis and theoretical depth, with justification drawn from the most philosophical reaches of political theory... Furthermore "behind Cockrell's disappointment with the Court's theoretical timidity, lies a particular vision of constitutional adjudication. According to Cockrell the constitutional 'paradigm shift' in 1994 required a new style of adjudication. While a 'formal vision of law' and dominated legal thinking and practice prior to 1994, the interim Constitution had brought its reign to an end. It was supplanted by a substantive vision of law... The idea that constitutional adjudication requires the courts to unlearn their habits of formal reasoning and substitute them with first-order theoretical justification inclines towards the adjudicative model described above as 'Herculean'. Hercules decides cases on the basis of making the legal text the best it can possible be, a constructive interpretation of a community's legal practice. Constructive interpretation means the hard work of developing a consistent and coherent set of principles which most adequately justify and make sense of our intuitive moral judgments. This obviously requires a great deal of theoretical self-consciousness and high abstraction. Herculean judges practice a jurisprudence of considerable theoretical ambition, aiming to find comprehensive legal, moral, philosophical and economic justifications for a decision. Besides comprehensiveness, Herculean theorizing aims at generality-the development of general principles determining not only a particular outcome on a concrete case but, at its limit, also explaining the entire record of past and future decisions. But to urge Herculeanism on the Constitutional Court greatly overstates both the incidence and

\begin{footnotesize}
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\item Currie (n 12)
\item Dworkin (n 12)
\item Cockrell (n 12)
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importance of first-order moral and political theorizing in constitutional adjudication. The Court decides cases on the basis of the first principles infrequently, relying instead where it can on deductive reasoning by reference to formal rules and analogies with the decided cases and foreign jurisprudence. This is not to deny that substantive reasoning is, on occasion, necessary. It in concrete cases of abstract and open-ended standards such as ‘unfair discrimination’ or a society based on human dignity, equality and freedom.’ But a full-blown Herculean model of adjudication is simply too heroic to provide an accurate means of measuring the Court’s rather more cautious performance. It fails to account for the habits of avoidance that the Court has acquired. Currie then continues to state “One will find very little Herculeanism in the Constitutional Court’s recent output. The Court has settled instead on a characteristic style of decision making that is the opposite of Herculean: cautious, incremental, particularistic and theoretically modest. In support of its minimalist style of jurisprudence the Court can draw on a repertoire that the Court has energetically elaborated over the past five years. These are the rules of justiciability and the procedural rules allowing the Court to decide not to decide a case. The learned author then continues illustrate his point by referring to the Courts decisions of Ferreira v Levin, Case v Minister of Safety and Security, National Coalition for Gay & Lesbian Equality v Minister of Justice. He concludes by stating that “To say that the Constitutional Court decides cases in much the same way as any other Court (cautiously, incrementally, emphasizing the particular rather than the general, avoiding large-scale theorizing and relying instead on incompletely reasoned agreements) is only controversial if one thinks constitutional adjudication to be a grander and more heroic enterprise than ordinary adjudication. Even if the stakes are higher in constitutional adjudication, the consequences of a decision more far-reaching, this mandates more caution rather than less.

Currie’s view simply states that although he concedes that a new style of substantive reasoning in respect of constitutional adjudication is required by the Constitution, the model as envisioned by Cockrell is idealistic and impractical. The approach as taken by

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52 Ibid 142-146
53 Currie(n 49)
54 Ibid 147
55 1996 (1) SA 984 (CC)
56 1996 (3) SA 617 (CC)
57 1999 (1) SA 6 (CC)
58 Currie (n.49)
the Constitutional Court should be continued, avoiding overcomplicated decisions, were matters can be decided with the avoidance of a multitude of issues.

De Vos argues the view that the metaphor of the Constitution as a bridge from the apartheid system to an idealistic democratic society, may be of high value as a tool of interpretation in general. He introduces this notion through the theory of the grand narrative as employed by the Constitutional Court. He states that “While it is difficult to claim that the Constitutional Court has developed a clear and unambiguous approach to the interpretation of the interim and 1996 Constitutions in general or even of the Bill of Rights, it is safe to say that, apart from its use of traditional methods of interpretation to signal the “legal” (as opposed to ‘political’) nature of its task, the Court has developed what can loosely be termed a ‘contextual’ approach to constitutional interpretation… The contextual approach to constitutional approach to constitutional interpretation employed by the Court is a complex and multifaceted endeavour. It is consequently beyond the scope of this article to describe and analyse it in full. Rather, this article focuses on the use of what may be termed a ‘grand narrative’ or ‘super context’ about South Africa’s constitutional order in the interpretation of its successive democratic Constitutions. This ‘grand narrative’ has been and continues to be, constructed by the jurisprudence of the Constitutional Court, and in turn plays an important role in construction of the scope and the content of the 1996 Constitution. The creation, maintenance and deployment of this grand narrative constitutes an ambitious attempt to situate (almost) any understanding of the constitutional text within the context of a universally accepted structuring, meaning – giving story about the origins and purpose of the interim and 1996 constitutions. The Court deploys this grand narrative in an attempt to limit the appearance of its own agency in the interpretative project and to assist it in ‘discovering’ (what some judges seem to believe is) a relatively fixed and determinable meaning… It could then be argued that, while many of the provisions in the constitutional text do not have one objective meaning, and while the meaning of the text (often) depends on the context (or at least the major tenets of such a context)… The text of the Constitution may not always have one objective meaning, so it is said, but if we read it in the context of our history it will pretty much tell us what we want to know without our having recourse to our

60 Ibid 9
61 Ibid 9
own personal, political or philosophical views\textsuperscript{62}...The idea of the interim Constitution as a link between a dark, apartheid past and a bright, human-rights based future has been embraced by the Constitutional Court and now forms the basis for the ‘grand narrative’ within which the interpretation of both the interim and 1996 Constitutions is usually situated\textsuperscript{63}...The notion of the Constitution as a bridge has thus become a powerful metaphor in constitutional adjudication. In terms of this scheme, the text reference to their historical context. In other words, the meaning of the text can (at least partly) be discovered with reference to South Africa’s recent past because the Constitution were designed precisely to guide our society in its movement away from the past...The term is “past” is used here in at least two distinct but interrelated ways. First, it refers to the actions and events associated with the implementation of apartheid and the inhuman, unequal and repressive conditions that came to exist under this system... The second refers to the manner in which South Africa has moved away from the apartheid system towards a new constitutional state\textsuperscript{64}...The Constitutional Court uses these references to the ‘past’ interchangeably, depending on the context of the case before it\textsuperscript{65}. The learned author however concludes that the historical context may however be problematic depending on which view of history the judges as individuals choose to accept.

In respect of the views advanced by Cockrell\textsuperscript{66}, I submit that his views have already been canvassed in preceding paragraphs. However it should be mentioned that despite advocating the substantive style of reasoning, he criticizes the Constitutional Courts lack of substantive reasoning at that stage of constitutional jurisprudence. He specifically analyses a number of judgments to illustrate his criticism. As already stated Currie\textsuperscript{67} differs from his view, terming his envisioned ‘shift in paradigm’ as a tendency towards Dworkin’s herculean judge, which is an impractical approach.

### 3.3 Indirect application

In respect of indirect interpretation, the jurisprudence discussed in Chapters 5 and 6, in respect of selected sections and Chapters of POCA will indicate the type of reasoning

\textsuperscript{62} Ibid 10
\textsuperscript{63} Ibid 11
\textsuperscript{64} Ibid 11
\textsuperscript{65} Ibid 12
\textsuperscript{66} Cockrell (n 12)
\textsuperscript{67} Currie (n 11)
the Supreme Court of Appeal as well as the Constitutional Court applies during the
interpretive process. The jurisprudence in respect of these rights clearly illustrates the
courts interpretive methodology ensuring that the prosecutions, forfeiture and conduct
comply with the values and spirit of the Chapter 2 (Bill of Rights). These issues will be
canvassed, with discussion of the jurisprudence of POCA. However, as will become
apparent from the discussion of the jurisprudence of POCA, the indirect application of
the Bill of Rights, with reference to the views by above-mentioned authors, that the
tendency of the courts are to adopt an approach that protects and shields the
fundamental rights listed in the Bill of Rights. This approach is not with specific reference
to protection of the fundamental rights of the accused, i.e property rights, fair trial rights,
right to privacy, etc., but a balancing act, aimed at the protection of the values and
freedoms of a democratic state based on freedom, equality and human dignity against
the threat of organised crime. The freedoms and rights of an individual in our democratic
society will always remain of paramount importance, especially where an individual is
accused of committing offenses. It is exactly in this context where the rights and
freedoms valued by our democratic society guarantees that human beings are treated
with fairness and dignity. However in order to protect these same freedoms, rights and
values from the horrors of organised crime, our courts have not hesitated to use the
interpretative processes to protect the interests of our democratic society. It is an
approach that is both flexible and takes cognizance of the socio-economic realities within
which the structures of organized crime operates. The approach is a practical one and
not an approach which makes use of metaphors and the likes to make value judgments
regarding the interpretation of POCA. Although the above views are insightful regarding
the type of approaches that may be applied in interpretation of POCA, I submit their real
value is indicating the substantive reasoning as opposed to formalism with which
interpretation should be approached.
3.4 Conclusion

Grasping the distinction between the direct and indirect application of the Bill of Rights is cardinal to the interpretative process of legislation. It is not only important for determining and adhering to the values as enshrined in Section 1 of the Constitution, but vital in fostering a developing constitutional culture, the Constitution requires the spheres to create. This distinction is also inseparable from the value-laden approach towards interpretation, mandated by the Constitution itself. It is within the context of this constitutional culture and constitutional values underpinning our system of justice that legislation, such as POCA, should be understood. The introduction of similar legislative measures highlights the importance of the distinction of direct and indirect application and the interpretative means that should be adopted to utilize these measures to the protection of these fundamental rights and freedoms as contained within the Bill of Rights. It is exactly this distinction and value-laden approach containing this distinction which the Court in Savoi ignored and which is fundamental to the Constitutional Court consideration to confirm the order of invalidity.
CHAPTER 4

PRACTICAL ORGANISED CRIME

4.1. Introduction

To fully understand POCA jurisprudence, I submit that a practical analysis of POCA legislation to specific circumstances will be required. In this Chapter the practical application of POCA as opposed to ordinary criminal law will be demonstrated, by examining two distinct set of facts. The objective of these practical exercises is to demonstrate how POCA seeks to protect and preserve the fundamental freedoms and rights as contained in the Bill of Rights from the phenomenon of organized crime. Further illustrating that the reasoning in the Savoi Judgment fails to take into account these practicalities as part of the value-laden approach to interpretation which should have been adopted.

4.2 First Example

Police stop 3 occupants during a routine roadblock in Khayalitsha: Ano, Bono, and Combo. All of them are members of the Phillistinians Criminal Gang, who operates in the suburbs of Cape Town with their stronghold in Khayalitsha. They have a tattoo mark “PG” which stands for Phillistinian Gang. Their leader is Nongoloza, a well known business man in Khayalitsha. The gang has about 50 members involved in hijacking, robberies, murders, Cash in Transit robberies, Rival Gang fights, etc. They report directly to him and receive instructions from him. Nothing happens without his approval.

1) They searched the car and found firearms and tools that they suspected were used in breaking into cars and a bunch of various car keys. R30 000 cash was also found in the car.

2) They arrested the 3 suspects and during the interrogation, ANO confessed to the police that they are a group in the business of hijacking and stealing cars. He gave the

68 These practical examples are contained in “The Organised Crime Component POCA Training Materials, 28th -30th March 2012” and used with permission of the author, Mr. Livingstone Sakatha, Deputy Director of Public Prosecutions, Western Cape.
details of 6 cars they had hijacked all around the Cape Peninsula area and 7 cars that they had also stolen. He further indicated that all those cars had been sold to a gentleman known as KALLIE, in Bellville. He also confessed to robberies; cash in transit robberies and murders committed by them and other gang members.

3) He took the police to Bellville South and there he pointed out KALLIE to the police. KALLIE was arrested. Police found out that KALLIE is a partner in a car sales business known as OASIS MOTOR DEALERS. Other partners are PIETER, KOOS and JOE.

4) The police confiscated all the books of the motor dealers business. An employee at the motor dealers told the police that they have other cars at a workshop in Athlone which were being repaired by MR. FIXIT.

5) There is R600 000, 00 in the bank account of the motor dealers at FNB. The personal Bank accounts of PIETER, KOOS and JOE amounted to R350 000, 00 for each.

6) MR FIXIT showed the police 2 cars which were brought to him by JOE for respraying. The personal assets of MR.FIXIT are valued at R2, 5 million.

7) When the police searched the workshop they found implements which appear to be used for changing engine numbers and the details of the cars.

8) MR.FIXIT also informed the police that after respraying or changing the details of the cars brought to him, he took the cars to Stikland registration centre where a police officer known to him as SKELM and cashier (female) by the name of LYDIA helped him to clear the cars for registration.

9) The police further investigated the whereabouts of the 13 cars mentioned by ANO.

10) They found the dockets for the cars stolen and hijacked.

4.3 Second Example

A truck full of sheep and lamb carcasses from the Enterprise Meat Company was being driven by the driver and his assistant from Malmesbury to Cape Town Abattoir.

1) The two accused A and B, were hitchhiking on the N7 road to Cape Town. The driver stopped to give them a lift. The two accused boarded, but 10km from Cape Town, the accused produced firearms and directed the driver to drive to a secluded area where the accused shot both the driver and his assistant.

2) They then drove the vehicle to Brian who has a warehouse in Landsdowne. They agreed with Brian that he would store the cargo, while they went to search for buyers.
3) Brian then phoned 4 Butcheries owners and offered them the carcasses at R150, 00 each. There were 500 carcasses in the truck. The value of the carcasses was R900, 00 each.

4) The accused then took the truck to Mr. Huys who owns a Second Hand Spare parts shop. He buys the truck for R20 000, 00 and immediately asks his employees to strip and dismantle the truck for all its parts.

5) A, bought a car with his share of the money. He had a fight with his girlfriend after drinking alcohol and assaulted her badly. He was arrested for the assault and the girlfriend in her anger also told the police about the hijacking and the murder.

4.4. Application of Organized Crime Principles

The two examples will be analyzed, in depth and I will illustrate how POCA applies, with reference to identifying the possible accused, charges, asset forfeiture possibilities and the elements of Chapters of POCA. The objective of the entire exercise is to place, the reader in a better position of understanding the functioning and application of POCA, as well as the jurisprudence that will be discussed.

The analysis will consist of firstly identifying the accused, secondly identifying the possible primary/ordinary charges in terms of the ordinary principles of criminal law and then POCA charges; lastly possible asset forfeiture procedures with reference to assets will be identified .Primary offences will be identified to illustrate the inadequacy of ordinary criminal principles in holding liable persons involved in organized crime, whilst the application of POCA will illustrate the latter’s effectiveness.

4.4.1. First Example Examined

4.4.1.1 Ano, Bono, Combo, the Phillistinian Gang, Nongoloza and Kallie
To the point where Ano confesses to the police, the possible accused are Ano, Bono, Combo, the Phillistinian Gang and its 50 members, Nongoloza and Kallie .

4.4.1.1.1 Ordinary Charges
1. Possession of unlicensed firearms against Ano, Bono and Combo
2. Possession of Housebreaking implements against Ano, Bono and Combo
3. Possession of stolen property of the R30 000 against Ano, Bono and Combo
4. Six charges of Robbery with aggravating circumstances against Ano, Bono and Combo
5. Seven charges of theft against Ano, Bono and Combo
6. Thirteen charges of theft against Kallie
7. Depending on the information Ano provides several charges of hijacking, robbery, murder against the various members of the Phillistinian Gang.

4.4.1.2 POCA Charges
1. Section 9(1)(a)\(^{69}\) (Gang participation) against Ano, Bono, Combo, Nongoloza and each member of the Phillistinian Gang.
2. Section 9(2)(b)\(^{70}\) against Nongoloza, as the leader of the Phillistinian Gang
3. Section 4(a)\(^{71}\) (Money laundering) against Ano, Bono and Combo, in the sense that they deliver cars to Kallie, who buys the stolen cars, having the effect of concealing true ownership of the cars.
4. Section 4(a)\(^{72}\) against Kallie for the same reason as stated above
5. Section 2(f)\(^{73}\) (Racketeering) against Nongoloza as the manager of the enterprise of selling stolen cars to Kallie
6. Section 2(e)\(^{74}\) against Ano, Bono and Combo as employees of Nongoloza providing the cars to Kallie
7. Section 2(a)\(^{75}\) against Kallie for buying the stolen cars and using them in the daily operations of OASIS MOTOR DEALERS.

4.4.1.3 Asset Forfeiture
The possible forfeiture exists in respect of the R30 000 found in the car. The state can apply in terms of Chapter 6\(^{76}\), firstly in terms of Section 38\(^{77}\), for a preservation order. The High Court must grant a preservation order if the state proves any of the grounds in

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\(^{69}\) Section 9(1)(a) of POCA
\(^{70}\) Section 9(2)(b) of POCA
\(^{71}\) Section 4(a)(i) of POCA
\(^{72}\) Section 4(a)(i) of POCA
\(^{73}\) Section 2(f) of POCA
\(^{74}\) Section 2(e) of POCA
\(^{75}\) Section 2(a) of POCA
\(^{76}\) Chapter 6 of POCA
\(^{77}\) Section 38(1) of POCA
Section 38(2)\textsuperscript{78}. However the preservation order will expire in 90 days unless the State applies for a forfeiture order\textsuperscript{79}. For a final forfeiture to the state, the state will have to apply in terms of section 48\textsuperscript{80} for a forfeiture order. The High Court shall make an order applied for in terms of Section 48\textsuperscript{81}, by the state, if the state proves any of the circumstances in Section 50\textsuperscript{82}. In this set of facts, the state would be successful in the argument that the monies seized are proceeds of crime, which would be grounds for an order in terms Section 38(2)\textsuperscript{83} and an order in terms of Section 50\textsuperscript{84}.

4.4.1.2 Oasis Motor Dealers, Pieter, Koos, Joe

4.4.1.2.1 Ordinary Charges
Thirteen charges of Theft against Oasis Motor Dealers, Pieter, Koos, Joe.

4.4.1.2.2 POCA Charges
One charge of contravention of Section 4(b)\textsuperscript{85} against Oasis Motor dealers, Pieter, Koos, Joe in the sense they ought reasonably to have known that Kallie, buys the stolen cars, having the effect of concealing true ownership of the car and as such they acted in concert with Kallie.

4.4.1.2.3 Asset Forfeiture:
1. The state may apply for a restraint order in terms of Section 26\textsuperscript{86} against the amounts of R600 000,00 of the Motor Dealership at FNB and the personal Bank accounts of Pieter, Koos and Joe amounted to R350 000,00 for each. The state will have to satisfy the High Court to exercise its discretion in terms of Section 26\textsuperscript{87} circumstances under Section 25\textsuperscript{88} exists. In this scenario, the best argument would be Section 25 (b)\textsuperscript{89} in the sense that a charge will be leveled against the abovementioned accused and a

\textsuperscript{78} Section 38(2)(a),(b),(c) of POCA
\textsuperscript{79} Section 40(a) of POCA
\textsuperscript{80} Section 48(1) of POCA
\textsuperscript{81} Section 48(1) of POCA
\textsuperscript{82} Section 50(1)(a) or (b) or (c) of POCA
\textsuperscript{83} Section 48(1) of POCA
\textsuperscript{84} Section 50(1)(b) of POCA
\textsuperscript{85} Section 4(b)(i) of POCA
\textsuperscript{86} Section 26(1) of POCA
\textsuperscript{87} Section 26(1) of POCA
\textsuperscript{88} Section 25 (1)(a)(i),(ii) or (b)(i),(ii) of POCA
\textsuperscript{89} Section 25(b) of POCA
confiscation order will be granted against them. This order prevents the accused from using their benefits from crime, before the state can apply that such gains be forfeited to the state. The accused is then prevented from dealing with such property in any manner.  

2. If the restraint order is granted, the logical next step would be to apply for a confiscation order in terms of Section 18. This order may be granted by a court after the accused conviction, forfeiting the amounts to the state as the proceeds of crime. This order is usually granted to deter accused who may seemingly benefit from money laundering.  

3. Arguably, the state may apply that the workshop of Oasis Motor Dealers as well as the Motor Dealership be forfeited to the state as an instrumentality of crime, based on the conduct of Mr.Fixit and the instruments used at the workshop and Kallies sale of stolen vehicles. The state can apply in terms of Chapter 6, firstly in terms of Section 38, for a preservation order. The High Court must grant a preservation order if the state proves any of the grounds in Section 38(2). However the preservation order will expire in 90 days unless the State applies for a forfeiture order. For a final forfeiture to the state, the state will have to apply in terms of section 48 for a forfeiture order. The High Court shall make an order applied for in terms of Section 48, by the state, if the state proves any of the circumstances in Section 50. In these circumstances Oasis Motor Dealers and the Motor Dealership could be argued to be instrumentalities of crime as required by Section 50.  

4.4.1.3 Mr.Fixit, Lydia and Skelm  

4.4.1.3.1 Ordinary Charges  
Two charges of Fraud alternatively theft against Mr.Fixit, Lydia and Skelm

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90 Section 26(1) of POCA  
91 Section 18(1) of POCA  
92 Chapter 6 of POCA  
93 Section 38(1) of POCA  
94 Section 38(2)(a),(b),(c) of POCA  
95 Section 40(a) of POCA  
96 Section 48(1) of POCA  
97 Section 48(1) of POCA  
98 Section 50(1)(a) or (b) or (c) of POCA  
99 Section 50(1)(a) of POCA
4.4.1.3.2 POCA Charges
Section 4(b)\textsuperscript{100} against Mr.Fixit, Lydia and Skelm in the sense that they respray and change the details of the cars, having the effect of disguising true ownership of the cars

4.4.1.2.3 Asset Forfeiture:
The personal assets of MR.FIXIT are valued at R2, 5 million, could be forfeited in terms of Section 26\textsuperscript{101} and Section 18\textsuperscript{102} to the state. Firstly, the state could apply for a restraint order in respect of these assets in terms of section 26(1), specifically in terms of Section 26(2)\textsuperscript{103} for all the accused realizable property, specified in the restraint order or not. The State could then argue, after accused conviction that these assets are benefits derived from criminal activity related to the offences and should be forfeited to the state, as property to be realized, in order to make payment to the state for an amount determined by the court\textsuperscript{104}.

4.4.1.4 Kallie, Pieter, Koos, Joe ,Mr.Fixit, Lydia and Skelm

4.4.1.4.1 POCA Charges
Section 2(e)\textsuperscript{105} against Kallie, Pieter, Koos, Joe, Mr.Fixit, Lydia and Skelm in that knew or ought reasonable to have known that Oasis Motor Dealers was conducting the enterprise of selling stolen vehicles or changing the details of stolen vehicles and profiteering from it.

4.4.2 Second Example examined

4.4.2.1 A and B

4.4.2.1.1 The ordinary charges
1. Two charges of Possession of unlicensed firearms against A and B.
2. One charge of Robbery of the truck against A and B

\textsuperscript{100} Section 4(b)(i) of POCA
\textsuperscript{101} Section 26(1) of POCA
\textsuperscript{102} Section 18 (1) (c) of POCA
\textsuperscript{103} Section 26(2)(b) of POCA
\textsuperscript{104} Section 18 (1) of POCA
\textsuperscript{105} Section 2 (e) of POCA
3. Two charges of Murder against A and B
4. Two charges of Kidnapping against A and B
5. One charge of Assault Common against A.
6. One charge of theft for the cargo of the truck against A and B.

4.4.2.1.2 POCA charges
1. One charge of contravention of Section 4(a)\textsuperscript{106} against A and B, in that both entered into an arrangement with Brian, to store the cargo, whilst they searched for buyers, thus concealing the property.
2. A second charge of contravention of Section 4(a)\textsuperscript{107} against A and B for selling the truck to Mr. Huys., conduct having the effect of concealing the true ownership of the truck.

4.4.2.1.3 Asset Forfeiture
1. R135000 confiscation order against A and B, collectively for the loss of the cargo and their benefit, in terms of Section 26\textsuperscript{108} and Section 18\textsuperscript{109} of POCA. R10 000 confiscation order against A and B each, individually for each share in the profit of the sale of the truck and lastly, A’s car. The state’s best option would be to argue that a restraint order be granted in respect of all the accused realizable property, specified in the restraint order or not.\textsuperscript{110} After conviction, the state can argue, that these assets be forfeited to the state in order to realize them for an amount determined by the court to be paid to the state.\textsuperscript{111} The argument that all these assets are benefits directly derived from their offences.\textsuperscript{112}

4.4.2.2 Brian

4.4.2.2.1 The ordinary charges
1. One charge of theft of the cargo
2. Four charges of fraud for offering of the sale of the cargo to the 4 butcheries

\textsuperscript{106} Section 4 (a)(i) of POCA
\textsuperscript{107} Section 4(a)(i) of POCA
\textsuperscript{108} Section 26 (1) of POCA
\textsuperscript{109} Section 18 (1) of POCA
\textsuperscript{110} Section 26(2)(b) of POCA
\textsuperscript{111} Section 18 (1) of POCA
\textsuperscript{112} Section 18(1)(a) of POCA
4.4.2.2.2 POCA charges
1. One charge of contravention of Section 4(a)\textsuperscript{113} against Brian for the arrangement with A and B, who store the cargo, while searching for buyers, assisting them to avoid prosecution.
2. One charge of contravention of Section 6(c)\textsuperscript{114} against Brian for storing the cargo, possessing the proceeds of unlawful activities.
3. One charge of contravention of Section 5(b)\textsuperscript{115} for selling the proceeds of unlawful activities to make funds available.

4.4.2.2.3 Asset Forfeiture
1. R135000 confiscation order against Brian, collectively with A and B for the loss of the cargo and benefit. The state could apply for a restraint order in terms of Section 26(2)\textsuperscript{116}, specifically for that benefit and argue that amount be paid to the State, in addition to punishment for Brian’s direct benefit from the crime.\textsuperscript{117}

4.4.2.3 Mr. Huys
4.4.2.3.1 The ordinary charges
One charge of theft of the truck against Mr. Huys

4.4.2.3.2 The POCA charges
1. One charge of contravention of Section 4(a)\textsuperscript{118} against Mr. Huys, the arrangement with A and B, buying the truck assisting them to avoid prosecution.
2. One charge of contravention of Section 6(a)\textsuperscript{119} against Mr. Huys, for acquiring the truck, when he ought to have reasonably known it is the proceeds of unlawful activities.

4.4.2.3.3 Asset Forfeiture
2. An order against Mr. Huys for the profit of the sale of the parts of the truck, in terms of Section 26(2)\textsuperscript{120} and section 18\textsuperscript{121}. Firstly, the state could argue for a restraint order for all

\textsuperscript{113} Section 4(a)(ii)(aa) of POCA
\textsuperscript{114} Section 6(c) of POCA
\textsuperscript{115} Section 5(b) of POCA
\textsuperscript{116} Section 26(2)(a) of POCA
\textsuperscript{117} Section 18(1)(a) of POCA
\textsuperscript{118} Section 4(a)(ii) of POCA
\textsuperscript{119} Section 6(a) of POCA
\textsuperscript{120} Section 26(2) of POCA
realizable property. After conviction the state may argue that any or all property may be seized from the accused, with an order from court, to be realized for the satisfaction of an amount, specified by the court, in addition to any punishment.

4.5 Conclusion

I submit that the application of POCA as opposed to ordinary criminal law practically demonstrates, the inadequacy of ordinary criminal principles in holding liable persons involved in organized crime. These exercises simplifies the discussion of the indirect application of the Bill of Rights; the jurisprudence of POCA and is exactly the central issue that the jurisprudence highlights. In the constitutional interpretative process of POCA, the bulk of the Supreme Courts decision emphasizes that the context of POCA is of importance, specifically spelled out by its Preamble. In the following chapters it becomes quite clear from the noteworthy cases that it is this very context that is the cornerstone of the constitutional interpretative process. It also the context which is taken into account when the Courts apply the value-laden approach in arriving at value judgments which “promote the spirit, purport and objects of the Bill of Rights.

These practical examples also illustrate the objective and intended use of the POCA legislation. The practical use of POCA as a means to protect and preserve the constitutional rights and freedoms as listed in the Bill of Rights. These examples further strengthen the arguments that the Savoi-judgment is fundamentally flawed, because it fails to recognize the underlying values of POCA. Values which would have an apparent to any jurist if the value-laden approach to the interpretative process was properly applied. An approach, clearly lacking in the judgment to the detriment of any democratic society.

121 Section 18 of POCA
122 Section 26(2)(b) of POCA
123 Section 18(1) of POCA
CHAPTER 5

SUPREME COURT JURISPRUDENCE

5.1. Introduction

In this chapter, I discuss certain judgments of the Supreme Court of Appeal, in respect of POCA. The purpose of these discussions is to determine the type of substantive approach the superior courts have adopted to the interpretation of the POCA and the courts' view of the specific legislation. Ultimately, these judgments reflect the indirect application of the Bill of Rights, the court observes when interpreting the POCA, as required by S39 (2). I will thoroughly discuss the indirect application of the Bill of Rights, with regards to the jurisprudence of the Superior Courts (both Supreme Court of Appeal and the Constitutional Court) in Chapter 6. The purpose of these discussions is to demonstrate how the Supreme Court has utilized the value laden approach to achieve the objective of POCA as outlined in its Preamble.

5.2. Noteworthy judgments

In National Director of Public Prosecutions v Carolus and others, Farlam AJA, found that the distinction sought to be drawn between Chapter 6 and Chapter 5 could not be upheld. In order to decide whether property was tainted by its link to criminal activity so that it was forfeited under an order made in terms of Chapter 6, entails an enquiry into the question whether the property was the proceeds of criminal activities, necessitating an inquiry into the past, viz as to whether the property had been derived, received or retained in connection with or as a result of any unlawful activity. The use of the present tense in S 38(2) and S50 (1) merely indicated that the property had to exist at the time the order was made. The fact that the Legislature had considered it necessary to state expressly in S 12(3) and S19 (1) and in the definitions of 'pattern of criminal activity' and 'pattern of racketeering activity' that offences committed before the Act came into operation could be looked at when dealing with matters falling under Chapters.
2, 4 and 5, was a strong indication that it had not intended that the provisions of Chapter 6 should be applied retrospectively\textsuperscript{129}. The cumulative effect of unfairness, the aversion of the legal culture to retrospectivity where it resulted in unfairness, the fact that the Legislature, had refrained from repeating the 'whether before or after the commencement of the Act' phrase used in S 12(3) and S19(1) of the Act\textsuperscript{130} and the fact that conduct before the commencement of the Act was specifically referred to in the definitions of 'pattern of criminal gang activity' and 'pattern of racketeering activity' ; meant that on a proper interpretation of the Act\textsuperscript{131}, Chapter 6 had not been intended to be retrospective\textsuperscript{132}.

In \textit{National Director of Public Prosecutions v Basson} \textsuperscript{133}, Nugent AJA, similarly found that there was a strong presumption against the retrospective operation of a statute.\textsuperscript{134} The fact that events preceding the coming into operation of the Act\textsuperscript{135} were to be taken into account in determining whether a defendant had 'benefited from unlawful activities'\textsuperscript{136} and in valuing the 'proceeds of unlawful activities'\textsuperscript{137} was not decisive of whether S 18(1) operated with the same effect.\textsuperscript{138} Those sections allowed for benefits received before the commission of the particular offence to be taken into account, both in determining whether a confiscation order should be made, and in determining the scope of such an order, and were equally consistent with the section operating only prospectively as they were with it operating retrospectively. To the extent that the provisions were of assistance at all, they indicated that the Legislature was alive to the question of retrospectivity, and the absence of similar words in 18(1) suggested that the omission was deliberate\textsuperscript{139}.

\begin{flushright}
\textsuperscript{129} Carolus(n125)316
\textsuperscript{130} POCA
\textsuperscript{131} POCA
\textsuperscript{132} Carolus(n 125)317
\textsuperscript{133} 2002 (1) SA 419 (SCA)
\textsuperscript{134} Basson(n 133) 426
\textsuperscript{135} POCA
\textsuperscript{136} Section 12(3) POCA
\textsuperscript{137} Section 19(1) of POCA
\textsuperscript{138} Basson(n 133) 427
\textsuperscript{139} Basson(n 133) 428
\end{flushright}
In *National Director of Public Prosecutions v Rebuzzi* \(^{140}\), Nugent AJA, remarked that the primary object of a confiscation order is not to enrich the State but to deprive the convicted person of ill-gotten gains.\(^{141}\) The purpose of such an order is to prevent the convicted person from profiting rather than to enrich the State and that the court's inquiry in terms of S 18(1) is directed towards establishing the extent of his benefit rather than towards establishing who might have suffered loss. In the case of so-called "victimless" crimes, such as drug-dealing and the like, there will be no person who could be said to have suffered a loss.\(^{142}\) That a confiscation order might not be necessary in order to deprive the convicted person of the proceeds of crime (i.e. where there is an identifiable victim who has suffered loss) is not a reason to withhold such an order\(^{143}\). The order serves the purpose of ensuring that, irrespective of whether claims are in due course established, the convicted person will not remain in possession of the proceeds.\(^{144}\)

In *National Director of Public Prosecutions v Kyriacou*\(^{145}\), Mlambo AJA, found that a court that convicts an offender is not restricted to making a confiscation order in relation only to the offences of which the offender has been convicted\(^{146}\). S 18(1) of the Act\(^{147}\) authorizes a court to make a confiscation order once it has found that the offender has benefited either from the offence of which he has been convicted, or from any other offence of which he has been convicted at the same trial, or from any criminal activity which the court finds to be sufficiently related to those offences\(^{148}\). A finding that the offender has benefited in any of those respects constitutes the jurisdictional fact that is necessary for a court to exercise its discretion to make a confiscation order\(^{149}\). Whether the court exercises that discretion, and the extent to which it does so, will depend upon the extent to which the offender is found to have benefited from either the crime concerned, or from other offences of which he was convicted, or from related criminal activity.\(^{150}\) The fact that a court, in convicting an offender of the offence of

\(^{140}\)2002 (2) SA 1 (SCA)
\(^{141}\)Rebuzzi, (n 140) 6
\(^{142}\)Ibid 6
\(^{143}\)Ibid 6
\(^{144}\)Ibid 7
\(^{145}\)2003 (2) SACR 524 (SCA)
\(^{146}\)Kyriacou (n 145) 529
\(^{147}\)POCA
\(^{148}\)Kyriacou (n 145) 529
\(^{149}\)Kyriacou (n 145) 529-530
\(^{150}\)Kyriacou (n 145) 530
receiving stolen property knowing it to have been stolen, has made an order in terms of s 34(1) (a) of the Criminal Procedure Act\textsuperscript{151} that the property concerned be returned to the rightful owners thereof, has no bearing on the jurisdictional fact that is necessary for the court to exercise its discretion to make a confiscation order\textsuperscript{152}. Having found that the offender received a benefit from the crimes of which he was convicted, the court has discretion to order the confiscation of benefits he received not only from that criminal activity but also from related criminal activity\textsuperscript{153}.

In \textit{National Director of Public Prosecutions v RO Cook Properties (PTY) Ltd; National Director of Public Prosecutions v 37 Gillespie Street Durban (PTY) Ltd and another; National Director of Public Prosecution v Seevnarayan} \textsuperscript{154}, Mpati DP and Cameron JA, found that the inter-related purposes of Chapter 6 of the Act\textsuperscript{155} include: (a) removing incentives for crime; (b) deterring persons from using or allowing their property to be used in crime; (c) eliminating or incapacitating some of the means by which crime may be committed; and (d) advancing the ends of justice by depriving those involved in crime of the property concerned. Objectives (b) and (d) embody a palpably penal aspect; but the statutory objectives transcend the merely penal. Therefore, the provisions must be restrictively interpreted\textsuperscript{156} .Chapter 6's primary focus is not on wrongdoers, but on property used to commit an offence or which constitutes the proceeds of crime. A criminal conviction is not a condition precedent to forfeiture, and property may be forfeited even where no charge is pending. In consequence (at least in the first phase of the chapter's two-stage procedure), the guilt or wrongdoing of owners or possessors of property is not primarily relevant to the proceedings. This approach to Chapter 6 has the interpretative consequence that in giving meaning to 'instrumentality of an offence' the focus is not on the state of mind of the owner, but on the role the property plays in the commission of the crime. The phrase must be interpreted independently of the guilt or innocence of the property-owner. Where a forfeiture order is sought the Court thus undertakes a two-stage enquiry. The contextual and constitutional indicators pointing to a restrictive interpretation of 'instrumentality' make it unnecessary to intrude the owner's

\textsuperscript{151} 51 of 1977
\textsuperscript{152} Kyriacou(n 145)530
\textsuperscript{153} Ibid 530
\textsuperscript{154} 2004 (2) SACR 208 (SCA)
\textsuperscript{155} POCA
\textsuperscript{156} R O Cook Properties(n 154)225
culpability into the first stage\textsuperscript{157}. The Act\textsuperscript{158} defines 'interest' very widely as including 'any right'. There can be no reason to exclude ownership - the most encompassing right of property - from that definition, nor to prevent owners from applying to exempt their full interest from forfeiture \textsuperscript{159}. The Act\textsuperscript{160} requires property owners to exercise responsibility for their property and to account for their stewardship of it in relation to its possible criminal utilization. The pursuit of those statutory objectives cannot exceed what is constitutionally permissible. Forfeitures that do not rationally advance the inter-related purposes of Chapter 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 not contemplated by or permitted under the Act\textsuperscript{161}. The relationship between the purpose of the forfeiture and the property to be forfeited must be close, the purpose of the forfeiture must be compelling and a proportionality analysis - in which the nature and value of the property subject to forfeiture is assessed in relation to the crime involved and the role it played in its commission - may be appropriate at the final stage.\textsuperscript{162} The words 'concerned in the commission of an offence', used in the definition of 'instrumentality of an offence' in S1\textsuperscript{163}, must be interpreted so that the link between the crime committed and the property is reasonably direct, and that the employment of the property must be functional to the commission of the crime. By this is meant that the property must play a reasonably direct role in the commission of the offence. In a real or substantial sense the property must facilitate or make possible the commission of the offence. As the term 'instrumentality' itself suggests, the property must be instrumental in, and not merely incidental to, the commission of the offence. Otherwise there is no rational connection between the deprivation of property and the objective of the Act.\textsuperscript{164} The deprivation will constitute merely an additional penalty in relation to the crime, but without the constitutional safeguards that are a prerequisite for the imposition of criminal penalties. To qualify for forfeiture as an 'instrumentality of an offence' the property must play a part, in a reasonably direct sense, in those acts which constitute the actual

\textsuperscript{157} R \textit{O} \textit{Cook Properties}(n 154)226
\textsuperscript{158} POCA
\textsuperscript{159} Ibid 227
\textsuperscript{160} POCA
\textsuperscript{161} POCA
\textsuperscript{162} R \textit{O} \textit{Cook Properties}(n 154)229
\textsuperscript{163} Section 1 ,POCA
\textsuperscript{164} POCA
commission of the offence in question. It is not necessary that the property is the means by which the offence is committed. A relation of indispensable causality between property and offence does not, by itself, constitute the measure of involvement necessary for making property an 'instrumentality' of the offence\textsuperscript{165}. The fact that a crime is committed at a certain location does not by itself entail that the venue is 'concerned in the commission' of the offence. Either in its nature or through the manner of its utilization, the property must have been employed in some way to make possible or to facilitate the commission of the offence\textsuperscript{166}. The Act\textsuperscript{167} is designed to reach far beyond 'organized crime, money laundering and criminal gang activities' and it clearly applies to cases of individual wrongdoing\textsuperscript{168}. The amplitude of the definition of 'proceeds of unlawful activities', should be approached somewhat differently from that in the case of 'instrumentality of an offence'. This is because the risk of unconstitutional application is smaller. It is less likely that forfeiture of benefits derived, received or retained 'in connection with or as a result of any unlawful activity' would fail rationally to advance the Act's\textsuperscript{169} objectives of removing incentives, deterring the use of property in crime, eliminating or incapacitating the means by which crime may be committed and at the same time advancing the ends of justice. The definition, subject to necessary attenuation of the linguistic scope of 'in connection with', should be given its full ambit\textsuperscript{170}.

In \textit{Prophet v National Director of Public Prosecutions}\textsuperscript{171}, Mpati DP, found that a constitutional application of chapter 6 of POCA required an element of proportionality between the crime committed and the property to be forfeited. A balance must be struck between the public interest in effective crime fighting and the interests of private property owners affected by forfeiture laws\textsuperscript{172}. The introduction of the forfeiture procedures by the POCA was brought about because of the realization, by the Legislature, that there was rapid growth, both nationally and internationally, of organized criminal activity and the desire to combat these criminal activities by, inter alia, depriving those who use property for the commission of an offence of such property. Forfeiture may play an important role

\footnotesize{\textsuperscript{165} R O Cook Properties(n 154)229-238

\textsuperscript{166} Ibid 231

\textsuperscript{167} POCA

\textsuperscript{168} Ibid 239

\textsuperscript{169} POCA

\textsuperscript{170} Ibid 239-240

\textsuperscript{171} 2006 (1) SA 38 (SCA)

\textsuperscript{172} Prophet(n 171)53}
in the prevention and punishment of drug offences. Courts should thus guard against the
danger of frustrating the lawmaker’s purpose for introducing the forfeiture procedure in
the POCA. A mere sense of disproportionality should not lead to a refusal of the order
sought. To ensure that the purpose of the law is not undermined, a standard of
‘significant disproportionality’ ought to be applied for a court to hold that a deprivation of
property is ‘arbitrary’ and thus unconstitutional, and consequently refuse to grant a
forfeiture order. The owner should place the necessary material for a proportionality
analysis before the court.\textsuperscript{173}

In National \textit{Director of Public Prosecutions v Vermaak}\textsuperscript{174}, Nugent AJA, decided that
where an offence has been committed in the course of a broader enterprise of criminal
activity, that is being conducted by the offender in association with others, deprivation
can serve not only to inhibit the particular offender from continuing that activity but also
to arrest the continuance of that activity by others who are party to the ongoing
enterprise. Even where the offence is committed in the course of an ongoing criminal
enterprise that is being conducted by the offender alone, the withdrawal of property is
capable of having a severely inhibiting effect on its continuance. Forfeiture will have a
great remedial effect where crime has become a business. Conversely, where the
offence is not committed in the course of ongoing criminal activity, the ordinary criminal
remedies are quite capable of serving the purpose of deterring the commission of further
offences, whether by the particular offender or by other offenders.\textsuperscript{175}

In \textit{Mazibuko v The National Director of Public Prosecutions}\textsuperscript{176}, Bosielo AJA 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)\textsuperscript{177} and an order for the forfeiture
of property under S 50(1) of the Act\textsuperscript{178}. It is trite that the right to property is a
fundamental right deeply ensconced in the Bill of Rights\textsuperscript{179}. S 25(1) of the Constitution\textsuperscript{180}

\textsuperscript{173} \textit{Prophet} (n 171)55-56
\textsuperscript{174}2008 (1) SACR 157 (SCA)
\textsuperscript{175}Ibid 162-163
\textsuperscript{176}2009 (2) SACR 368 (SCA)
\textsuperscript{177}108 of 1996
\textsuperscript{178}Mazibuko(n 176) 378
\textsuperscript{179}108 of 1996
\textsuperscript{180}108 of 1996
prohibits, in clear terms, any arbitrary deprivation of property. On the other hand S 7(2) of the Constitution obliges the State to respect, protect, promote and fulfill 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. 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 the 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. The primary purpose of POCA is to prevent organized 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 offenders, but to deprive them of the instrument used to facilitate or commit the offence. Such forfeiture is intended mainly to cripple the illegal activities which are carried on. Once this has happened, the objects of POCA will have been achieved.

In *National Director of Public Prosecutions v Gardener*, Cachalia JA, found that in the exercise of its discretion, a court must bear in mind the main object of the legislation, which is to strip sophisticated criminals of the proceeds of their criminal conduct. The legislature has, in Chapter 5 of POCA, provided an elaborate scheme to facilitate such stripping. The function of a court in this scheme is to determine the ‘benefit’ from the offence, its value in monetary terms and the amount to be confiscated. It is undoubtedly so that a confiscation order may often have harsh consequences, not only for the defendant but also for others who may have innocently benefited, directly or indirectly, from the criminal proceeds. This is what the legislation contemplates and a court may not, under the guise of the exercise of its discretion, disregard its provisions. Confiscation and sentence are to be treated separately. The purpose of sentencing is to punish an offender for his or her criminal wrongdoing. The severity of a sentence is primarily intended to reflect the defendant’s culpability in relation to the offence for which he or she is being punished. The main purpose of a confiscation order

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181 Mazibuko(n 176)380
182 Ibid 380-381
183 2011 (4) SA 102 (SCA)
184 Gardener(n 183)107-108
is to deprive offenders from deriving any benefit from their ill-gotten gains. The achievement of this purpose may have a punitive effect but this is not its rationale. The severity of a sentence, therefore, generally ought not to have a bearing on the exercise of a court’s discretion whether to make a confiscation order 185.

In *De Vries v The State* 186, Leach JA, found the POCA was largely modeled upon “RICO” 187 statute from which the definitions of “pattern of racketeering activity” and “enterprise” were directly taken. The jurisprudence of the United States is of considerable assistance in understanding why indictments are usually formulated in this way. The Fifth Amendment of the Constitution of the United States provides that no person shall be “subject for the same offence to be put twice in jeopardy of life and limb”. This has given rise to the so-called defense of “double jeopardy”, a multi-faceted defense which, first, protects a citizen against a second prosecution for the same events after an acquittal on the first charge (autrefois acquit); secondly, bars a convicted offender being prosecuted once again for the same offence (autrefois convict) and, thirdly, protects against multiple punishments being imposed for the same offence (splitting of charges). After the introduction of RICO and other similar statutes 188 intended to combat organized crime, which introduced racketeering offences similar to those created by s 2 of POCA, many accused offenders in the United States raised pleas of double jeopardy in circumstances similar to the present. In doing so they argued that the RICO charge (sometimes referred to as an “umbrella” charge) together with the underlying so-called „predicate offences” relied on to prove the racketeering activities, led them to face either being convicted again for earlier offences in respect of which they had already been tried, or to being sentenced twice for the same unlawful action. The arguments in respect of those pleas were essentially the same as that upon which the present appellant relies, namely, that having been convicted in respect of the predicate offences it is impermissible to either convict or sentence him for the umbrella offence of racketeering. These arguments received short shrift in the United States. In a series of

185 Ibid 108
186 2012 (1) SACR 186 (SCA)
188 For example the Continuing Criminal Enterprise statute 21 USC § 849 (1988)
decisions the courts\textsuperscript{189} of that country held the umbrella offences to be separate and discrete from the underlying predicate offences — and capable of being punished separately\textsuperscript{190}. The definition of pattern of racketeering activity, which the state is obliged to prove in order to secure a conviction under s 2(1)(e) of the POCA, includes offences for which the offender may already have been convicted and sentenced — the legislature’s necessary intent in this regard is to be inferred from the phrase “excluding any period of imprisonment” in the calculation of the 10 year period referred to in the definition of “pattern of racketeering activity”. In addition, the preamble to the POCA also proclaims its intent \textsuperscript{191}.Due to the similarities between RICO and POCA, and bearing in mind certain of the decisions in the United States, the Court in S v Dos Santos and another\textsuperscript{192} concluded:... “Prosecutions under POCA, as also the predicate offences, would usually involve considerable overlap in the evidence, especially where the enterprise exists as a consequence of persons associating and committing acts making up a pattern of racketeering activity. Such overlap does not in and of itself occasions an automatic invocation of an improper splitting of charges or duplication of convictions. As should be evident from a simple reading of the statute, a POCA conviction requires proof of a fact which a conviction in terms of the Diamonds Act\textsuperscript{193} does not. I can conceive of no reason in principle or logic why our approach should be any different to that adopted by our American counterparts.”

Proving an offense in terms of S 2(1)(e) of POCA, the State must do more than merely prove the underlying predicate offences. It must also demonstrate the accused association with an enterprise and a participatory link between the accused and that enterprise’s affairs by way of a pattern of racketeering activity. In the light of this, an offence under S 2(1) of POCA is clearly separate and discrete from its underlying predicate offences. POCA recognizes that past convictions may be taken into account in

\textsuperscript{189} Compare, for example, United States v Peacock 654 F2d 339 at 349 (5th Cir 1981); Garrett v United States 471 US 773 (105 S Ct 2407; 85 L Ed 2d 764 (1985); United States v Pungitore 910 F2d 1084 at 1108, n24 (3rd Cir 1990); United States v Beale 921 F2d 1412 at 1437 (11th Cir 1991); United States v Gonzalez 921 F2d 1530 at 1538 (11th Cir 1991); United States v Cyprian 23 F3d 1189 at 1198 (7th Cir 1994); United States v O’Connor 953 F2d 338 at 344 (7th Cir 1994); United States v Crosby 20 F3d 480 at 484 (DC Cir 1994); United States v Morgano 39 F3d 1358 at 1368 (7th Cir 1994); United States v Baker 63 F3d 1478 at 1494 (9th Cir 1995)
\textsuperscript{190} De Vries,(n 186)204-205
\textsuperscript{191} “the South African common-law and statutory law fail(ed) to deal effectively with organised crime, money laundering and criminal gang activities, and also fail(ed) to keep pace with international measures aimed at dealing effectively with organised crime, money laundering and criminal gang activities . . .”
\textsuperscript{192} 2010 (2) SACR 382 (SCA)
\textsuperscript{193} Diamonds Act 56 of 1986
establishing a pattern of racketeering, there is no reason in either law or logic why that pattern cannot be established by proving both the umbrella and predicate offences in the same trial.\(^{194}\)

### 5.3 Conclusion

The judgments of Basson and Carolus are illustrative of the extremes of the generous approach, where the interpretative methodology utilized by the Court to the advantage of the accused. The accused are given the full benefit of their constitutional rights as enshrined in Section 35 of the Constitution. These two judgments are disappointing, especially in light of the context and purpose of POCA. I submit that in applying the value-laden approach, the value judgment that should have been made would have taken cognizance of the language, context, history, purpose, text of POCA. The interests of both the individual and that of the state should have been taken into account in advancing the protection of the democratic state. Fortunately, the other judgments of reflect how the SCA, indeed developed a jurisprudence entailing the value-laden approach. Rebuzzi, Kyriacou and Gardener are indicative of the value-laden approach, where the SCA emphasized the language, text and purpose of POCA in making judgments advancing the democratic goals of POCA. Cook Properties, Prophet; and Mazibuko are judgments where the SCA focuses on both the historical, language and text of POCA itself, while developing the notion of proportionality. I submit that this is indicative of the SCA developing the constitutional value of fairness, a notion that the Constitutional Court has indicated several times forms part of our criminal justice system.\(^ {195}\) De Vries exemplifies the cognizance the SCA takes of foreign law in the application of POCA. This accord with the versatile and value-laden approach that is required in promotion and development of constitutional values. I submit that the overall jurisprudence of the SCA reflects and supports the approach of Devenish and is exemplary of the inductive and substantive reasoning required by section 39 of the Constitution. The jurisprudence of the SCA is indicative of a value-laden approach seeking to achieve and enhance the objectives of POCA, outlined in its preamble.

\(^{194}\) De Vries, (n 186) 204-206

\(^{195}\) Key v Attorney-General, Cape of Good Hope Provincial Division and Another 1996 (6) BCLR 788 (CC); Ferreira v Levin NO and Others and Vryenhoek and Others v Powell NO and Others 1996 (1) BCLR 1 (CC)
further strengthens the notion that the Savoi-judgment is fundamentally flawed, because it fails to recognize this jurisprudence encompassing the value-laden interpretative approach to POCA.
CHAPTER 6

CONSTITUTIONAL COURT JURISPRUDENCE

6.1. Introduction

In this chapter, I discuss certain judgments of the Constitutional Court, in respect of POCA. The purpose of these discussions is to determine the type of substantive approach the superior courts have adopted to the interpretation of POCA and the courts view of the specific legislation. Ultimately, these judgments reflect the indirect application of the Bill of Rights, the court observes when interpreting POCA, as required by S39 (2). I will thoroughly discuss the indirect application of the Bill of Rights, with regards to the jurisprudence of the Constitutional Court. As with the previous chapter, the purpose of these discussions is to demonstrate how the Constitutional Court has utilized the value laden approach to achieve the objective of POCA as outlined in its Preamble. Ultimately these demonstrations will illustrate how flawed the reasoning of the Savoi judgment is for failure to employ the value-laden approach, from a comparative viewpoint.

6.2. Noteworthy judgments

In National Director of Public Prosecutions and Another v Mohamed NO and Others, Ackerman J, found “the Act’s overall purpose can be gathered from its long title and preamble and summarized as follows: The rapid growth of organized 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 organized crime to book, in view of the fact that they

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197 2002 (9) BCLR 970 (CC)Mohammed(1)
198 POCA
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 organized crime, money laundering and criminal gang activities. Hence, the need for the measures embodied in the Act\textsuperscript{199}. It is common cause that conventional criminal penalties are inadequate as measures of deterrence when organized crime leaders are able to retain the considerable gains derived from organized crime, even on those occasions when they are brought to justice. The above problems make a severe impact on the young South African democracy, where resources are strained to meet urgent and extensive human needs. Various international instruments deal with the problem of international crime in this regard and it is now widely accepted in the international community that criminals should be stripped of the proceeds of their crimes, the purpose being to remove the incentive for crime, not to punish them. This approach has similarly been adopted by our legislature. The present Act\textsuperscript{200} represents law reform which has sought to give effect to South Africa's international obligation to ensure that criminals do not benefit from their crimes...\textsuperscript{(My emphasis)}\textsuperscript{201}. Further "The order, in this matter was couched as a notional severance order. It followed from the High Court’s construction of section 38\textsuperscript{202}, and its consequent finding that the section was regarded as inconsistent with section 34 of the Constitution because it precluded an application under section 38 being made on notice, and further precluded the High Court hearing the matter from granting a rule \textit{nisi} and ordering such rule \textit{nisi} to act as an interim property preservation and seizure order under the section. The defect in the section which the High Court sought to remedy was accordingly an omission from the section, namely the failure to provide for the above procedure and remedy. The High Court attempted to do something that the Constitutional Court had held could not be done, that is, to remedy, by notional severance formulation, a constitutional invalidity caused by an omission (\textit{My emphasis})\textsuperscript{203}. The Court then referred to an earlier constitutional judgment.

"Where the invalidity of a statutory provision resulted from an omission, it was not possible to achieve notional severance by using words such as “invalid to the extent that”, or other expressions indicating notional severance. An omission could not,
notionally, be cured by severance. The only logical equivalent to severance, in the case of invalidity caused by omission, was the device of reading in.204

In *National Director of Public Prosecutions and Another v Mohamed NO and Others*205 Ackerman J, found that

"It is common cause, and correctly so, that on the High Court’s construction of the section, the constitutional fair hearing rights of various persons could be materially limited and that unless such limitation was justifiable under section 36 of the Constitution, section 38206 would be constitutionally invalid. On the construction favored by both parties in the present hearing, this would not be the case and the section would pass constitutional muster. A settled principle of constitutional construction recognizes that a statutory provision may be capable of more than one reasonable construction. If the one construction leads to constitutional invalidity but the other not, the latter construction, being in conformity with the Constitution, must be preferred to the former, provided always that such construction is reasonable and not strained207…. The importance of the *audi* rule, as one of the main pillars of the section 34 fair hearing right needs to be stressed, when construing a statutory provision which, it is contended, excludes *audi*.208..It is well established that, as a matter of statutory construction, the *audi* rule should be enforced unless it is clear that the legislature has expressly or by necessary implication enacted that it should not apply or that there are exceptional circumstances which would justify a court not giving effect to it209.

For stronger reasons this approach should apply when construing a statutory provision in order to determine its constitutionality. Accordingly, in construing section 38210 where no express reference is made to the *audi* principle, or its exclusion, the question to be asked is not whether the *audi* principle can be implied in the section, but rather whether it has been excluded from the section by clear necessary implication, or whether there

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204 *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and others* 2000 (1) BCLR 39(CC); 2000 (2) SA 1 (CC) paragraphs 63–64. *Mohammed 1*, (n 1)981 205 2003 (5) BCLR 476 (CC), *Mohammed*(2) 206 Section 38 of POCA 207 *Mohammed (2)*, (n205) 488 208 *Mohammed (2)*, (n 205) 489 209 *Mohammed (2)*, (n 205) 489 210 Section 38 of POCA
are exceptional circumstances which would justify a court not giving effect to it 211…. We have adopted the view, consistently enunciated over the years by the courts, that words cannot be read into a statute by implication unless the implication is a necessary one in the sense that without it effect cannot be given to the statute as it stands and that such implication must be necessary in order to realize the ostensible legislative intention or to make the Act 212 workable. The same approach must be adopted when considering whether, by necessary implication, the audi principle has been excluded from section 38 213 and it cannot be found that it has been so excluded. There are no exceptional circumstances and the purposes of the Act 214 can be fully achieved when, in relation to section 38 215, the principles relating to the issuing of rules nisi and the making of interim preservation orders are applied by a High Court. The essence of these principles is their practicability, flexibility and adaptability. They can be narrowly and appropriately tailored to accommodate the interests of the State in attaining the purposes of the Act 216, in particular in preventing property to which the State can lay claim under the Act 217 from disappearing or being squandered, and also to protect, as far as possible, the interests of the individuals by observing the audi rule and in so doing to afford them as fair a trial as possible under section 34 218…. The proper construction of section 38 219 is that the audi rule has not been excluded and that the principles relating to the issuing of rules nisi and the making of interim preservation orders by the High Courts, as discussed in this judgment, are applicable to the section 38 220 procedures when the National Director applies ex parte, as he is entitled to do in all cases, for relief under section 38 221… 222

In Fraser v Absa Bank Ltd 223 the Court in deciding whether to grant leave to appeal the Court observed that Applicant had not challenged the constitutional validity of any of the provisions of the POCA itself, or of the restraint order. He merely claimed that the

211 Mohammed (2), (n 205) 489
212 POCA
213 Section 38 of POCA
214 POCA
215 POCA
216 POCA
217 POCA
218 Section 34 of the Constitution of 1996
219 Section 38 of POCA
220 Section 38 of POCA
221 Section 38 of POCA
222 Mohammed (2), (n 205), 492
223 2007 (3) BCLR 219 (CC)
Supreme Court of Appeal’s interpretation of POCA was constitutionally problematic. Nevertheless the Court was satisfied that a constitutional matter was raised. The proper interpretation of section 26(6) of the POCA was in issue. That provision conferred a discretion to allow the payment of reasonable legal expenses for a criminal trial and related matters out of restrained property. The way in which the discretion was exercised would determine how much of the restrained property was available for legal fees in the criminal trial and could have an effect on how speedily the trial was conducted\textsuperscript{224}. Applicant had invoked section 35(3)(d) (prohibits an unreasonable delay in trial proceedings) and section 35(3)(f)\textsuperscript{225}. These two provisions were relevant. The question arose whether the Supreme Court of Appeal’s interpretation of section 26\textsuperscript{226} had failed to promote the spirit, purport and objects of the Bill of Rights in terms of section 39(2)\textsuperscript{227}. Section 39(2)\textsuperscript{228} required more from a court than merely to avoid an interpretation which conflicted with the Bill of Rights. It demanded the promotion of the spirit, purport and objects of the Bill of Rights. These were to be found in the matrix and totality of rights and values embodied in the Bill of Rights. It could also in appropriate cases be found in the protection of specific rights such as \textit{in casu} the right to a fair trial in section 35(3)\textsuperscript{229} of which the rights to legal representation and against unreasonable delays were components. The spirit, purport and objects of the protection of the right to a fair trial therefore had to be considered. A constitutional matter had thus been raised.\textsuperscript{230} The questions that arose were whether a concurrent creditor of a defendant had standing to intervene in an application by that defendant in terms of section 26(6)\textsuperscript{231} to provide in a restraint order for reasonable legal expenses; whether a court had a discretion to allow it to intervene; and if so, the nature and extent of the discretion. The Court set out its reasons for holding that on the wording of POCA, the High Court had discretion to allow a creditor to intervene. Such an interpretation was not at odds with the obligation to promote the spirit, purport and objects of the Bill of Rights. Whether the intervention of a creditor could result in a situation where a criminal trial had to be unreasonably delayed was an important factor to be considered by the court when exercising its discretion.

\textsuperscript{224} Ibid 235
\textsuperscript{225} Section 35 of the Constitution of 1996
\textsuperscript{226} Section 26 of POCA
\textsuperscript{227} Section 39(2) of the Constitution of 1996
\textsuperscript{228} Section 39(2) of the Constitution of 1996
\textsuperscript{229} Section 35 of the Constitution of 1996
\textsuperscript{230} Fraser v Absa, (n 223) 235
\textsuperscript{231} Section 26 of POCA
right to legal representation embodied in section 35(3)(f) of the Constitution did not mean that an accused was entitled to the legal services of any counsel he or she chose, regardless of his or her financial situation. An accused also had the right to have a legal practitioner assigned at the State’s expense in terms of section 35(3)(g) where substantial injustice would otherwise result. The extent to which this might be appropriate or sufficient in a particular case would depend on all the particular circumstances, including the complexity and seriousness of the criminal charges.

In *Mohanram and Another v National Director of Public Prosecutions and Others* A question arose as to whether the offences for which forfeiture was potentially competent were limited to those created by the POCA, namely racketeering; money laundering and criminal gang activities under. These could collectively be termed “organized crime offences” as distinct from “ordinary crimes.” The Court divided on this issue. Van Heerden AJ held that “offence” in the context of civil forfeiture authorized by Chapter 6 of the POCA was not limited to “organized crime offences” as distinct from “ordinary crimes.” Specifically:

“First, it is important to note that, subsequent to the judgment of the Cape High Court in *National Director of Public Prosecutions v Carolus and Others*, in which Blignault J held that Chapter 6 of POCA (as it was then) was not retrospective in effect, the Act was amended by the Prevention of Organised Crime Second Amendment Act 38 of 1999, (“Act 38 of 1999”) “so as to make it clear that the provisions of Chapters 3, 5 and 6 are applicable in respect of instrumentalities of offences and proceeds of unlawful activities where such offences or unlawful activities occurred before the commencement of the Act”, that is, that these provisions do operate retrospectively. The definition of “instrumentality of an offence” in section 1(1) of POCA was substituted so as to mean:

“any property which is concerned in the commission or suspected commission of an offence at any time before or after the commencement of this Act, whether committed within the Republic or elsewhere”. (Emphasis added.)

The definition of “proceeds of unlawful activity” was also substituted to mean:

“, . . . any property or any service, advantage, benefit or reward which was derived, received or retained, directly or indirectly, in the Republic or elsewhere, at any time before or after the commencement of this Act, in connection with or as a result of

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232 35(3) of the Constitution of 1996
233 *Fraser v Absa,* (n 223) 237-241
234 2007 (6) BCLR 575 (CC)
235 *Mohanram,* (n 234) 576
any unlawful activity carried on by any person, and includes any property representing property so derived.”

The point of the amending legislation was driven home most pertinently by the insertion of a new section 1(5) into POCA in the following terms:

“Nothing in this Act or in any other law, shall be construed so as to exclude the application of any provision of Chapter 5 or 6 on account of the fact that –

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

(b) any proceeds of unlawful activities were derived, received or retained, before the commencement of this Act.” (Emphasis added.)

This being so, the contention of the LRP to the effect that the offences for which forfeiture under Chapter 6 of POCA is potentially competent are limited to the offences “created” by Chapters 2, 3 and 4 of POCA (what the LRP calls “organised crime offences”) cannot be correct. A reading of POCA, as amended, makes it clear that it applies to offences committed before and after the commencement of the Act and accordingly has a wider ambit than that of offences that were “created” by POCA, and which thus only existed from its date of commencement in January 1999.”

Sachs J observed that no “bright lines” could be drawn between organized crime and private criminal activities. It was unnecessary to decide the issue. For the purposes of the judgment, they would assume that there was no obligatory jurisdictional requirement that the instrument of an offence be shown to have a connection with organized crime. It was assumed that once a criminal offence was literally covered by the schedule to the POCA, and the property concerned was proved to be an instrument in its commission, a forfeiture order in terms of Chapter 6 became permissible.

Mosenek DCJ similarly found it unnecessary to decide the issue. The conclusion reached on proportionality rendered it unnecessary to resolve the issue in the instant case. Furthermore, the proper scope of section 50(1)239 had not been debated before the High Court or the Supreme Court of Appeal. However, Mosenek DCJ observed that the proposition that “offence” in the context of civil forfeiture authorized by Chapter 6 of

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236 Ibid 585-586
237 Chapter 6 of POCA
238 Mohunram,(n 234) 576
239 Section 50 of POCA
the POCA was indeed limited to “organized crime offences” as distinct from “ordinary crimes” was not without merit.\textsuperscript{240}

In \textit{Shaik and Others v The State}\textsuperscript{241}, the Court found that it will be useful to describe the scheme of criminal confiscation contemplated by POCA. Chapter 5 of POCA confers a power on a criminal court to make a confiscation order against a person who has been convicted of a crime where the court has found that the person has benefited from the crime. Once a person has been convicted, the prosecutor may apply for a confiscation order. In order for a confiscation order to be made, the court must find that the person convicted of the offence has derived a benefit from the offence of which he or she has been convicted or of any “criminal activity which the court finds to be sufficiently related” to that offence. The court may then make an order that the person pay to the State “any amount it considers appropriate”. A confiscation order is a civil judgment for payment to the State of an amount of money determined by the court and is made by the court in addition to a criminal sentence. Before going further, it is important to emphasize that the order that a court may make in terms of chapter 5 is not for the confiscation of a specific object, but an order for the payment of an amount of money to the State, even though it is ordinarily referred to as a “confiscation order”. The mechanism of a civil judgment sounding in money may well have been selected by the Legislature to avoid the difficulty of tracing particular assets which may have been the proceeds of crime and so to facilitate the recovery of the value of the proceeds. Section 12(3) of the POCA provides that for the purposes of chapter 5\textsuperscript{242}, “a person has benefited from unlawful activities if he or she has at any time, whether before or after the commencement of this Act, received or retained any proceeds of unlawful activities”. “Proceeds of unlawful activities” are in turn broadly defined in section 1 of POCA. The section is widely cast, something which becomes even more evident when the definition of “property” contained in section 1 of the Act is considered. One of the reasons for the wide ambit of the definition of “proceeds of crime” is that sophisticated criminals will seek to avoid proceeds being confiscated by creating complex systems of “camouflage”. Similarly, the definition makes clear that proceeds of crime will constitute proceeds even if “indirectly obtained”. A person who has benefited through the enrichment of a company as a result of a crime in

\textsuperscript{240} \textit{Mohunram},(n 234)576
\textsuperscript{241} 2008 (8) BCLR 834 (CC)
\textsuperscript{242} POCA
which that person has an interest will have indirectly benefited from that crime. Finally, it should be noted that “proceeds”, as defined, include anything “derived, received or retained” in connection with or as a result of the offences. Section 18(2) sets two bases for calculating the upper limit of the amount that may be confiscated. For the purposes of the judgment, only the amount ordered to be confiscated that may not have exceeded the value of the proceeds of the offences or related criminal activities as calculated in accordance with chapter 5 of the Act, was considered. That calculation would be based on the definition of the proceeds of unlawful activities as set out in POCA. Section 19(1) of the Act is also relevant in calculating the value. Chapter 5 deals with the making of confiscation orders by a criminal court at the end of a criminal trial. Its structure and process is therefore different to that contemplated by Chapter 6. The Preamble to the Act captures the overall purposes of the POCA very clearly. The preamble which points most directly to the key purpose of Chapter 5: to ensure that no person can benefit from his or her wrongdoing. From this primary purpose, two secondary purposes flow. The first is general deterrence: to ensure that people are deterred in general from joining the ranks of criminals by the realization that they will be prevented from enjoying the proceeds of the crimes they may commit. And the second is prevention: the scheme seeks to remove from the hands of criminals the financial wherewithal to commit further crimes. These purposes are entirely legitimate in our constitutional order. Understanding the purposes of chapter 5 of the POCA are best done on the terms of Chapter 2 of our Constitution and our own legislation. Upon a proper construction of the POCA, Chapter 5’s primary purpose seems rather to be to ensure that criminals cannot enjoy the fruits of their crimes. It may well be that the achievement of this purpose might at times have a punitive effect, but that is not to say that the primary purpose is punitive.

In Naidoo and Others v National Director of Public Prosecutions and Another,

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243 POCA
244 POCA
245 POCA
246 Shaik, (n 241)852-853
247 Constitution of 1996
248 POCA
249 Shaik,(n 241)855
250 2011 (12) BCLR 1239 (CC)
the Court found that "to interpret the wide discretion conferred by section 26(1)\textsuperscript{251} as permitting an override of the preconditions expressly set in section 26(6)\textsuperscript{252} would run counter to the scheme of the provisions as a whole. The provision for reasonable legal and living expenses in section 26(6)\textsuperscript{253} is narrowly and finely crafted. Its careful mechanism should not readily be overridden. And its overall legislative purpose must be borne in mind. It is to discourage defendants who face criminal prosecution from hiding their assets. If a defendant retains the alleged proceeds of crime, they remain available for living and legal expenses. But if these assets are donated away, they become unavailable for this purpose. This is a legitimate statutory objective and the Court's construction of the provisions recognizes it."\textsuperscript{254}

6.3 Conclusion

The value-laden interpretative approach is apparent throughout all the noteworthy judgments of the CC. In \textit{Mohammed 1}, the Court takes several factors into account in arriving at the proper judgment, reflective of the value-laden approach. The court considered the purpose of the Act, the history of organized crime in our democratic state and the inadequacies of the ordinary criminal principles in combating it, our state’s international obligations and the context of combating organized crime remedial processes. The court took these considerations into account as well as the language of the text itself, in order to arrive at the important decision that findings regarding the constitutionality of important legislation such as POCA, cannot be lightly made. A practical approach is required to cater to the needs of our new and emerging state and this exactly the approach which is reflected in \textit{Mohammed 2} and \textit{Shaik}. In both these matters the CC emphasized the purpose of the Act and how the practicalities of the legislation require a flexible and adaptable approach. The notion of fairness in the principle of \textit{audi alt partem} must be adhered to\textsuperscript{255}, but also the notions of deterrence and prevention, must be sought to be advanced\textsuperscript{256}. Adherence to fairness is supported by the judgment of \textit{Fraser v ABSA}, where cognizance of the individual's rights is taken into account, in advancing the purpose of the POCA, as well as support for the views of

\begin{itemize}
\item \textsuperscript{251} POCA
\item \textsuperscript{252} POCA
\item \textsuperscript{253} POCA
\item \textsuperscript{254} Naidoo,(n 250)1247
\item \textsuperscript{255} Mohammed (2)(n205)
\item \textsuperscript{256} Shaik(n 241)
\end{itemize}
Shaik by Naidoo, in that the overall purpose of POCA is deterrence. I submit that the CC judgments are further illustrative of the approach of Devenish and inductive and substantive reasoning required by Section 39 of the Constitution and the CC. I submit that the jurisprudence of the Constitutional Court, like the SCA, is indicative of a value-laden approach seeking to achieve and enhance the objectives of POCA, outlined in its preamble. Thus, as in the previous chapter, the idea that the Savoi-judgment is fundamentally flawed, because it fails to recognize this jurisprudence encompassing the value-laden interpretative approach to POCA as illustrated in the SCA and Constitutional Court jurisprudence, is confirmed.
CHAPTER 7

INTERNATIONAL POSITION AND ACADEMIC VIEWS

7.1. Introduction

In this chapter, I discuss the international position regarding POCA, as well as the viewpoints held by certain academic writers with regard to POCA. The purpose of these discussions is to determine the type of view that is held by some academic writers and the international approach, to a phenomenon that has global impact. I submit that a better understanding of these aspects places POCA in context, especially with regard to considerations of international law and foreign law. Considerations which are mandated and vital in terms of Section 39 of the Constitution and South Africa’s constitutional obligations of the observance and application of international law, in terms of the Constitution. These views are core to the idea of comparing our current interpretative approach to other and international jurisdictions. Ultimately I submit that the discussion to follow is illustrative of how the South African value-laden interpretative approach to organized crime is the value-laden approach other and international jurisdictions have to this phenomenon. I submit that this comparison will also indicate the flawed reasoning of the Savoi-judgment for failure to take the international viewpoints correctly into account.

7.2. International and Foreign Legal Positions

7.2.1 United Nations

The 2000 United Nations Convention Against Transnational Organised Crime (Palermo Convention) was signed by 124 member states, including South Africa on the 15 December 2000. The purpose of the convention is to promote cooperation to prevent and combat transnational crime more effectively. 1. It applies, to the prevention, investigation and prosecution of offences established in accordance with articles 5, 6, 8 and 23 of the Convention; and serious crime as defined in article 2 of the

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257 Section 231 of the Constitution
258 Article 1 of Palermo Convention
Convention; where the offence is transnational in nature and involves an organized criminal group\textsuperscript{259}.

I submit that the most important article of this convention, for purposes of the value–laden approach to interpretation, is Article 5 of the Convention, which holds:

“1. Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:

(a) Either or both of the following as criminal offences distinct from those involving the attempt or completion of the criminal activity:

(i) Agreeing with one or more other persons to commit a serious crime for a purpose relating directly or indirectly to the obtaining of a financial or other material benefit and, where required by domestic law, involving an act undertaken by one of the participants in furtherance of the agreement or involving an organized criminal group;

(ii) Conduct by a person who, with knowledge of either the aim and general criminal activity of an organized criminal group or its intention to commit the crimes in question, takes an active part in:

a. Criminal activities of the organized criminal group;

b. Other activities of the organized criminal group in the knowledge that his or her participation will contribute to the achievement of the above-described criminal aim; “

In terms of Section 231 of the Constitution, South Africa is bound to its international agreements and must comply with its obligations and undertakings, in terms of international measures and agreements, it has adopted\textsuperscript{260}. At the time of ratifying the Palermo Convention, POCA legislation had already been in effect and by adopting the Convention, South Africa was expanding its commitment to combat organised crime to a transnational or international level. I submit that Article 5(1)(ii)(a)and(b) is especially

\textsuperscript{259} Article 3 of Palermo Convention

\textsuperscript{260} Section 231(1)-(5) of the Constitution of 1996
important, i.e. that it criminalizes conduct of an offender. At an international level, cognizance is taken that an offender’s conduct is already an indication that a person with merely knowledge of the aim of an organized criminal group, participating in other activities of the group, can be held criminally accountable for the larger crimes. I submit that this article places into perspective the international context of the words “ought reasonably to have known.” as defined in Section 1 of POCA, referring not to an innocent party, but an active participant, although not fully aware of the grand design or even each activity of the organised criminal group, but aware of its general aim or criminal activity. The provisions of the Palermo Convention cannot be ignored if one takes into account the constitutional obligation of Section 233\(^{261}\) which provides: “When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.”

7.2.2 SADC – Countries

The 14 member states of the Southern African Development Countries are Angola, Botswana, Democratic Republic of Congo, Lesotho, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, Tanzania, Zambia and Zimbabwe\(^{262}\).

To date, with the exception of Botswana and Zambia, all the members of the SADC countries have signed the Palermo Convention. However, it seems that adherence to the Convention, in the sense of introducing its measures into the domestic jurisdictions of the members states, are non-existent.\(^{263}\) With the exception of South Africa and Tanzania\(^{264}\), none of the SADC members have adopted legislative measures addressing the combating of organized crime as required by the Convention.

\(^{261}\) Section 233 of the Constitution of 1996

\(^{262}\) Pete.Gastrow *Penetrating state and business: Organised crime in Southern Africa*


\(^{264}\) The Economic and Organised Crime Control Act
7.2.3 United States of America

In *De Vries v The State*\(^{265}\), Leach JA, found the POCA was largely modeled upon “RICO”\(^{266}\) statute from which the definitions of “pattern of racketeering activity” and “enterprise” were directly taken. The jurisprudence of the United States is of considerable assistance in understanding why indictments are usually formulated in this way.

Section 1 of RICO provides as follow:

“The Congress finds that (1) organized crime in the United States is a highly sophisticated, diversified, and widespread activity that annually drains billions of dollars from America's economy by unlawful conduct and the illegal use of force, fraud, and corruption; (2) organized crime derives a major portion of its power through money obtained from such illegal endeavors as syndicated gambling, loan sharking, the theft and fencing of property, the importation and distribution of narcotics and other dangerous drugs, and other forms of social exploitation; (3) this money and power are increasingly used to infiltrate and corrupt legitimate business and labor unions and to subvert and corrupt our democratic processes; (4) organized crime activities in the United States weaken the stability of the Nation's economic system, harm innocent investors and competing organizations, interfere with free competition, seriously burden interstate and foreign commerce, threaten the domestic security, and undermine the general welfare of the Nation and its citizens; and (5) organized crime continues to grow because of defects in the evidence-gathering process of the law inhibiting the development of the legally admissible evidence necessary to bring criminal and other sanctions or remedies to bear on the unlawful activities of those engaged in organized crime and because the sanctions and remedies available to the Government are unnecessarily limited in scope and impact.

\(^{265}\) *De Vries* (n234)

\(^{266}\) Racketeer Influenced and Corrupt Organisations Statute enacted as Title IX of the Organised Crime Control Act of 1970, codified as 18 USC \$\$ 1961 – 1968,(RICO)
"It is the purpose of this Act [see Short Title note above] to seek the eradication of organized crime in the United States by strengthening the legal tools in the evidence-gathering process, by establishing new penal prohibitions, and by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime."

In addition, RICO also provides:
Section 904 of title IX of Pub. L. 91-452 provided that:
`` (a) The provisions of this title [enacting this chapter and amending sections 1505, 2516, and 2517 of this title] shall be liberally construed to effectuate its remedial purposes."

I submit a brief survey of the jurisprudence in respect of RICO will be reflective of the American Courts approach to organized crime.

In *United States v. Anderson*\(^{267}\) the court found:

"The motivating policy of the Act, to free our nation's economic system from the tentacles of organized crime, does not even suggest that Congress intended the definition of an enterprise to encompass a simple association to commit the predicate crimes constituting the pattern of racketeering activity. An expansive definition of the enterprise element of the offense grossly disrupts the balance between federal and state law enforcement efforts, and brings within the ambit of the statute offenses which Congress did not consider sufficiently threatening to our economy to warrant federal intervention. Indeed, the primary purpose of RICO could be displaced. There is no indication that Congress ever intended to grant federal prosecutors the flexibility to pursue relatively minor offenders, having no connection with organized crime, who simply associate to commit two of the predicate crimes.

We hold that Congress intended that the phrase "a group of individuals associated in fact although not a legal entity," as used in its definition of the term "enterprise" in section 1961(4), to encompass only an association having an ascertainable structure.

\(^{267}\) 626 F.2d 1358 (1980)
which exists for the purpose of maintaining operations directed toward an economic goal that has an existence that can be defined apart from the commission of the predicate acts constituting the "pattern of racketeering activity."

In *United States v. Turkette*\textsuperscript{268} the Court remarked: "In determining the scope of a statute, we look first to its language. If the statutory language is unambiguous, in the absence of "a clearly expressed legislative intent to the contrary, that language must ordinarily be regarded as conclusive," The Court reaches the following conclusion: "In view of the purposes and goals of the Act, as well as the language of the statute, we are unpersuaded that Congress nevertheless confined the reach of the law to only narrow aspects of organized crime, and, in particular, under RICO, only the infiltration of legitimate business. This is not to gainsay that the legislative history forcefully supports the view that the major purpose of Title IX is to address the infiltration of legitimate business by organized crime. The point is made time and again during the debates and in the hearings before the House and Senate. But none of these statements requires the negative inference that Title IX did not reach the activities of enterprises organized and existing for criminal purposes."

In *US v Bledsoe*\textsuperscript{269} This construction of the requirements that a defendant be "employed by or associated with" an enterprise and that he or she "conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs" through a pattern of racketeering has some support in the case law. Courts have held that predicate crimes which constitute "a pattern of racketeering" need not be related in any manner other than that they were perpetrated through an enterprise. Some courts have interpreted the statutory language requiring that a person be "employed by or associated with" an enterprise and "conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs" to require nothing more than any association with the individuals constituting the enterprise...The substantive proscriptions of the RICO statute apply to insiders and outsiders — those merely "associated with" an enterprise — who participate directly and indirectly in the enterprise’s affairs through a pattern of racketeering activity.... Thus, the RICO net is woven tightly to trap even the smallest fish, those peripherally involved with the enterprise."

\textsuperscript{268} 452 U.S. 576 (1981)

\textsuperscript{269} 674 F.2d 647 (1982)
In *United States v. Bagaric*[^270]270, the Court considered an argument that the enterprise itself, rather than the predicate acts of racketeering, must be shown to yield financial gain. The Court decided that:

“The indictment and proof in this prosecution were consistent with the language and purposes of RICO. We decline to impose upon the Government an obligation to show pure or ultimate economic motive in any of the various formulations urged by appellants. Although we have previously noted, *United States v. Huber*, supra, 603 F.2d at 395-96, and we repeat the admonition here, "that the potentially broad reach of RICO poses a danger of abuse [when the statute is] appl[ied] . . . to situations for which it was not primarily intended," our obligation is "to rule on actual, as opposed to hypothetical, applications of the statute," *United States v. Weisman*, 624 F.2d 1118, 1123 (2d Cir.), cert. denied, 449 U.S. 871, 101 S.Ct. 209, 66 L.Ed.2d 91 (1980), and it is clear to us that the present one was appropriate.”

It is reasonable to infer, from this absence of any textual identification of sorts of pattern that would satisfy § 1962's requirement, in combination with the very relaxed limits to the pattern concept fixed in § 1961(5), that Congress intended to take a flexible approach, and envisaged that a pattern might be demonstrated by reference to a range of different ordering principles or relationships between predicates, within the expansive bounds set. For any more specific guidance as 239*239 to the meaning of "pattern," we must look past the text to RICO's legislative history, as we have done in prior cases construing the Act.....The legislative history...shows that Congress indeed had a fairly flexible concept of a pattern in mind. _RICO's legislative history reveals Congress' intent that to prove a pattern of racketeering activity a plaintiff or prosecutor must show that the racketeering predicates are related, and that they amount to or pose a threat of continued criminal activity...._Various *amici* urge that RICO's pattern element should be interpreted more narrowly than as requiring relationship and continuity in the senses outlined above, so that a defendant's racketeering activities form a pattern only if they are characteristic either of organized crime in the traditional sense, or of an organized-crime-type perpetrator, that is, of an association dedicated to the repeated commission of criminal offenses. 244*244 Like the Court of Appeals' multiple scheme rule, however, the

[^270]: 706 F.2d 42 (1983)
argument for reading an organized crime limitation into RICO's pattern concept, whatever the merits and demerits of such a limitation as an initial legislative matter, finds no support in the Act's text, and is at odds with the tenor of its legislative history.

One evident textual problem with the suggestion that predicates form a RICO pattern only if they are indicative of an organized crime perpetrator — in either a traditional or functional sense — is that it would seem to require proof that the racketeering acts were the work of an association or group, rather than of an individual acting alone. RICO’s language supplies no grounds to believe that Congress meant to impose such a limit on the Act's scope. A second indication from the text that Congress intended no organized crime limitation is that no such restriction is explicitly stated. In those titles of OCCA where Congress did intend to limit the new law’s application to the context of organized crime, it said so. Thus Title V, authorizing the witness protection program, stated that the Attorney General may provide for the security of witnesses "in legal proceedings against any person alleged to have participated in an organized criminal activity... And Title VI permitted the deposition of a witness to preserve testimony for a legal proceeding, upon motion by the Attorney General certifying that "the legal proceeding is against a person who is believed to have participated in an organized criminal activity...Moreover, Congress' approach in RICO can be contrasted with its decision to enact explicit limitations to organized crime in other statutes..... Congress drafted RICO broadly enough to encompass a wide range of criminal activity, taking many different forms and likely to attract a broad array of perpetrators operating in many different ways. It would be counterproductive and a mismeasure of congressional intent now to adopt a narrow construction of the statute's pattern element that would require proof of an organized crime nexus."

US v. Locascio271 the Court decided: “... although mere presence or mere association with conspirators is not enough, it's a factor that you may consider among others to determine whether a defendant was a member of the conspiracy. The defendant's presence may establish his membership in a conspiracy, if all of the circumstances considered together show that his presence was meant to advance the goals of that conspiracy. He must not only have been present, he must have known about the conspiracy, he must have intended by his presence to participate in the conspiracy or to

271 6 F.3d 924 (1993)
help it succeed. In other words, presence itself may demonstrate membership in a conspiracy only if that presence is a functional part of the conspiracy.”

7.3. Academic Views regarding POCA

Kruger\textsuperscript{272} states the following regarding “knows or ought reasonably to have known”: “Knowledge is attributed to someone who deliberately avoids establishing the truth of circumstances surrounding a transaction or even despite the flashing of warning lights that unlawfulness is involved or that the transaction is tainted by illegality. The knowledge POCA requires – that the property forms part of unlawful proceeds – does not imply that the actual source need be known. It is submitted that, because of the content of section 1(2) and (3) of POCA; the accused need only have known that an offence had been committed, as is the case in the United States.

I agree with Kruger to the extent that the phrase of words captures the situation of an individual deliberately avoiding the truth of illegality. However, as apparent from the American case law and the Palermo Convention, this notion is far more reaching to the situation where an accused, aware of the grander scheme of the enterprise, knows or ought reasonably to have known that his conduct is conducive or contributes to illegal activities of an organized nature. This is clear, when one takes into consideration the definition in section 1 of POCA of ‘pattern of racketeering activity’ means the planned, ongoing, continuous or repeated participation or involvement in any offence referred to in Schedule 1. It refers to individuals partaking in a repetitious, ongoing, continuous and planned criminal activity, from employer to employee. An accused cannot escape liability, as the so-called “small fish” of an enterprise on the basis that he was not aware of the pattern of racketeering and the inner workings of these crimes. The fiction of “ought reasonably to have known” excludes this type of defense, in the sense that it does not matter whether he knew each and every detail or in fact any detail, as long as he was aware or ought to have been aware of the enterprise.

I therefore cannot agree with submissions, made by Burchell\textsuperscript{273} that the extension of \textit{mens rea} regarding POCA, has been extended to cover both negligence and intention. Furthermore, I cannot agree that this extension is questionable in terms of the current emphasis on subjective fault in South African law.\textsuperscript{274}

The same author states that the test for negligence in South African law requires a three part test to be applied by the Court\textsuperscript{275}. First, would a reasonable person, in the same position as the accused have foreseen the possibility of the unlawful occurrence/circumstance? Secondly, would the reasonable person have taken steps to avoid/ guard against the possibility? Lastly did the accused fail to take reasonable steps to guard against the possibility? If all three questions are answered in the affirmative the accused can be regarded as negligent.\textsuperscript{276} This common law test of negligence cannot be equated the definition of POCA’s constructive knowledge, because the question of taking preventative steps to guard against the unlawful possibility by either the accused or reasonable person does not form part of POCA’s definition. I submit that any argument assuming that negligence forms part of \textit{mens rea} of POCA, is without substance, because the statutory definition of constructive knowledge does not contain the elements of the test of negligence.

\textbf{7.4 Conclusion}

From all the views held above and the language of international, as well as foreign instruments, I submit that from a comparative viewpoint, the importance of POCA cannot be overemphasized. POCA is the measure and means with which, the legislature has recognized our democratic state’s national, regional and international commitment to combating the transnational and international phenomenon. It is not a phenomenon which South Africa experiences in its domestic law, but an issue which has received global recognition. This is a key aspect to take in account, in applying the value-laden approach to interpretation. It also is indicative of how POCA compares to global instruments and the type of principles and application of foreign jurisdictions that can be

\begin{footnotesize}
\textsuperscript{274} Burchell,(n 273)P 977
\textsuperscript{275} See also Exton Burchell, Jonathan Burchell and Peter Hunt “South African Criminal Law and Procedure”, Volume 1,Third Edition,P275-278
\textsuperscript{276} Burchell (n273) P525
\end{footnotesize}
taken cognisance of, when interpreting POCA. The academic views are noteworthy to
the extent that it illustrates that the secular reasoning that exists in common law is
exactly the reason why measures such as POCA was introduced. The shortcomings of
the common law, regarding concepts of the reasonable man, cannot be equated with the
type of phenomenon that POCA is designed to eradicate. I submit that similarly to RICO,
POCA must be liberally construed and applied to effectively combat, the ever adapting
criminal element of organised crime. The interpretative process must take cognisance of
especially these aspects, to make bold and constructive value-judgments in
safeguarding the human rights, values and principles of our open and democratic
society, based on human dignity, equality and freedom.
CHAPTER 8

CONCLUDING REMARKS AND RECOMMENDATIONS

8.1. Introduction

In this chapter, I critically discuss the Savoi-judgment, with reference to the jurisprudential position nationally\(^\text{277}\) and internationally; the academic views regarding POCA\(^\text{278}\) and the value-laden approach to the interpretative process\(^\text{279}\). The purpose of these discussions is to make recommendations on how POCA should be interpreted to determine the values underpinning the legislation. These recommendations seek the achievement of POCA principles; complying with democratic international obligations; effective combating of organized crime and protection of the fundamental rights and freedoms of the members of our democratic society against the threat of organized crime.

8.2. Noteworthy findings of the judgment

Madondo J, remarks the following at par.52 to 54 of Savoi:

“[52] The fundamental principle in statutory interpretation is that the purpose of the legislation must be determined in light of the spirit, purpose and objects of the Bill of Rights in the Constitution. Where the law is clear and unambiguous, and in keeping with the Bill of Rights, the court must give effect to its meaning. See section 39(2) of the Constitution of the Republic of South Africa, 108 of 1996( the Constitution)…[53]The most important principle is to determine and apply the purpose of the legislation in the light of the Bill of Rights. The ordinary meaning must be attached to the words. See Union Government v Meck 1917 AD 419. In Volschenk v Volschenk 1946 TPD486 it was decided that the most important rule of interpretation was to give words their ordinary, literal meaning. In Association of Amusement and Novelty Machine Operators v Minister of Justice 1980(2)SA 636(A)the Court held that this means colloquial speech. A meaning must be assigned to every word…[54]The intention of the legislation must essentially be

\(^{277}\) See Chapter 5 and 6
\(^{278}\) See Chapter 7
\(^{279}\) See Chapter 2
gathered from the language used. In *Greenshields v Willemburg* (1908) 25 SC, 568, it was held that a court should not extend the meaning of the legislation beyond the words used. The court should give effect to what the legislature has said, and not try to cover the eventualities that the legislature has, for whatever reason omitted to cover.”

He continues in a declaration of unconstitutional invalidity at par.90 to 91:

“[90] However, a person cannot be convicted on the ground that circumstances were foreseeable consequences of his conduct. The requirement that the accused ought reasonably to have known that his conduct would constitute an offense of racketeering calls for the application of an objective test in determining whether or not the accused “ought reasonably to have known”, because the fictitious reasonable person would have known that his conduct constituted racketeering activity. However, such a conclusion would constitute negligence and not *dolus* in any form ….This renders the accused exposed to a conviction for an offense he did not commit. In the circumstances, the possibility of punishing an unintended, insensible or unconscious conduct cannot be excluded, and that would in the decision in Humphreys' case, supra, conflate different tests for *dolus* and negligence.[91] The same can be said for deductive reasoning on the ground that the process of inferential reasoning also starts from the premise ,that in accordance with human experience the possibility of the consequences ensuing would have been obvious to any person of normal intelligence .There is no certainty or constructive knowledge is a requirement for the contravention of section 2(1)(a)-(1)(g) of POCA. Such a confusion has the effect of rendering the provisions of sections 2(1)(a)(ii),2(b)(ii),2(c)(ii) and (f) vague and unintelligible, and as a consequence such provisions are unconstitutional and, therefore, invalid to the extent only of the words “ought reasonably to have known” in each paragraph referred to above.”

Also of importance is the following:[par.128]…On the whole POCA is a valid enactment under the Constitution and the Rule of Law. Since no finding has been made as to the interference of any of the constitutionally protected rights of the applicant, the need to balance the interests of the community against that of the applicants and the question whether or not the perceived infringement could constitute a justifiable limitation of the right of fair trial do not necessarily arise. For, not only the rights and values of the individual must be emphasised, but those of the community as well. This means that the constitutional state is not only involved in upholding and protecting the traditional
individual rights and values, but also has to establish re-affirm community rights and values.”

8.3. Implications of the judgment

Section 1 of POCA, defines the terms “ought reasonably to have known”:
“(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 vigilant 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 “

The term itself is used throughout POCA, i.e. section 2, 4, 5 and 6. Forfeiture applications on the basis of these sections are also lodged in terms of Chapter 5 and 6 of POCA. The Savoi judgment, indirectly affects the validity of these provisions, because the same reasoning of Madondo regarding the validity of Section 2 of POCA, with reference to the term ‘ought reasonably to have known’, applies to these sections. Another implication is that, like section 2, the prosecution can only initiate proceedings with direct evidence that perpetrators intentionally committed the offences in section 4, 5 and 6. Asset forfeiture applications, in terms of Chapter 5 and 6, based on these offences will have to meet the same standards. Strict liability based on dolus directus is required

I submit that a third implication is that two key reasons for POCA stated in the preamble that the South African common law and statutory law fail to deal effectively with organized crime, money laundering and criminal gang activities and that it is usually very difficult to prove the direct involvement of organized crime leaders in particular cases, because they do not perform the actual criminal activities themselves, are ignored. The common law principles of culpa and recklessness are applied to legislation whose purpose and existence is owed to the very fact that South African common and statutory law had failed to combat organized crime enabling crime leaders to escape liability.
8.4. Fallacies of the judgment

I submit that the first fatal flaw in the Savoi, finding is Madondo’s failure to address the applicant’s issue with regard to constitutional standing. The approach adopted by the CC in *Ferreira v Levin NO*\(^{280}\), i.e. that an applicant will have standing if there is an allegation that a right in the Bill of Rights has been infringed or threatened and; the applicant can demonstrate with reference to the categories listed in Section 38(a) to (e)\(^{281}\) that there is a sufficient interest in obtaining the remedy they seek, is ignored.\(^{282}\)

From the judgment it is not quite clear, that the applicants avers any specific right in the Bill of Rights have been infringed or threatened, nor is there any demonstration in terms of Section 38 that there is a sufficient interest in obtaining the remedy they seek. Applied to the facts, Madondo finds: “[par.21] In my view, the applicants are entitled to challenge the constitutional validity of the provisions of POCA under which they are currently charged. The said provisions are pertinent to the impending criminal trial proceedings against them. Accordingly, it follows that the applicants have a cause for concern or fear that their fundamental rights to fair trial may be infringed or threatened, presumably, by the unlawful conduct of the first respondent. They are, therefore, entitled to claim enforcement and protection of their fundamental rights.\(^{283}\)

Not one fair trial right is alleged by the applicant, nor is any specific fair trial right referred to, by the learned judge. Section 35(3)(a) to (o) of the Constitution contains the fair trial rights of an accused person and not one of these rights are specifically referred to or in my submission, finds any application. I submit that a cause for concern or fear that their fundamental rights to fair trial may be infringed or threatened cannot equated with is an allegation that a right in the Bill of Rights has been infringed or threatened. Fear of anticipatory infringement or threats of a general unknown fair trial right, is far removed from an allegation of an actual infringement of a fair trial right, listed in the Bill of Rights. The applicants can neither claim enforcement or protection of any right in section 35(3), because it is unclear which right is to be protected or enforced. It could be a combination of the rights, a particular right or even all of the rights.

\(^{280}\) Levine (n 23)
\(^{281}\) The Constitution of 1996
\(^{283}\) Page 8
This part of the judgment is vague and its vagueness can easily be demonstrated. Section 35(3)(e) provides that “Every accused has the right to a fair trial, which includes the right...(e)to be present when being tried”. The obvious question would be, in what possible manner would POCA infringe on this fair trial right? I submit that this point illustrates the general manner in which the issue of standing was approach. The applicants should have failed on this issue from the outset.

A second fallacy of the judgment is with reference to the remarks made by Madondo, which is also contrary to his finding with regard to his finding to standing of the applicants, at par 128\(^\text{284}\). The learned judge blatantly ignores the issue of limitation of rights, in the Bill of Rights, in terms of section 36 of the Constitution. If the court found that the right has been infringed, the respondent (usually the state, but sometimes the person relying on the validity of the legislation) may then seek to demonstrate that the infringement of the right is nevertheless permissible in terms of section of the criteria for a legitimate limitation of rights laid down in section 36.\(^\text{285}\) No attempt is made to perform a balancing act of the interests of the applicants and the state, in terms of section 36. This is despite and contrary to the approach of the CC, in *National Coalition for Gay and Lesbian Equality v Minister of Justice*\(^\text{286}\), where the Court found that even if the respondent makes no attempt at justification, the court must nevertheless consider the issue of limitation.\(^\text{287}\)

I have submitted that no infringement or threat or infringement of the fair trial rights contained in the Bill of Rights, is present in this judgment, but even if one was to concede this point, the learned judge did not hear any arguments on the limitation clause or even consider the issue of limitation. This also contrary the principle of *stare-decisis*\(^\text{288}\), in that Madondo was constitutionally obliged to consider this issue, because the Constitutional Court has mandated that it be considered\(^\text{289}\). The High Court was bound by the CC’s

\(^{284}\) Supra at note hh
\(^{285}\) *S v Makwanyane* 1995(3) SA 391 (CC)
\(^{286}\) 1999 (1) SA 6 (CC)
\(^{287}\) Par.33-57
\(^{288}\) For full discussion see Lourens Du Plessis, “*An Introduction to law,*” Third Edition,P239-244
\(^{289}\) *National Coalition*(note 286)
A noteworthy consideration, which is absent Madondo’s approach is the principle of avoidance. In *S v Mhlungu*, Kentridge AJ stated:

“I would lay it down as a general principle that where it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the course which should be followed.”

The CC has made its approach clear as to the principle of avoidance of constitutional issues and it is apparent from Savoi that the applicants simply alleged that POCA was unconstitutional for vagueness and over breadth allowing for arbitrary penalties. The applicants never raised a substantive allegation or application that POCA legislation violates or threatens to violate any specific right contained in the Bill of Rights. The respondents contention in this matter that the applicants allegations were abstract and premature had merit and Madondo, should have at the least, addressed the issue as to why this matter could not have been finalized without the question of a constitutional issue. If Madondo decided against a constitutional issue being raised, this matter could have been finalized without further arguments regarding the constitutionality of POCA.

The main flaw in Madondo’s approach and point of departure is regarding the interpretative approach that applies when interpreting legislation. It is quite clear, that according to Madondo’s approach the legislative purpose is to be sought from the ordinary meaning of the legislative text itself. That the interpretative purpose is to be applied to give words their ordinary meaning to determine legislative intend and that a court cannot extend the meaning of words beyond their colloquial scope.

I submit that this approach is in stark contrast to the approach that section 39 of the Constitution mandates. The approach that the CC has directed when utilizing the interpretation of statutes approach has been fully canvassed in *S v Zuma*. It is the same approach that has been advocated by *Botha, Cockrel, Devenish, De Waal, et al.* The approach that Madondo applies, results in the interpretative approach to statutes being utilized to determine the legislative intent, by using the text of the legislation as

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290 1995 (3)SA 867(CC)
291 Ibid para 59; see also *S v Melani* 1995(4)SA 412(E); *S v Eckert* 1996(2)BCLR208(SE)210-1;1996(2)BCLR174(E);*Schinkel v Minister of Justice* 1996(6)BCLR 872(N); *S v Friedland* 1996(8)BCLR1049(W)
292 Savoi (n 2) para 13-14,P5-6
293 Zuma, (n12)
yardstick for such determination. The CC and writers abovementioned advocates the notion that the statutory interpretative approach in our democracy must be used to determine the values that underlie an open and democratic society based on human dignity, equality and freedom. This approach applies irrespective of whether the Constitution is being interpreted or whether it is ordinary legislation being interpreted. This approach mandates that a deontic value judgment must be made, to determine what these values are and in making these determination aspects such as the legislative text, the language of the legislation, the drafting history of the legislation, the context\textsuperscript{294}, the purpose, socio-economic impact, etc. are taken into account by the court. Once the value judgment has been made, the determination can be made whether the particular legislation or provision is contra the values of our democratic society. If the legislative offends the values of our democracy and cannot be justified, either by an alternative approach that avoids a constitutional invalidity or even in terms of the limitation clause in terms of section 36 of the Constitution, then the legislation may be declared unconstitutionally invalid. If the issue is a matter pertaining to the Bill of Rights as contained in Chapter 2 of the Constitution, as is the case in Savoi, a court must first determine the meaning of a provision in the Bill of Rights in order to establish whether law or conduct is inconsistent with that provision. First the meaning or scope of a right must be determined, and then it must be determined whether the challenged law or conduct conflicts with the right.

8.5. Value-Laden Approach and Recommendations

I have already submitted that no specific right in the Bill of Rights has been violated by POCA, based on the reasoning in Savoi. However for demonstrating the importance of constitutional interpretation and recommending the correct approach, that should have been followed, I will determine whether the phrase “ought reasonably to have known” contained in POCA, conflicts with fair trial rights, in terms of section 35 of the Constitution, on assumption that a constitutional issue has been raised.

I submit that the interpretative approach requires that several considerations be taken into account to make a value judgment.

\textsuperscript{294} See recent judgment of Director of Public Prosecutions, Western Cape v Prins 2012 (2) SACR 183 (SCA) and \textit{Natal Joint Municipal Pension Fund v Endumeni Municipality} [2012] 2 All SA 262 (SCA)
8.5.1 Text and language

The context of text and language itself of POCA may place the setting in terms of which POCA should be interpreted. The jurisprudence developed by our courts under POCA. The term “ought reasonably to have known” is used throughout the text of POCA to criminalize the conduct of would be offenders under several sections. I submit that if one focuses on the Preamble of POCA phrase “AND BEARING IN MIND that it is usually very difficult to prove the direct involvement of organised crime leaders in particular cases, because they do not perform the actual criminal activities themselves, it is necessary to criminalise the management of, and related conduct in connection with enterprises” it is clear that POCA aims to prevent an accused charged with mere denials or defences of unwittingly partaking in serious crimes, because POCA recognises that the difficulty in proof is that accused in particular cases do not partake in the actual criminal activities themselves. A defense that the accused was not aware of an enterprise can easily be accepted if ordinary statutory and common law principles were to be applied.

I submit that the ordinary principles of criminal law are too underdeveloped to adapt to the phenomenon of ordinary crime. The examples have been discussed in Chapter 4, in which the inadequacies of criminal law were illustrated in combating organized crime. Unfortunately, the common law, because of historical development could not have anticipated crimes that developed by a designed and organized nature. Criminal law could not anticipate the notion of a criminal enterprise. The Preamble of POCA is reflective of this in providing “AND WHEREAS the South African common law and statutory law fail to deal effectively with organised crime, money laundering and criminal gang activities, and also fail to keep pace with international measures aimed at dealing effectively with organised crime, money laundering and criminal gang activities”. It is thus concerning that the judge does not take this in consideration. The fact that one of the motivations for passing a legislative initiative such as POCA, is stated in its Preamble, i.e. that the Legislature has taken notice that the current legal principles of the country are inadequate and outdated to combat crime and protect society’s interests, cannot be ignored.

295 See Chapter 5 and 6, infra
296 See section 2,4,5,6 of POCA
Furthermore if one looks at the definition of a pattern of racketeering, it is not a once-off crime, but a series of offenses. The seriousness of the offense of racketeering can be emphasized by focusing on Section 2(4) of POCA, providing: “A person shall only be charged with committing an offence contemplated in subsection (1) if a prosecution is authorised in writing by the National Director.” Section 1 of POCA states “National Director” means- (b) for the purposes of sections 2 (4), 71 or 72 the National Director of Public Prosecutions appointed as contemplated in paragraph (a) and includes a Director of Public Prosecutions, an Investigating Director of Public Prosecutions and a Special Director of Public Prosecutions referred to in section 1 of the National Prosecution (Act 32 of 1998, who is authorized thereto in writing by the National Director in a specific case or in general.” The offense itself has to be considered not by local offices of the prosecution, but by the National Director of Public Prosecutions or a Director of Public Prosecutions authorized thereto. It is an offense which attracts the attention of the prosecution authority at a national level and is to be carefully considered before prosecutions are instituted. I submit that this requirement cannot be ignored and is in fact a substantial consideration that the term “ought reasonably to have known” is a legal fiction that does not refer to negligence for purposes of POCA, if one considers the seriousness of the requirement of Section 2(4) of POCA. I submit that the Preamble also assists here as is evident from the phrase “AND BEARING IN MIND that it is usually very difficult to prove the direct involvement of organized crime leaders in particular cases, because they do not perform the actual criminal activities themselves, it is necessary to criminalise the management of, and related conduct in connection with enterprises which are involved in a pattern of racketeering activity.”

8.5.2 International and foreign law

The context of RICO statute and Palermo conventions, as discussed in chapter 7 are also indications of the seriousness with which organized crime is viewed from a comparative law perspective. It has been recognized by our courts that RICO and the case law of the United States are of large assistance in interpreting POCA. I submit that noteworthy is the fact that in terms of RICO, the statute itself mandates that it be

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297 See definition of “pattern of racketeering” Section 1 of POCA
298 See De Vries (n 234)
interpreted liberally 299 and states further in section 1 of RICO “(5) organized crime continues to grow because of defects in the evidence-gathering process of the law inhibiting the development of the legally admissible evidence necessary to bring criminal and other sanctions or remedies to bear on the unlawful activities of those engaged in organized crime and because the sanctions and remedies available to the Government are unnecessarily limited in scope and impact. If one takes into consideration the judgments of Locascio 300 and Bledshoe 301, I submit that objectives of the measures, such as RICO are clearly to attach liability to each role player in an enterprise and the easy technicalities available to offenders, in terms of ordinary criminal law are no longer there. POCA itself also recognizes that currently the rapid growth of organized crime is has caused that RSA’s ordinary legislation and common law is out of touch with the rest of the world, as mentioned in 8.5.1. I submit that it becomes so much more imperative that jurisprudence such as American case law be taken into account , by the recognition that South African Law fails to keep pace with international measures aimed at dealing effectively with organised crime, money laundering and criminal gang activities. By adopting such an approach , the role of international legal considerations are broadened in application of the value-laden approach.

8.5.3 Purpose

I submit that the Preamble of POCA captures clearly its purpose and the objectives it is designed to achieve and the term of “ought reasonably to have known, should in addition to the above-mentioned, be read in light of this background. I submit that these objectives have already been recognized by the CC itself as spelt out in POCA’s preamble. 302 I submit that the importance of POCA’s purpose and the balance that needs to be struck has been remarked on by the CC 303

299 RICO (n 266) Section 904
300 Locascio (n 271)
301 Bledshoe(n 269)
302 Mohammed I (n 197)
303 See Prophet (n 171) and Vermaak(174)
8.6. Recommendations and Conclusion

I submit that if one takes into consideration all of the above-mentioned factors, I cannot agree with Madondo’s finding that the possibility of punishing an unintended, insensible or unconscious conduct in terms of POCA, might ensue based on the words “ought reasonably to have known”.

The business of a racketeering enterprise is acquiring interests through a pattern of racketeering. This pattern requires 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, in terms of S 1 of POCA. I submit that a value judgment can be made that organised crime is an ever adapting phenomenon which does not focus on specifically one type of offense. It is an ever expanding criminal entity which commits a variety of offenses to achieve its financial objectives.304 I have already illustrated above through example 1 and 2 that ordinary criminal principles have not developed or fails to recognize this pattern or connectedness of these offenses. Ordinary principles of criminal law focuses on the criminal conduct of an offense in isolation, it cannot focus on all the offenses committed by larger operations and syndicates, i.e the planned, ongoing, continuous pattern. It is exactly these patterns, or methods of criminal entities that POCA attracts criminal liability to. The importance of this aspect of POCA cannot be overemphasized enough.

The individuals partaking in these structures, conduct is equated with the pattern of racketeering and this determines whether they are charged in terms of S2(a), or S2(b), etc. Their conduct determines the roles they play in the enterprise and the conducting of its criminal business. A clear example of this is the United States judgment Bagaric305, illustrating the operations of a racketeering enterprise. See also commentary of the CC in Vermaak.

I submit that similarly to RICO, our CC has and must continue to interpret POCA liberally. Liberal, in the sense that the CC recognizes the international, transnational and regional threat of organized crime, the importance of our democratic states commitment

304 See example 1 and 2 in Chaper 4
305 Bagaric (n 270)
to our international agreements, such as the Palermo Convention\textsuperscript{306}. Liberal, in the sense that the CC takes cognizance of foreign legislation, such as RICO and the jurisprudence of other foreign jurisdictions, as was done by the SCA in De Vries\textsuperscript{307}

I submit that once this liberal approach is applied, the reasoning of Madondo, regarding the phrase “ought reasonably to have known” cannot be substantiated and must be rejected. The term does not refer to any form of negligence and I submit that no reading of the text of POCA, its language or context, supports such a view. Nothing in comparative case law, international law or RICO, supports such a finding.

I agree that the notion of the reasonable person as the term “ought reasonably to have known” is a legal fiction, but I submit that to these two terms do not refer to each other. It is rather a legal fiction which eliminates the possibility of a role player in the grander scheme of the enterprise to escape POCA liability, by claiming that he did not know the operations of the enterprise. It is to ensure that even “the smallest fish” do not escape liability, but simultaneously, that a court applying a liberal approach will come to findings that role-players, especially criminal bosses, in elaborate organized criminal activities does not escape criminal liability in terms of POCA.

\textsuperscript{306}Palermo Convention (n 258)
\textsuperscript{307}De Vries(n 186)
BIBLIOGRAPHY

BOOKS AND JOURNAL ARTICLES


17. The Organised Crime Component POCA Training Materials, 28th -30th March 2012” used with permission of the author, Mr. L. Sakatha, Deputy Director of Public Prosecutions, Western Cape
LIST OF LEGISLATION

SOUTH AFRICAN LEGISLATION
Criminal Procedure Act 51 of 1977
Diamonds Act 56 of 1986

TANZANIA
The Economic and Organised Crime Control Act OF 1984

UNITED STATES

INTERNATIONAL LAW
United Nations Conference against Transnational Organized Crime and Protocols
There to Palermo, Italy, in December 2000

LIST OF CASES

SOUTH AFRICAN CASE LAW
1. Case v Minister of Safety and Security 1996 (3) SA 617 (CC)
2. De Vries v The State 2012 2012 (1) SACR 186 (SCA)
3. Director of Public Prosecutions, Western Cape v Prins 2012 (2) SACR 183 (SCA
4. Ferreira v Levin NO and Others and Vryenhoek and Others v Powell NO and
Others1996 (1) BCLR 1 (CC)
5. Fraser v Absa Bank Ltd -2007 (3) BCLR 219 (CC)
6. Gaston Savoi,Intaka Holdings,Fernando Praderi v The National Director of Public
Prosecutions and The Minister of Justice and Constitutional Development, [2013] JOL
30466 (KZP)
7. Key v Attorney-General, Cape of Good Hope Provincial Division and Another
1996 (6) BCLR 788 (CC)
8. Mazibuko v The National Director of Public Prosecutions 2009 (2) SACR 368 (SCA)
9. Mohunram and Another v National Director of Public Prosecutions and Others-2007
(6) BCLR 575 (CC)
10. Naidoo and Others v National Director of Public Prosecutions and Another-2011 (12) BCLR 1239 (CC)
11. National Coalition for Gay & Lesbian Equality v Minister of Justice 1999 (1) SA 6 (CC)
13. National Director of Public Prosecutions of SA v Carolus and others –2004 (2) SACR 208 (SCA)
14. National Director of Public Prosecutions v RO Cook Properties (PTY) Ltd; National Director of Public Prosecutions v 37 Gillespie Street Durban (PTY) Ltd and another; National Director of Public Prosecutions v Seevnarayan 2004 (2) SACR 208 (SCA)
15. NDPP v Gardener 2011 (4) SA 102 (SCA)
16. National Director of Public Prosecutions v Kyriacou-2003 (2) SACR 524 (SCA)
17. National Director of Public Prosecutions and Another v Mohamed NO and Others 2002 (9) BCLR 970 (CC)
18. National Director of Public Prosecutions and Another v Mohamed NO and Others 2003 (5) BCLR 476 (CC)
20. National Director of Public Prosecutions v Vermaak-2008 (1) SACR 157 (SCA)
22. Prophet v NDPP – 2006 (1) SA 38 (SCA)
23. Shaik and Others v The State-2008 (8) BCLR 834 (CC)
24. S v Dos Santos and another 2010 (2) SACR 382 (SCA)
25. S v Friedland 1996(8)BCLR1049(W)
26. S v Makwanyane 1995(3) SA 391 (CC)
27. S v Melani 1995(4) SA 412(E)
28. S v Mhlungu 1995 (3) SA 867(CC)
29. Schinkel v Minister of Justice 1996(6)BCLR 872(N)
30. S v Zuma1995 (4) BCLR 401 (CC)
UNITED STATES CASE LAW

4. United States v Baker 63 F3d 1478 at 1494 (9th Cir 1995)
5. United States v Beale 921 F2d 1412 at 1437 (11th Cir 1991)
7. United States v Crosby 20 F3d 480 at 484 (DC Cir 1994)
8. United States v Cyprian 23 F3d 1189 at 1198 (7th Cir 1994)
9. United States v Gonzalez 921 F2d 1530 at 1538 (11th Cir 1991)
11. United States v Morgano 39 F3d 1358 at 1368 (7th Cir 1994);
12. United States v O’Connor 953 F2d 338 at 344 (7th Cir 1994)
14. United States v Peacock 654 F2d 339 at 349 (5th Cir 1981)
15. United States v Pungitore 910 F2d 1084 at 1108, n24 (3rd Cir 1990)