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TEN YEARS OF THE SOUTH AFRICAN PREVENTION OF ORGANISED CRIME ACT (1999–2009)

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TEN YEARS OF THE SOUTH AFRICAN PREVENTION
OF ORGANISED CRIME ACT (1999–2009)

What Case Law Tells Us?

Jamil Ddamulira Mujuzi



Open Society Foundation for South Africa

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Jamil Ddamulira Mujuzi¹

1. INTRODUCTION

Organised crime² is one of the main challenges that governments and intergovernmental organisations³ are grappling with. Its history, consequences and different forms in South Africa are well documented⁴ and fall outside the scope of this paper. On 21 January 1999, the Prevention of Organised Crime Act (POCA)⁵ came into force. Its preamble recognises, *inter alia*, that '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'. The Act has now been in force for ten years and it is time to take stock of how the South African courts have shaped its application.

One of the purposes of POCA is to make sure that 'no person should benefit from the fruits of unlawful activities...'⁶ It is on that basis that the Supreme Court of Appeal has held that '[o]ne should not lose sight of the fact that the purpose of the Act [POCA] is to divest criminals of the proceeds of their criminal activity and to prevent them from deriving benefit from such proceeds.'⁷

On the other hand, POCA, like similar legislation to it in other jurisdictions,⁸ limits the rights of those subject to it. The exercise of state power to impose such limitations is not inherently problematic. Historically, the common law has always allowed drastic restrictions of the rights of convicted offenders. However, the common law and latterly the Constitution of the Republic of South Africa⁹ (the Constitution), contain safeguards designed to protect all those who may be held to have fallen foul of the criminal law. This is done by recognising a range of safeguards that relate to the definition of criminal conduct, the procedures for determining its existence and calculation of appropriate penalties for those that have been found to have committed criminal offences. In as much as POCA departs from the common law, it is inherently controversial. It does so by creating new

forms of prohibited conduct, new procedures for determining whether such conduct has taken place and new ways of sanctioning it, amongst which extensive asset forfeiture is the most innovative. For these reasons the South African courts have often been called upon to adjudicate on POCA. As Michael Avery has written: “The now infamous Prevention of Organised Crime Act of 1998 (POCA) is steadily becoming one of the most frequently contested and controversial pieces of legislation in South Africa and it appears that every new judgment relating to POCA adds more fuel to the fire.”¹⁰

POCA is all the more controversial because of its wide scope. It provides for three broad categories of offences: offences relating to racketeering activities;¹¹ offences relating to proceeds of unlawful activities;¹² and offences relating to criminal gang activities.¹³ However, POCA is not limited to the offences in these three categories. It is aimed also ‘at dealing with a wide range of criminal activities, some of which are quite commercial in nature...’¹⁴ In *Mohunran v National Director of Public Prosecutions*, the Constitutional Court held that ‘the wording of POCA as a whole makes it clear that its ambit is *not* in fact limited to so-called “organised crime offences”’.¹⁵ Different penalties are imposed for an offence or offences falling in one of the three categories, with racketeering-related offences carrying the heaviest penalties of a fine not exceeding R1,000 million or imprisonment to a period up to imprisonment for life.¹⁶

Because of the wide range of offences to which POCA could apply and the breadth of its other provisions it is both timely and necessary to look closely at how the courts have interpreted it. This paper examines all the reported decisions¹⁷ between 1999 and October 2009 in which the South African courts have applied the different provisions of POCA in order to highlight the following issues: (1) the meaning and applicability of key concepts in POCA as clarified by the courts; (2) the nature and type of offences that have appeared before courts; (3) the sentences imposed, if any, for offences provided for in POCA; and (4) the types of assets that have been confiscated or forfeited to the state. Although the National Prosecuting Authority’s Asset Forfeiture Unit has been instrumental in the implementation of POCA, the discussion of its mandate, success and challenges falls outside the scope of this paper.¹⁸

2. DEALING WITH THE CONCEPTUAL ISSUES

POCA is a complex piece of legislation enacted to deal with complex criminal activities. It can be deduced from the jurisprudence of the courts that its implementation has been, and continues to be, a learning process for the National Director of Public Prosecutions and for the judiciary. The judiciary has had to grapple with difficult questions relating to the interpretation and application of POCA. One of the major challenges has been to strike the correct balance between achieving the objectives of POCA, on one hand, and protecting the rights of those suspected of having committed offences under POCA, on the other. The

primary objective of POCA is to remove the incentive for criminal activity – that is, to make it as clear as possible to law breakers that the conduct that POCA defines as criminal and the common law offences that underlie it do not pay. Unlike ‘ordinary’ crimes, such as murder, rape, and assault with the intention to commit grievous bodily harm, which are of no or very little direct financial benefit, if any, to the offenders, those who commit organised crimes (especially racketeering and money laundering) do it with the major, if not the only, objective of accumulating as much wealth as possible.

The successful application of POCA is measured not only by how many offenders have been successfully prosecuted for organised crimes but also by how many people (whether prosecuted or not) have been deprived of property that is the proceeds of unlawful activities. It is in relation to the latter objective that courts have developed criteria that must be carefully applied to ensure that the forfeiture to the state of property in terms of POCA does not lead to the violation of the property owner’s constitutional right to property.¹⁹ It has been held that before an order is issued for property to forfeit to the state, the court must consider whether three main requirements have been met: (1) whether the property in question was an instrumentality of an offence; (2) whether any interest (that is, a third party interest) should be excluded from the forfeiture order; and (3) whether the forfeiture sought would be disproportionate.²⁰ The discussion now shifts to the interpretation that courts have given to these three requirements.

Instrumentality of an offence: Section 1(1) of POCA defines instrumentality of an offence 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 [of South Africa] or elsewhere.’²¹ One of the most contentious issues that courts have had to deal with has been whether the property in question was an instrumentality of an offence within the meaning of POCA. The Supreme Court of Appeal has explained, in the words of Mpati DP and Cameron JA, that

the words ‘concerned in the commission of an offence’ must ... be interpreted so that the link between the crime committed and the property is reasonably direct, and that the employment of the property must be functional to the commission of the crime. By this we mean 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 (albeit that it is defined to extend beyond its ordinary meaning), the property must be instrumental in, and not merely incidental to, the commission of the offence.²²

Relying on jurisprudence from the United States of America, the Court gave examples of using property that meet the threshold of making that property an instrumentality of an offence: ‘the cultivation of land for the production of drug crops; the appointment, arrangement, organisation, construction or furnishing of premises to enable or facilitate

the commission of a crime; or the fact that the particular attributes of the location are used as a lure or enticement to the victims upon whom the crime is perpetrated'.²³ South African courts have thus adopted a strict interpretation of what forms of use of property amount to that property being regarded as an 'instrumentality' of an offence. The National Director of Public Prosecutions has to prove not only that an offence was committed on the property in question but also that the property itself was the instrument with which the offence was committed. It has been held, for example, in *National Director of Public Prosecutions v Braun and another* that the fact that sexual offences involving minors were committed on residential property did not in itself make the property an instrumentality of an offence.²⁴

It has to be recalled that not every property that has been instrumental in the commission of an offence should be forfeited to the state in terms of POCA. POCA should only be invoked in cases where ordinary criminal law would be insufficient to deal with the criminal. The Supreme Court of Appeal underlined this point in *National Director of Public Prosecutions v Van Staden*, a case where the National Director of Public Prosecution had sought to make a forfeiture order against a car that was being driven whilst the driver was under the influence of alcohol. In its words:

It must be borne in mind that drunken driving, which does not ordinarily result from organised illicit activity, and presents no special difficulties to detect and prosecute, can attract substantial penalties, and the ordinary criminal law ought to be the first port of call to combat the evil. For the Act [POCA] exists to supplement criminal remedies in appropriate cases and not merely as a more convenient substitute.²⁵

This ruling indicates that POCA should only be invoked in cases where ordinary criminal law would be insufficient in dealing with the situation. POCA was not enacted as a substitute for existing criminal remedies but rather in order to supplement them in appropriate cases. Moreover, it should be used only in cases where 'detection and successful prosecution' pose 'particular difficulties'.²⁶

Third party interests: Section 48(1) of POCA provides that the High Court, upon the application of the National Director of Public Prosecutions, may make an order forfeiting to the State all or any of the property that is subject to the preservation of property order. Under section 48(4)(b)(i) any person who has an interest in the property against which a forfeit order is about to be issued has a right to apply for an order excluding his or her interest in that property from the operation of the order.²⁷

Proportionality: POCA specifically provides for the first two requirements – that the property is an instrumentality of an offence and that a third party has a right to apply to court for his or her interest to be excluded from the property that is about to be forfeited to the state. However, POCA does not require courts to decide whether a forfeiture order will be proportional to the offence before such an order is made. Nevertheless, proportionality is a fundamental requirement of the South African Constitution. As Deputy Chief Justice

Moseneke succinctly put it in the Constitutional Court:

[P]roportionality is not a statutory requirement but an equitable requirement that has been developed by the courts to curb excesses of civil forfeiture. Put otherwise, the requirement of proportionality is a constitutional imperative. It is imposed not by the relevant statute [POCA] but by constitutional disdain for arbitrary dispossession of property and unwarranted or excessive punishment.²⁸

In the earlier case of *Prophet v National Director of Public Prosecutions* the Constitutional Court also held that

The general approach to forfeiture once the threshold of establishing that the property is an instrumentality of an offence has been met is to embark upon a proportionality enquiry – weighing the severity of the interference with individual rights to property against the extent to which the property was used for the purposes of the commission of the offence, bearing in mind the nature of the offence.²⁹

The Court added that the following issues should be the focus of the proportionality inquiry: (1) the relationship between the purpose of the deprivation and the person whose property is affected; (2) the relationship between the purpose of the deprivation, the nature of the property affected and the extent of the deprivation; (3) a more compelling purpose is required where the property rights involved are the ownership of land or corporeal movables; (4) the reasons should be more compelling as more incidents of ownership are affected; (5) depending on the nature and extent of the rights affected, the test is one that comprises elements of rationality and proportionality, moving closer to proportionality as the effects increase; and (6) the inquiry takes full account of the relevant circumstances of each case.³⁰ These criteria indicate that, although the property may be found to have been an instrumentality of an offence and there are no third party interests involved, the court may decline to order it forfeit to the state on the sole ground that such an order would violate the principle of proportionality.

3. THE SENTENCES IMPOSED

Section 3(1) of POCA provides that any person convicted of an offence relating to racketeering shall be liable to a fine not exceeding R1,000 million, or to imprisonment for a period up to imprisonment for life. Section 3(1) clearly gives the court discretion to determine which sentence to impose depending on the facts of the case. Although racketeering charges have been brought against various accused, a review of reported cases does not give a clear picture of which sentences have been imposed in such cases.

This could be explained by the fact that in some cases the accused were acquitted or where convicted their appeals were allowed.³¹ Moreover, some cases dealt only with procedural issues³² and, where the accused were convicted of racketeering, the decision is sometimes silent on the punishment that was imposed.³³

Under section 8 any person convicted of an offence relating to proceeds of unlawful activities – money laundering and the related offences – shall be liable to a fine not exceeding R100 million or to imprisonment for a period not exceeding 30 years. Case law shows that the National Director of Public Prosecutions has heavily relied on sections 38(2)(b) – relating to preservation of property order – sections 48 to 57 – relating to forfeiture proceedings – and, to a lesser extent on section 18 – relating to confiscation orders, to deal with offences relating to proceedings of unlawful activities. This could be attributed to the fact that it is easier to secure a preservation of property order³⁴ and later a forfeiture order than a confiscation order. This is because a confiscation order can only be made after the offender has been convicted of a crime under POCA or under any other legislation whereas on the other hand, a forfeiture order is made whether the owner of the property had been prosecuted or not.³⁵

In addition, the standard of proof for a confiscation order is higher than that for a forfeiture order. For a confiscation to be made, it has to be proved beyond reasonable doubt that the offender derived benefit from the crime of which he/she is being convicted.³⁶ In contrast the standard of proof for a forfeiture order is on a balance of probabilities that the property is an instrumentality of an offence, is the proceeds of unlawful activities or is associated with terrorist and related activities.³⁷ The fact that it is easier to deprive an individual of the proceeds of unlawful activities through the forfeiture proceedings could also explain the low number of reported cases where suspects have been punished in terms of section 8 of POCA.³⁸

Section 10(1) provides that any person convicted of an offence relating to criminal gang activities shall be liable to a fine or to imprisonment for a period not exceeding eight years. Although gang activity is known to be rampant in South Africa,³⁹ the author's review of reported cases since the coming into force of POCA revealed that no accused has been successfully prosecuted for an offence relating to criminal gang activities under sections 9 and 10 of POCA.⁴⁰

4. THE NATURE OF OFFENCES DEALT WITH AND ISSUES INVOLVED

POCA provides for three broad categories of offences: offences relating to racketeering activities; offences relating to proceeds of unlawful activities; and offences relating to criminal gang activities. As mentioned earlier, POCA's main objective is to deprive offenders of the benefits of their criminal activities. As a result, the Act provides for different orders that can be issued to prevent suspects from disposing of property acquired through illegal activities – restraint and preservation of property orders – and also, when it is established

that indeed the affected property was acquired through unlawful means, to permanently deprive the law breakers of that property – confiscation and forfeiture orders. The relevant provisions relating to these mentioned orders are highlighted below.

For a provisional restraint order or a preservation of property order to be made, the National Director of Public Prosecution makes an *ex parte* application to the High Court. Section 25(1) provides that a High Court may issue a restraint order in the following circumstances: (a) when (i) a prosecution for an offence has been instituted against the defendant concerned; (ii) either a confiscation order has been made against the defendant or it appears to the court that there are reasonable grounds for believing that a confiscation order may be made against that defendant; and (iii) the proceedings against that defendant have not been concluded; or (b) when (i) the court is satisfied that a person is to be charged with an offence; and (ii) it appears to the court that there are reasonable grounds for believing that a confiscation order may be made against a person.

Section 25(1) provides for two broad situations in which an application for a restraint order can be made and granted. The first situation is only applicable if the prosecution proceedings against the defendant have been initiated but not yet completed. The reason is that, if the prosecution has successfully prosecuted the accused, sections 18–24 of POCA become applicable.⁴¹ The second situation is applicable where the court is satisfied that the suspect will be charged with the offence and that, in addition, there are reasonable grounds for believing that a confiscation order may be made against him or her. This was explained in *National Director of Public Prosecutions v Kyriacou*⁴² where the Supreme Court of Appeal held that, for a restraint order to be made, the National Director of Public Prosecutions

is not required to prove as a fact that a confiscation order will be made, and in those circumstances there is no room for determining the existence of reasonable grounds for the application of the principles and onus that apply in ordinary motion proceedings. What is required is no more than evidence that satisfies a court that there are reasonable grounds for believing that the court that convicts the person concerned may make such an order.

It is important to note that under section 25(2) where the High Court has made a restraint order on the basis that the suspect is to be charged with an offence, the court is obliged to rescind that order if the person is not charged within such period as the court may consider reasonable.

As in the case of restraint orders, under section 38 the High Court is empowered to issue a preservation of property order on an *ex parte* application from the National Director of Public Prosecutions if there are reasonable grounds to believe that the property concerned: (a) is an instrumentality of an offence referred to in Schedule 1 of POCA;⁴³ (b) is the proceeds of unlawful activities; or (c) is property associated with terrorist and related

activities. It will shortly be illustrated that all the cases reviewed show that it is only in the first and second instances where preservation of property orders and later forfeiture orders have been issued. There is no known case in which a preservation of property order was issued on the ground that there were reasonable grounds to believe that the property concerned was associated with terrorist and related activities.

Contestations of restraint orders have featured in many reported cases. Suspects have challenged the legality of restraint orders granted to the National Director of Public Prosecutions in terms of sections 24A-29A of POCA. There are several examples in the decisions of the courts where POCA has been invoked in situations in which a person was suspected of committing one or more of the offences under the Act, or in some instances also offences under other pieces of legislation. These include racketeering and money-laundering under POCA and drug-trafficking under the Drugs and Drug Trafficking Act.⁴⁴

Examples of POCA being used in this way include *ABSA Bank Ltd v Fraser and another*,⁴⁵ where the respondent's immovable assets and money, R1.8 million, were restrained because of allegations of money-laundering, racketeering and drugs-trafficking. Similarly, in *Director of Public Prosecutions: Cape of Good Hope v Bathgate*,⁴⁶ the respondent's immovable property (two houses) and vehicles were subject to a restraint order on allegations that they were bought using proceeds of drug dealing; and in *Mngomezulu and others v National Director of Public Prosecutions*⁴⁷ the appellant's 12 immovable properties and his movable property, such as Persian carpets, works of art, vehicles and numerous bank accounts, were subjects of a restraint order on allegations that they were instrumentalities of offences or proceeds of unlawful activities – drug dealing in this instance. Fraud relating to, and theft of, insurance premiums, where defendants allegedly forged certificates and other documents and stole R14.8 million from their clients, led to the High Court in *National Director of Public Prosecution v Alexander and others*⁴⁸ granting a restraint order against the property bought using the fraudulently acquired money. In *National Director of Public Prosecutions v Mcasa and another*,⁴⁹ where the respondents kidnapped a businessman's daughter and released her on receiving a ransom of R1.8 million and after their conviction, the Court issued a restraint order against their plot of land, cars, home theatre, insurance policy, and bank accounts. Similarly a restraint order was upheld in *National Director of Public Prosecutions v Mohamed and others*⁵⁰ where the defendant, a former attorney, was facing charges of stealing money that his clients had received from the Road Accident Fund as compensation. Finally, illicit trading in platinum group metals led, in *National Director of Public Prosecutions v Naidoo and others*,⁵¹ to a restraint order being granted against the property of 22 defendants and 23 respondents who allegedly dealt illegally in platinum.

In terms of section 38 of POCA the National Director of Public Prosecutions is empowered to lodge an *ex parte* application to the High Court for an order (called a preservation of property order) prohibiting any person from dealing with any property in any manner if there are reasonable grounds to believe that the property concerned has one or more of

the following features: is an instrumentality of an offence referred to in Schedule 1 of the POCA; is the proceeds of unlawful activities; or is property associated with terrorist and related activities. Section 48(1) provides that '[i]f a preservation of property order is in force the National Director [of Public Prosecutions], may apply to a High Court for an order forfeiting to the State all or any of the property that is subject to the preservation of property order.' A review of the case law shows that forfeiture orders have been issued in the following circumstances: against a residential property that was being used to manufacture drugs;⁵² a farm on which drugs were being manufactured and a trailer that was bought with the proceeds of the drugs;⁵³ a large quantity of diving equipment, a small fishing ship, and a Toyota 4x4 Landcruiser after the owners were convicted of being in possession and transportation of abalone illegally;⁵⁴ a building for being used as a brothel;⁵⁵ a building for being used for illegal gambling (operating a casino illegally);⁵⁶ and money that was offered to a police officer as a bribe.⁵⁷

There are at least three important points to note from the above discussion:

- One, because of the fact that POCA targets the property of suspects and offenders, the courts have interpreted it in such a way that its objective is balanced against constitutional right to property of the suspect or criminal concerned. It is against this background that the element of proportionality was introduced into the equation to ensure that property which would otherwise have been legally forfeited to the state in terms of POCA is not forfeited if the forfeiture would be disproportionate.
- Two, courts have limited the application of POCA to only those offences that are difficult to detect and prosecute. Crimes that can be addressed adequately through ordinary criminal law have been interpreted as falling outside the ambit of POCA. However, one could argue that, because the courts have interpreted POCA as applicable not only to organised crimes but also to cases which one would not ordinarily classify as organised crimes, the danger looms large that its application to the latter cases may result in inconsistent outcomes. This is because it is more likely to depend on the discretion of the judge to determine whether POCA should be applicable in borderline cases – that is, cases that could be prosecuted both under ordinary criminal law and POCA. Thus, in some borderline cases POCA will be invoked and in others will not.
- Three, whereas it is widely believed that organised crime almost always has an international dimension – with both national and international or regional actors – all the cases reviewed show that the offenders or people whose property was confiscated or forfeited to the state were South African nationals. Most importantly, all the offences were committed not by people in highly organised criminal groups or gangs but by one or more individuals who were purely motivated by profit. The author was unable to find a reported case in which the crime was committed with proven aim of the offenders 'smuggling' their property out of South Africa.

5. CONCLUSION

Combating organised crime remains a complex challenge facing not only the South African government but also the international community. This type of crime threatens not only the lives and well-being of the citizenry but also democracy.⁵⁸ The ten years since the coming into force of POCA has seen the judiciary, while relying heavily on foreign case law,⁵⁹ developing a rich jurisprudence on the most controversial provisions of the Act. Broadly speaking, the courts have got the balance right. Although fully cognisant of the dangers associated with organised crime and the legislature's determination to combat it, the courts have made sure that safeguards are put in place to ensure that key human rights, especially the right not to be arbitrarily deprived of one's property, are not violated in the 'war' on organised crime. It is against this background that the principle that a forfeiture order can only be made if it passes the proportionality test has been developed.

The question of whether ten years since its coming into force POCA has contributed significantly to the fight against organised crime is still debatable. However, what is not in dispute is that hundreds of individuals have had their property, in many instances worth several millions of rand, confiscated or forfeited to the state in terms of POCA. In allowing this to happen, while seeking to guarantee rights, the courts have played a vital role.

ENDNOTES

1. Senior Project Officer, Criminal Justice Initiative, Open Society Foundation for South Africa.
2. For the definitions of organised crime see A. Wright, *Organised Crime* (2006), Willan Publishing: Cullompton, 2–26; V. Mitsilegas, 'From National to Global, From Empirical to Legal: The Ambivalent Concept of Transnational Organised Crime' in M. E. Bear (ed) *Critical Reflections on Transnational Organised Crime, Money Laundering and Corruption* (2005), University of Toronto Press: Toronto, 55–87. POCA does not define organised crime.
3. For some forms of organised crime, some of the measures adopted by the international community and some European countries to combat organised crime see Letizia Paoli and Cyrille Fijnaut, 'Organised Crime and Its Control Policies' (2006) 14 *European Journal of Crime, Criminal Law and Criminal Justice* 307–327.
4. See A. Kruger, *Organised Crime and Proceeds of Crime Law in South Africa* (2008), LexisNexis, Durban.
5. Prevention of Organised Crime Act, 121 of 1998.
6. Preamble to POCA, paragraph 10.
7. *ABSA Bank Ltd v Fraser and another* 2006(2) SACR 158(SCA), paragraph 24. In *National Director of Public Prosecutions v Gouws* 2005(2) SACR 193(SE), where the defendant pleaded guilty to, and was convicted of, the charge of being in unlawful possession of 62 units abalone the Court, although it declared his vehicle to be 'an instrumentality of an offence' did not order its confiscation on, amongst other grounds, that the power to deprive owners of their property should be invoked sparingly. The court added further that 'the primary object of POCA is to remove the incentive for criminal activity and not to punish the offender. However...it can hardly be denied that forfeiture of assets can have the effect also of punishing the owner albeit that such punishment is a side-effect, and not the primary object, of POCA' (at page 196).
8. The most famous of these is the Racketeer-Influenced and Corrupt Organisations (RICO) legislation in the USA: See E. M. Wise, 'RICO and Its Analogues: Some Comparative Considerations' (2000) 27 *Syracuse Journal of International Law and Commerce* 303.

9. Act 108 of 1996.
10. M. Avery, 'Time to Clear the Confusion around POCA' (December 2007) 7:11 *Without Prejudice* 24.
11. Chapter 2.
12. Chapter 3.
13. Chapter 4.
14. *National Director of Public Prosecution v Alexander and others* 2001(2) SACR 1(T), page 16.
15. *Mohunram and another v National Director of Public Prosecutions and another (Law Review Project as amicus curiae)* 2007(2) SACR 145(CC). Where the appellants were convicted of illegal gambling and their gambling machines and premises declared forfeit to the state as instrumentalities of crime. They had argued that illegal gambling was not an organised crime within the meaning of POCA. Emphasis in the original.
16. Section 3 of POCA. In terms of section 8, a person convicted of an offence relating to proceeds of an unlawful activity or activities 'shall be liable to a fine not exceeding R100 million, or to imprisonment for a period not exceeding 30 years. Section 10 provides for eight years as the maximum sentence for offenders convicted of offences relating to criminal gang activities.
17. A total of 60 judgments reported in the South African Criminal Law Reports and South African Law Reports were reviewed. All the cases were decided by one of the three courts: the various divisions of the High Court; the Supreme Court of Appeal; or the Constitutional Court. Some of the cases went on appeal from the High Court to the Supreme Court and others to the Constitutional Court of Appeal. In cases where a matter was, for example, decided by the High Court and appealed again to the Constitutional Court, each decision is counted separately for the purpose of this study because it raises different legal issues at every stage.
18. For a brief discussion of the history and role of the Asset Forfeiture Unit, see M. Montesh, 'An Analysis of the Role of the South African Asset Forfeiture Unit and the Special Investigating Unit' (2009) 22(2) *Acta Criminologica* 31–40. Since 2004 the Asset Forfeiture Unit has registered some of the following 'successes' or achievements: the number of new restraint orders successfully applied for were 161 in 2004/2005 (with the value of R234,406,000), 252 in 2005/2006 (with the value of R344,129,000), 252 in 2006/2007 (with the value of R1,294,569,000), 223 in 2007/2008 (with the value of R395,229,000) and 275 in 2008/2009 (with the value of R320,254,000); the number of completed forfeiture cases: 151 in 2004/2005 (with the value of R172,855,000), 221 in 2005/2006 (with the value of R106,748,000), 242 in 2006/2007 (with the value of R100,600,000), 223 in 2007/2008 (with the value of R127,322,000), and 277 in 2008/2009 (with the value of R271,588,000). The success rates in judgments fluctuated as follows: 65.2% in 2004/2005, 72.4% in 2005/2006, 81.8% in 2006/2007, 80.0% in 2007/2008, and 63.2% in 2008/2009. See *Annual Report of the National Prosecuting Authority 2008/2009* (2009) page 39.
19. The right to property is protected under section 25 of the Constitution.
20. *Mohunram and another v National Director of Public Prosecutions and another (Law Review Project as amicus curiae)* (note 15 above) 154.
21. For a detailed discussion of the retrospective application of POCA see *National Director of Public Prosecutions v Basson* 2001(2) SACR 712(SCA).
22. *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), paragraph 31.
23. *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* (note 22 above), paragraph 34.
24. *National Director of Public Prosecutions v Braun and another* 2009(2) SACR 390(WCC).
25. *National Director of Public Prosecutions v Van Staden and others* 2007(1) SACR 338(SCA), paragraph 7.
26. *National Director of Public Prosecutions v Van Staden and others* (note 25 above), paragraph 7.
27. For a detailed discussion of the protection of third parties' interest under POCA see J.Y. Nel, 'The Constitutional Rights of Children and the Prevention of Organised Crime Act 121 of 1998' (2003) 28(1) *Journal for Juridical Science* 97, 102–106.
28. *Mohunram and another v National Director of Public Prosecutions and another (Law Review Project as amicus curiae)* (note 15 above), paragraph 130 per Moseneke DCJ dissenting in part.
29. *Prophet v National Director of Public Prosecutions* 2006(2) SACR 525(CC). In *Mohunram and another v National Director of Public Prosecutions and another (Law Review Project as amicus curiae)* 2007(2) SACR 145(CC), paragraph 143, Sachs J also held that '[i]n approaching the question of proportionality in relation to the forfeiture of an instrumentality of an offence, it is necessary to weigh the purpose of the legislation against the effect of the forfeiture on the effected person.'

30. *Prophet v National Director of Public Prosecutions* (note 29 above) paragraph 62.
31. In *S v Eysen* 2009(1) SACR 406(SCA) the High Court had sentenced the accused to 20 years' imprisonment for racketeering and the Supreme Court of Appeal set aside the conviction and the sentence on the ground that the appellant's activities did not amount to racketeering as defined in section 2 of POCA.
32. *National Director of Public Prosecutions v Moodley and others* 2009(2) SA 588(SCA). The defendants unsuccessfully argued that their racketeering charges had been brought illegally because they had been brought without the authorisation of the National Director of Public Prosecutions. See also *S v De Vries and others* 2008 (4) SA 441(C) where the accused unsuccessfully challenged the validity of the racketeering charges brought against them. In *Fraser v ABSA Bank Ltd (National Director of Public Prosecutions as amicus curiae)* 2007(3) 484(CC) the applicant argued successfully that the legal guardian (curator bonis) should sell some of the property that had been a subject of a restraint order for the applicant to be able to fund the reasonable legal expenses relating to his racketeering trial. In *National Director of Public Prosecutions v Carolus and others* 2000(1) SA 1127(SCA) the appellant argued unsuccessfully that the preservation orders under POCA could be invoked retrospectively in racketeering-related offences.
33. In *S v De Vries and others* 2009(1) SACR 613(C), the accused were convicted of, inter alia, racketeering but the judgment is silent on the sentences imposed.
34. Under section 38 an application for a preservation order is made by the National Director of Public Prosecutions ex parte and the High Court is obliged to make that order if there are 'reasonable grounds to believe that the property concerned: (a) is an instrumentality of an offence referred to in Schedule 1 [of POCA]; (b) is the proceeds of unlawful activities; or (c) is property associated with terrorist and related activities.' It was held in *National Director of Public Prosecutions v Van Heerden and others* 2004(2) 26(C) at 34 that 'at the preservation stage...the applicant is required to establish under s 38(2) no more than a *prima facie* case that there are reasonable grounds to believe that the property concerned ...(b) is the proceeds of unlawful activities'.
35. Chapters 5 and 6 of POCA. See *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* (note 22 above), paragraph 7 where it was held that a confiscation order can only be made after the accused has been convicted whereas a forfeiture order can be made whether prosecution takes place or not.
36. *National Director of Public Prosecutions v Ncongwane and others* 2005(2) SACR 377(N) where the accused were convicted of robbery but the court declined to order the confiscation of their property on the ground that the National Director of Public Prosecutions had not proved beyond reasonable doubt that they had derived benefit from the property they had robbed.
37. Section 50 of POCA.
38. In *S v Shaik and others* 2008(5) SA 354(CC) the offender's property was confiscated after his conviction for corruption.
39. In *S v Peterson en'n ander* 2001(1) SACR 16(SCA) the appellants were sentenced to 18 years' imprisonment for a gang-related murder. Their appeal to the Supreme Court of Appeal against their conviction was dismissed. In *S v Khambule* 2001(1) SACR 501(SCA) the appellants' appeal against their 35 years' imprisonment for gang-related murders and robberies was dismissed.
40. In *S v Eysen* (note 31 above) the Supreme Court of Appeal set aside the appellant's conviction for offences relating to criminal gang activities, on amongst other grounds, that the evidence did not show that the appellant gave instructions to other members of the gang to commit robbery.
41. Section 18(1) provides that '[w]henever a defendant is convicted of an offence the court convicting the defendant may, on the application of the public prosecutor, enquire into any benefit which the defendant may have derived from – (a) that offence; (b) any other offence of which the defendant has been convicted at the same trial; and (c) any criminal activity which the court finds to be sufficiently related to those offences, and if the court finds that the defendant has so benefited, the court may, in addition to any punishment which it may impose in respect of the offence, make an order against the defendant for the payment to the State of any amount it considers appropriate and the court may make any further orders as it may deem fit to ensure the effectiveness and fairness of that order.' Section 19 deals with the value of proceeds of unlawful activities in confiscation cases; section 20 provides for the amounts which might be realized in confiscation cases; section 21 governs the manner in which the public prosecutor can tender in evidence statements relating to proceeds of unlawful activities in confiscation cases; section 22 deals with evidence relating to unlawful activities in confiscation cases; section 23 lays down the effect of confiscation orders; and section 24 provides for the procedure of securing a confiscation order where the person affected or to be affected by that order absconds or dies. It was held in *National Director of Public Prosecutions v Basson* (note 21 above) that a confiscation order in terms of section 18 of POCA could not be imposed based on a conviction for an offence committed before the Act came into force.
42. *National Director of Public Prosecutions v Kyriacou* 2003(2) SACR 524(SCA), paragraph 10.
43. Schedule 1 provides for 34 different types of offences including offences in other pieces of legislation such as under the

- Criminal Law (Sexual Offences and Related Matters) Amendment Act (Act 32 of 2007); Sexual Offences Act (Act 23 of 1957); Prevention and Combating of Corrupt Activities Act (Act 12 of 2004); General Law Amendment Act (Act 62 of 1995); Drugs and Drug Trafficking Act (Act 140 of 1992); Arms and Ammunition Act (Act 75 of 1969); Intimidation Act (Act 72 of 1982); and the Protection of Constitutional Democracy against Terrorist and Related Activities Act (Act 33 of 2004).
44. Drugs and Drug Trafficking Act 140 of 1992.
 45. *ABSA Bank Ltd v Fraser and another* (note 7 above).
 46. *Director of Public Prosecutions: Cape of Good Hope v Bathgate* 2000(1) SACR 105(C).
 47. *Mngomezulu and others v National Director of Public Prosecutions* 2007(2) SACR 274(SCA).
 48. *National Director of Public Prosecution v Alexander and others* (note 14 above).
 49. *National Director of Public Prosecutions v Mcasa and another* 2000(1) SACR 263(TKH).
 50. *National Director of Public Prosecutions v Mohamed and others* 2003(2) SACR 258(C).
 51. *National Director of Public Prosecutions v Naidoo and others* 2006(2) SACR 403(T).
 52. *National Director of Public Prosecutions v Cole and Others* 2005(2) SACR 553(W) in which the court ordered that a residential house be forfeited to the state because drug-manufacturing machines and drugs were found on the premises. In *National Director of Public Prosecutions v Patterson and another* 2001(2) SACR 665(C) in dismissing the applicant's application for the forfeiture of the respondents' property to the state as an instrumentality of crime because, inter alia, some people had been seen smoking drugs on the premises, the court held that '[t]he mere fact that one smokes a prohibited substance on a property does not make the property instrumental in the smoking. Selling from the property or on the property would obviously be a different matter' (at 671). In *National Director of Public Prosecutions v Prophet* 2003(2) SACR 287(C), a forfeiture order was issued against a house in which drugs were being manufactured. An appeal against this order was dismissed by the Supreme Court of Appeal (*Prophet v National Director of Public Prosecutions* 2005(2) SACR 670(SCA) and the Constitutional Court (*Prophet v National Director of Public Prosecutions* (note 29 above).
 53. *National Director of Public Prosecutions v Mazibuko and others* 2008(2) SACR 611(N) where the court ordered that a farm (on which the drugs were being manufactured) and trailer (that was being used in the business) be forfeited to the state as instrumentalities of crime. See also *Mazibuko and another v National Director of Public Prosecutions* 2009(2) SACR 368(SCA), where the court dealt, inter alia, with the issue of property that is ordered forfeit to the state which is owned by spouses married in community of property.
 54. *National Director of Public Prosecutions v Engels* 2005(1) SACR 99(C). In *National Director of Public Prosecutions v Swart* 2005(2) SACR 186(SE) the defendant's vehicle, in which 1190 illegally fished abalone were found, was declared an instrumentality of an offence and was ordered forfeit to the state.
 55. *National Director of Public Prosecutions v Geyser and another* 2008(2) SACR 103(SCA) in which a forfeiture order was issued against the defendant's immovable property as a result of his having kept a brothel.
 56. *National Director of Public Prosecutions v Mohunram and others* 2006(1) SACR 554(SCA).
 57. *National Director of Public Prosecutions: In Re Appeals* 2005(2) SACR 610(N). It was held that the money that two vehicle thieves had offered to the police officer as a bribe for the latter not to arrest them was an instrumentality of an offence – corruption – and had to be forfeited to the State.
 58. It has been observed that organised crime 'presents exceptional risks and challenges to the social, political and economic well-being of states and to the international community'. See A. Wright, *Organised Crime* (2006) 1.
 59. Especially from the United States.