# IN THE HIGH COURT OF LESOTHO

**HELD AT MASERU** **CIV/APN/183/20**

**In the Matter between: -**

**THE DIRECTORATE ON CORRUPTION AND ECONOMIC OFFENCES** **APPLICANT**

**AND**

**SOBITA INVESTMENTS (PTY) LTD** **RESPONDENT**

Neutral Citation: Directorate on Corruption and Economic Offences (CIV/APN/183/20) [2020] LSHC 27

## JUDGMENT

**CORAM : MOKHESI J**
**DATE OF HEARING : 27th OCTOBER 2020**
**DATE OF JUDGMENT: 15th DECEMBER 2020**

## SUMMARY

**CRIMINAL LAW:** *Civil forfeiture of assets; The DCEO had applied for Preservation and forfeiture of property which it alleges is an instrumentality of a serious offence and/or the proceeds of unlawful activities- principles involved articulated and applied- Application dismissed with costs.*

**ANNOTATIONS:**

**STATUTES:**

*Money Laundering and Proceeds of Crime Act, 2008 (as amended)*

*Prevention of Corruption and Economic Offences Act, 1999 (as amended)*

*Finance Order, 1988*

*Financial Regulations, 1973; and*

*Accommodation, Catering and Tourism Enterprise Act, 1977*

**CASES:**

*National Director of Public Prosecutions v RO Cook Properties (PTY) Ltd (260/03) [2004] ZASCA 36 (13 May 2004*

*National Director of Public Prosecutions v Rautenbach and Another [2005] ALLSA 412 (SCA)*

*National Director of Public Prosecutions v Mohamed NO and Others 2003 (1) SACR 561; 2003 (4) SA 1 (CC)*

*Sekoala v The Directorate on Corruption and Economic Offences C of A (CIV) NO. 61/2017 (dated 16/01/19)*

*National Director of Public Prosecutions v Phillips and Others 2002 (4) SA 60 (WLD)*

*National Director of Public Prosecutions v Van Heerden 2004 (2) SACR 26 (C)*

*National Director of Public Prosecutions v Van Staden and Others [2006] SCA 135 (RSA): [2007]2 A11 SA 1 (SCA)*

*Prophet v National Director of Public Prosecutions 2006 (1) SA 38 (SCA)*

*Lebotsa v The Crown C of A (Cri) No.13/2008 [2009] LSA 11 (23 October 2009)*

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

*Cool Ideas 1186 CC v Hubbard and Another [2014] ZACC16; 2014 (4) 474 (CC)*

*Prophet v National Director of Public Prosecutions 2007 (2) BCLR 140 (CC); 2006 (2) SACR 525 (CC)*

*National Director of Public Prosecutions v Van Staden and Others [2006] SCA 135 (RSA): [2007] 2 All SA 1 (SCA)*

*National Director of Public Prosecutions and Others v Vermaak [2007] SCA 150 (RSA); [2008] 1 All SA 448 (SCA); 2008 (1) SACR 157 (SCA)*

*Mohunram and Another v National Director of Public Prosecution and Others 2007 (6) BCLR 575 (CC)*

*Oudekraal Estates (Pty) v City of Cape Town and Others [2004] 3 ALL SA 1 (SCA)*

*R v Nova Scotia Pharmaceutical Society [1992] 2 S.C.R*

*Sunday Times v The United Kingdom Appl. NO. 6538/74 judgment of 26 April 1979*

*L'Office Cherefien des Phosphates and Another v Yamashita – Shinnihon Steamship Co. Ltd: [1994] 1 AC 486*

*National Director of Public Prosecutions v Carolus [2000] 1 ALL SA 302 (A); 2000 (1) SA 1127*

*Yew Bon Tew v Kenderaan Bas Mara [1982] 3 ALL ER 833, P.C*

*United States of America v Certain Funds Located at the Hong Kong and Shanghai Banking Corporation et al (1996) 96 F 3d 20 (2nd Cir): (1996) US App Lexis 23606,*

*Lesotho Medical Association v The Minister of Health Constitutional Case NO.19 of 2019 (dated 24/06/2020).*

*National Director of Public Prosecutions v Botha N.O and Another [2020] ZACC 6*

*Mothobi and Another v The Crown LAC 92009-2010) 465*

*National Director of Public Prosecutions v Joseph and Another (8271/2018) [2018] ZAWCHC 121*

*National Director of Public Prosecutions v Van Der Merwe and Another [2011] ZAWCHC 8; 2011 (2) SACR 188 (WCC); [2011] 3 ALL SA 635 (WCC)*

**[Mokhesi J]**

## [1] INTRODUCTION

This application concerns the leasing of the hotel in the Maseru city center which trades by the name Victoria Hotel. This property is owned by the Government of Lesotho (GOL). The applicant is the Directorate on Corruption and Economic Offences (DCEO) and the respondent is the lessee (Sobita Investments). The DCEO had launched a preservation and forfeiture of this property and its proceeds, rolled into one. The property for purposes of this application according to the Director General of the DCEO, Adv. Manyokole, comprises the following:

1. The rights accruing to Sobita;
2. Plot number 12284 – 544 known as Victoria Hotel (the Victoria Hotel);
3. Sobita business account number 9080003857332; and
4. Sobita business account number 9080002755331

**[2]** This application was launched in terms of the provisions of Money Laundering and Proceeds of Crime Act N0. 4 of 2008 (hereinafter the 'MLPCA') *ex parte* in terms of the provisions of the same Act on the 15th June 2020 before a duty Judge. The learned judge issued the preservation order *ex parte* and did not issue the *rule nisi*. I revert to this aspect of the case in due course.

## [3] Factual Background

The GOL entered into a sub-lease agreement with Sobita in relation to Victoria Hotel on the 16th December 2002, for the latter to run it for ten (10) years with an option for further extension for five (5) years. Sobita was in terms of the sub-lease agreement expected to pay an amount of sixty thousand Maloti (M60,000.00) per month as rental to be increased by 5% annually. In terms of the sub-lease the

respondent was to renovate, upgrade and furnish Victoria Hotel at the cost of two Million Maloti (M2,000 000.00) within three years of the commencement of the sub-lease agreement so as to bring it to the standards of the Don Suite Hotels in South Africa, and that where the costs of repairs, improvements or furnishings were to exceed the stated threshold, Sobita should seek approval from the GOL. Sobita was further expected to keep proper books of accounts and records of all monies spent for the improvements and furnishings. On 12th June 2006 Sobita sought and was granted approval to spend on amount of M13 939 866 for effecting renovations, upgrades and furnishings on the property. The approval was granted by the then Minister of Finance, Dr. Thahane. On 28th December 2011 Sobita sought and was granted further approval for the same purpose by the same Minister. On the 13th April 2012 the sub-lease agreement was extended for further ten (10) years by the same Minister Thahane.

**[4]** Prior to occupancy of Victoria Hotel by Sobita, it was under the management of Mr. Antonio Mario Florio trading as Lesotho Hotels from 1982 to 2001 when he passed on. The decision to lease the property was done under the auspices of Dr. T. Thahane and his then Principal Secretary Mrs Mphutlane under the authority of Cabinet. The former Prime Minister and Ministers who were privy to this decision deposed to supporting affidavits in this regard. In his supporting affidavit Dr. Thahane makes the following averments:

> "13. Ms Mphutlane indicated that the Victoria Hotel had not been included in the government assets to be privatised under privatization programme because Cabinet felt then that once the Hotel was renovated upgraded and operated by an experienced operator, it would be a source of pride to Basotho and a center of tourist activities. However, the

Hotel was in a very dilapidated state, having stood vacant for over ten years.

14. With Victoria Hotel in need of major renovations, upgrading and furnishings, the Government's challenge was that it lacked the necessary financial resources at the time to fund the cost of renovations from its own resources. During the privatisation process, the Principal Secretary told me, the Hotel had been canvassed and offered to many Hotel operators in South Africa and internationally, but none were interested.

15. Ms Mphutlane went further to inform me that Mr Tlelai, a businessman and entrepreneur that had successfully developed and operated a number of hotels and properties in South Africa and Lesotho might be interested in investing in rehabilitating and operating the Victoria Hotel."

**[5]** The above averments represent the rationale for the GOL of approaching Mr. Tlelai (Sobita's director) for sub-leasing of Victoria Hotel. Dr. Thahane's assertion that Victoria Hotel lay unused for ten years before Sobita took occupancy cannot be true. It is a fact that Mr. Florio had been the one managing this hotel for many years until his passing away three years prior to the impugned sublease.

**[6] The basis of the applicant's case:**

It is the applicant's case that the property is the proceeds of unlawful activities and/or instrumentalities of an offence in terms of MLPCA, on the following bases:

i) Money laundering in terms of section 25(1) (a) of the Money Laundering and Proceeds of Crime Act, 2008 (as amended) (MLPCA)

ii) Corruption in terms of section 21(3) (b) of the Prevention of Corruption and Economic Offences Act, 1999 (as amended) ("Corruption Act")

iii) Procurement breach in terms of section 36(1) read with section 29 of the Finance Order, 1988

iv) Procurement breach in terms of section 36(1) of the Finance Order, 1988 read with Regulation 2101 (1) and (2) of the Financial Regulations 1973; and

v) Contravention of section 15 of Accommodation, Catering and Tourism Enterprise Act, 1977 (ACTEA)

The DCEO contends that the above are serious offences in terms of section 2 of MLPCA warranting their approach to this court in the manner they did.

**[7] The Respondent's Case:**

The respondent is opposing both the preservation and forfeiture of the properties itemized in the application. I will deal with the substance of its opposition when I deal with individual bases of the application. The respondent has also raised certain technical points to the application, *viz*; non-retrospectivity of the MLPCA; Non-disclosure by the applicant that the sublease agreement has not yet been challenged in review proceedings, and therefore remains presumptively valid. I deal with these points in due course.

**[8] Procedural Matters:**

Before dealing with the procedural issues implicated in this matter a legislative framework which governs these matters should be laid out. The procedure is provided in section 88 and 89 of the MPLCA. Sections 88 and 89 provides that:

> "88(1) The Authority [ DCEO for present purposes] may by way of an *ex parte* application apply to the High Court for an order prohibiting a person, subject to such conditions and exceptions as may be specified in the Order, from dealing in any manner with any property referred to in subsection (2).
>
> (2) The High Court shall make an order referred to in subsection (1) if there are reasonable grounds to believe that the property concerned –
>
> (a) is an instrumentality of a serious offence; or
>
> (b) is the proceeds of unlawful activities.
>
> (3) The High Court making preservation of property order may, when it makes the order or at any time thereafter, make any ancillary orders that the court considers appropriate for the proper, fair and effective execution of the order, including an order authorising the seizure of the property concerned by a police officer or an authorised officer.
>
> (4) Property seized under subsection (3) shall be dealt with in accordance with the directions of the High Court which made the relevant preservation of property order.

**Notice of preservation of property Order.**

89. (1) If the High court makes preservation of property order, the Authority shall, as soon as practicable after making of the order -

a) give notice of the order to all persons known to the Authority to have an interest in property which is subject to the order; and

b) publish a notice of the order in the Gazette.

(2) A notice under subsection (1) (a) shall be served in the manner in which a summons whereby civil proceedings in the High Court are commenced, is served.

(3) A person who has an interest in the property which is subject to the preservation of property order may enter an appearance giving notice of his or her intention to oppose the making of a forfeiture order or to apply for an order excluding his or her interest in the property concerned from the operation thereof.

(4) An appearance under subsection (3) shall be delivered to the Authority within, in the case of –

(a) a person upon whom a notice has been served under subsection (1) (a), 14 days after such service; or

(b) any other person, 14 days after the date upon which a notice under subsection (1) (b) was published in the Gazette.

(5) An appearance under subsection (3) shall contain full particulars of the chosen address for the delivery of documents concerning further

proceedings under this part and shall be accompanied by an affidavit dating –

a) full particulars of the identity of the person entering the appearance;

b) the nature and extent of his or her interest in the property concerned; and

c) the basis of the defence upon which he or she intends to rely in opposing a forfeiture order or applying for the exclusion of his or her interests from the operation thereof…"

**[9]** These provisions together with other provisions under Part V of the MLPCA deal with what is called civil forfeiture of property associated with criminality or offences. The provisions of MLPCA appearing under this part are not aimed at criminally punishing the individual but are instead based on the notional guilt of the property in the commission of the serious offence. Civil forfeiture regime is divided into two parts; *viz*, (a) the preservation phase; and (b) the forfeiture phase. The purpose of civil forfeiture procedure has been variously stated to be to create a disincentive for commission of organized crime, whether that crime was committed by an individual or syndicates (organized crime), by removing the property and its proceeds from offenders' possession thereby decapitating and decapacitating the means by crimes are committed; it further serves the purposes of deterring persons from using or allowing other persons to use their property for the commission of crime. **(*National Director of Public Prosecutions v RO Cook Properties (PTY) Ltd (260/03) [2004] ZASCA 36 (13 May 2004)*** at para.18. Civil forfeiture is remedial and not penal, and serve to supplement criminal remedies "… and not merely as a more convenient substitute" ***(National Director of Public Prosecutions v Van Staden and Others [2006] SCA 135 (RSA): [2007] 2 All SA 1 (SCA)*** at para.70. In

the ***National Director of Public Prosecutions and Others v Vermaak [2007] SCA 150 (RSA); [2008] 1 All SA 448 (SCA); 2008 (1) SACR 157 (SCA)*** at para. 11 and 12, Nugent JA, in the context of South African civil forfeiture, said:

> "[11] 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 it 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. And even where the offence is committed in the course of an ongoing criminal interprise that is being conducted by the offender alone, the withdrawal of property is capable of having a severely inhibiting effect on its continuance. It seems to me, in other words, that forfeiture is likely to have its greatest remedial effect where crime has become a business.
>
> [12] Conversely, where the offence is not committed in the course of ongoing criminal activity, as in cases of the kind that are now in issue[driving under the influence of intoxicating liquor], 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. If the sentences that are available to serve that purpose are inadequate it is open to the legislature to remedy that defect, I do not think that forfeiture should be seen as a means of 'topping-up' penalties that are imposed by a court."

**[10] *Ex Parte* Procedure.**

As seen above, the DCEO is given a discretion whether to seek preservation of property on notice to the affected person or to proceed *ex parte*. It is trite that *ex parte* procedure is deployed where the exigency of the situation cries out for non-

notification of the affected person in order to avert the torpedoing of the purpose for which non-notification was intended to serve. In a case such as the ones concerning crime, an application for preservation on notice would at times lead to an undesirable consequence of the concerned persons dissipating the property before an order for its preservation is issued, and so to ensure that preservation of property pending its forfeiture is fully secured, an *ex parte* procedure usually comes in handy as a useful tool for that end.

**[11]** A preservation order which is granted *ex parte* is provisional by its nature. It is provisional not only because in terms of section 90 of the MLPCA, it will lapse after 90 days after being issued unless an application for forfeiture is made for a property subject to preservation, or where there is an unsatisfied forfeiture order in force in relation to the property in issue, or where the preservation order is rescinded before its expiry. Fundamentally, in our law, and I do not read section 88(1) to exclude this possibility, an order granted *ex parte* is provisional and is subject to confirmation by the court after having heard the other side against whom the order was issued. It is a trite principle of our law that an applicant who secures an order *ex parte* is not placed at an advantageous position thereby, as on the return day he/she still have to justify that it was properly issued in the first place. The same principles are applicable when the DCEO invokes the provisions of section 88. It is apposite to recall further that an order obtained *ex parte* breaches one of the fundamental tenets of our justice, *viz, the audi alteram paterm* rule (see for the exposition of the *ex parte* procedure within the context of Civil forfeiture, ***National Director of Public Prosecutions v Rautenbach and Another [2005] ALLSA 412 (SCA)*** at paras 9 – 12; and more importantly, dealing with a section similar to section 89, see: ***National Director of Public Prosecutions v Mohamed NO and Others 2003 (1) SACR 561; 2003 (4) SA 1 (CC) at paras 27 – 42).*** A court which deals with an *ex parte*

application should not adopt a *non possumus* attitude where an order is sought without giving a return date upon which the allegations of the applicant and the affected party will be considered, and for the applicant to justify finalization of the order.

**[12]** It is common cause that when the application was initially launched on the 15th June 2020, the applicant sought both the preservation and forfeiture reliefs rolled-up into one application. The application served before a duty Judge who issued the preservation order without calling upon the respondents to appear before court on the return day. Approached in this manner, the court issued the preservation order which was to all intends and purposes final without hearing the other side. It cannot be overemphasized that preservation orders are by their nature prejudicial as they may freeze livelihoods of individuals affected for as long as they are operational ***Sekoala v The Directorate on Corruption and Economic Offences C of A (CIV) NO. 61/2017 (dated 16/01/19) at para. 13***. And so, it is important, as in this case, not to issue a final preservation order without affording the effected parties the benefit of the *audi alteram paterm* principle.

**[13]** I am fully mindful that I am not sitting on review or appeal against the order of my colleague. In the instant case when the respondent received the application it filed its Notice of Intention to oppose and its opposing papers. In opposing papers, the respondent said it was anticipating the return day. There was no return day to be anticipated as the court did not issue the return day. What the court order did was to call upon the respondent, in terms of section 89(3) of MLPCA, to enter its appearance or notice of intention to oppose the making of a forfeiture order. The respondent was thus presented with a situation where the preservation order was *feit accompli* and could thus not be subject to reconsideration. Since the factual matrix on which the preservation and the forfeiture orders are sought are the same, and that

the respondent had indicated in its answering affidavit opposing forfeiture that it relies on the same affidavit it used to oppose the granting of preservation order, to oppose the granting of forfeiture order. I consider that there is no prejudice occasioned by this approach and therefore I deal with the forfeiture on the basis of the same papers used to oppose preservation, as the DCEO is also relying on them without any additional facts.

**[14]** Although Mr. Maleka S.C, for the respondent, during argument had impressed upon this court to rescind the preservation order in terms of the provisions of section 96(2) of the MLPCA, I however, do not think I should follow that route, but rather the provisions of section 97 of the MLPCA as the respondent had indicated its intention to oppose forfeiture.

Section 97 provides:

> "97. If a preservation of property is in force the Authority may apply to the High Court for an order forfeiting to the Crown all or any of the property that is subject to the preservation of property order.
>
> Making of a forfeiture order:
>
> 98. (1) The High Court shall, subject to section 103, make an order applied for under section 17 of the court finds on a balance of probabilities that the property concerned –
>
> (a) is an instrumentality of an offence; or
>
> (b) is the proceeds of unlawful activities.
>
> (2) The High Court may when it makes a forfeiture order or at any time thereafter, make any ancillary orders that it considers appropriate

including orders for and with respect to facilitating the transfer to the state of property forfeited under such an order.

(3)…..

(4)….

(5)….

(6)….”

And further under section 100 of MPLCA, the High Court on application by interested party may make an order excluding that party’s interest in the property which is subject to the forfeiture order from the operation thereof. And under section 100 (2);

“(2) The High Court may make an order under subsection (1) if it finds on a balance [or the party opposing forfeiture] for such an order –

(a) had acquired the interest concerned legally; and

(b) neither knew nor had reasonable grounds to suspect that the property in which the interest is held –

(i) is an instrumentality of a money laundering or financing of terrorism offence under this Act; or

(ii) Is the proceeds of unlawful activities.

(3) The High Court making an order for the exclusion of an interest in property under subsection (1) may, in the interest of the administration of justice or in the public interest, make that order upon the conditions that the court deems appropriate including a condition requiring the person who applied for the exclusion to take all reasonable steps, within

a period that a court may determine, to prevent the future use of the property as an instrumentality of a money laundering or terrorist funding offence under this Act."

**[15]** In terms sections 88, 89, 96,97 and 100, the scheme of the MLPCA is clear; a person faced with preservation order has two options; either oppose the characterization of property as either the instrumentality of a serious crime or proceeds of unlawful activities the forfeiture in terms of section 89(3); or in terms of s.96, apply for rescission of the preservation order, which order may only be rescinded if the court deems it necessary in the interests of justice or if the proceedings against the applicant are concluded. But where preservation has not been rescinded, and forfeiture been applied for, the affected person may apply for exclusion of his or her interest in the property from operation of forfeiture order by advancing the 'defences' itemized under section 100(2).

**[16]** A two-tier approach is envisioned when dealing with the so-called defences to forfeiture: the first tier relates to a determination whether the property is instrumentality of an offence or proceeds of crime. Once the court will have determined that indeed the property is either instrumentality or proceeds, can it move on to determine whether the property can be excluded in terms of section 100(2). The exclusionary relief provided for under this section places an onus on the respondent/applicant therefor to satisfy the court that his interest should be excluded from the effects of the forfeiture order. Section 100(2) places a duty on owners of property to ensure that their properties are not used for commission of crimes. When applying for an exclusionary relief, the applicant or respondent has to show that he acquired the property or interest in the property legally and that he neither knew or had reason to suspect that his property is an instrumentality of a serious offence or is proceeds of unlawful activities. This is what is commonly known as the innocent

owner defence in this area of the law. What is clear is that even persons who are not owners but hold interest in relation to property are covered by this section, because interest in the property has been broadly defined under section 2(1) of MLPCA to mean:

> "(a) a legal or equitable interest in the property;
>
> (b) a right, power or privilege in connection with the property."

An innocent owner defence is not a defence as such but merely a legally cognizable objective factual justification for excluding the applicant's interest from the ambit of the forfeiture order. This factual justification is placed before court post characterization of property as either instrumentality of a serious crime or proceeds of a serious crime.

> "The 'innocent owner defence' is, however, not a defence, properly so called, because it does not arise to be asserted against the entitlement of the NDPP [DCEO] on the facts to a forfeiture order, but rather by way of an application for an order excluding the affected party's interest from the effect of a forfeiture order to which the NDPP [DCEO] has proven an entitlement. It is thus in the second stage of the proceedings, if it is reached, that the owner or affected interest holder's innocence or culpability arises becomes the focus of enquiry, and the *onus* is on such person to establish his or her innocence or lack of culpability." ***(National Director of Public Prosecutions v Van Der Merwe and Another [2011] ZAWCHC 8; 2011 (2) SACR 188 (WCC); [2011] 3 ALL SA 635 (WCC)).***

**[17]** The standard which is applied under forfeitures differs from that applicable to preservation of property. Under the latter, the standard of proof is that the court be

satisfied that there are reasonable grounds to believe that the property concerned is either instrumental in the commission of serious offence(s) or is proceeds of unlawful activities. However, in forfeiture applications the standard is that of the balance of probabilities (section 100(2)). In preservation procedure the standard of proof was correctly captured in the ***National Director of Public Prosecutions v Joseph and Another (8271/2018) [2018] ZAWCHC*** **121**(7 September 2018) at para.10 where McWilliam AJ said:

> **"<u>THE STANDARD OF PROOF</u>**
>
> [10] The authorities which both parties referred me to related almost exclusively to forfeiture orders and not to orders in terms of Section 38 of POCA.
>
> [11] The applicable principles in relation to the standard proof to be applied when an application is heard in terms of Section 38 of POCA are set out in <u>*NDPP v Starplex 47 CC and Others*</u> [2] in the following terms:
>
> "*[8] As regards the standard of proof required in order to obtain a preservation order, in National Director of Public Prosecutions v Kyriacou 2004 (1) 379 (SCA) [also reported at [2003] 4 ALL SA 153 (SCA) - Ed], Mlambo AJA, on behalf of the majority of the court, rejected the notion that disputed evidence in such applications must be dealt with in accordance with the principles set out in Stellenbosch Farmers Winery Ltd v Stellenvale Winery (Pty) Ltd* 1957 (4) SA 234 *(C) [also reported at [1957] 1 ALL SA 123 (C) - Ed] and Plascon Evans Paint Ltd v Van Riebeeck Paints (Pty) Ltd* [1984] ZASCA 51 ; 1984 (3) SA 623 *(A) [also reported at [1984] ZASCA 51; [1984] 2 ALL SA 366 (A) - Ed]. He stated as follows (at 384I-385B):*

'*Section 25(1)(a) confers a discretion upon a court to make a restraint order if, inter alia, "there are reasonable grounds for believing that a confiscation order may be made ...". While a mere assertion to that effect by the appellant will not suffice ..., on the other hand the appellant 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.'*

*[9] Although the Kyriacou case (supra) dealt with restraint orders under chapter 5 of the Act rather than preservation orders under chapter 6, the two procedures are analogous inasmuch as they are temporary orders pending the institution and determination of a forfeiture action. In National Director of Public Prosecutions v Phillips and others* 2002 (4) SA 60 *(W) [also reported at 2002 (a) BCLR 41 (W) - Ed] in dealing with the question of what degree of proof is required of the applicant in section 26 i.e. restraint proceedings in terms of chapter 5 of the Act, Heher J, as he then was, stated as follows at paragraph [12]:*

'*In my view an application for a restraint order is analogous (although not identical) to an application for an interim interdict and attachment pendente lite. Insofar as such relief contains elements of finality, the Legislature could never have intended that it should be defeated by reason of conflicts of fact per se. Nor would a reference to evidence be appropriate: that might well anticipate the enquiry at the criminal trial and impinge on the right of silence. The prima facie case is proof of a reasonable prospect of obtaining*

*both a conviction in respect of the charges levelled against the respondent and a subsequent confiscation order under section 18(1). It is appropriate in determining whether the onus has been discharged to apply the long accepted test of taking the facts set out by the applicant together with any facts set out by the respondent which the applicant cannot dispute and to consider whether, having regard to the innate probabilities, the applicant should on those facts obtain final relief at a trial (for this purpose, the confiscation hearing). The facts set up in contradiction by the respondent should then be considered and, if serious doubt is thrown upon the applicant's case, he cannot succeed.'*

*This approach was endorsed by this Court in the case of National Director of Public Prosecutions v Van Heerden and others 2004 (2) SACR 26 (C) (at 33-34) [also reported at [2003] 4 ALL SA 459 (C) - Ed], where Meer J stated as follows:*

'*A preservation order under section 38 of POCA is akin to an interim interdict. Its aim is to preserve property for up to 90 days pending proceedings for a forfeiture order under section 48 of POCA ... The appropriate standard of proof at the preservation order stage must therefore be the well-established one of prima facie proof applicable to interim interdicts. In Webster v Mitchell 1948 (1) SA 1186 (W) at 1189 as qualified in Gool v Minister of Justice1955 (2) SA 275 (C) at 688C-D the degree of proof required was formulated as follows:*

"*In an application for a temporary interdict the applicant's right need not be shown on a balance of probabilities; it is sufficient if such right is prima facie established, though open to some doubt. The proper manner of*

*approach is to take the facts set out by the applicant together with any facts set out by the respondent which applicant cannot dispute and to consider whether, having regard to the inherent probabilities, the applicant should (not could) on those facts obtain final relief at a trial. The fact set up in contradiction by the respondent should then be considered, and if serious doubt is thrown upon the applicant's case, he could not succeed."*

*At the preservation stage therefore the applicant is required to establish under section 38(2) no more than a prima facie case that there are reasonable grounds to believe that the property concerned is (a) an instrumentality of an offence referred to in schedule 1; and [sic] (b) is the proceeds of unlawful activitiesc [sic]. It is only at forfeiture stage under section 48 that proof on a balance of probabilities is specified by the Legislature. Had the intention been for the higher standard to have applied also at the preservation stage, the legislature would also have specified. It provided instead for reasonable grounds to believe.'"*

**[18] Instrumentality of a Serious offence.**

MLPCA does not define 'Instrumentality of a serious offence'. However, the approach which the South African Courts have adopted in interpreting similar legislation is to be preferred. Case law emphasizes that instrumentality means that there must be a functional relational connection between the property and the commission of the offence. The property must not be incidental or subject of the offence. The link between the property and the commission of an offence was articulated in the matter of ***National Director of Public Prosecutions v R O Cook Properties (supra) at para. 31****:*

> "[31]….For now it is enough to say that the words 'concerned in the commission of an offence 'must in our view 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. For otherwise there is no rational connection between the deprivation of property and the objective of the Act…" (See also; ***National Director of Public Prosecutions v Van Staden and Others [2006] SCA 135 (RSA): [2007]2 A11 SA 1 (SCA) at para. 12); Prophet v National Director of Public Prosecutions 2006 (1) SA 38 (SCA) para. 27)***

In ***Prophet*** (ibid at para.27) the court provided certain determinants of instrumentality:

> "[27]…(1) Whether the use of the property in the offence was deliberate and planned or merely incidental and fortuitous; (2) whether the property was important to the success of the illegal activity; (3) the time duration which the property was illegally used and the spatial extent of its use; (4) whether its illegal use was an isolated event or had been repeated; and (5) whether the purpose of acquiring, maintaining or using the property was to carry out the offence. As the court of Appeals observed, no one factor is dispositive…"

**[19]** It must be recalled that the *property* for purposes of this application is "the rights accruing to Sobita," Victoria Hotel and the two Sobita business accounts. I did not understand what the DCEO means by rights accruing to Sobita, however, i am going to proceed from the basis that they were referring to the contract itself and whatever pecuniary interests were associated with it. I include the contract itself because the definition of property under section.2(1) of the MLPCA is wide enough to cover even legal instruments.

**[20]** The offence with which we are concerned with within the context of the MLPCA is what is described as a 'serious offence'. A serious offence is an offence for which in Lesotho, upon conviction carries a maximum penalty of death or imprisonment for a period of not less than 24 months, inclusive of money laundering, and an offences in respect of the law of foreign States which would have carried the same penalties if the offences would have been committed in Lesotho. To establish the nexus between the property and the offences, the DCEO place reliance on the breaches of the following legislative enactments:

(a) Procurement breach in terms of S.36 (1) read with Section 29 of the Finance Order 1988

(b) Procurement breach in terms section 36 (1) of the Finance Order read with Regulation 2101 (1) and (2) of the Financial Regulations; 1973

(c) Corruption in terms of section 21 (3) of the Corruption Act

(d) Money laundering in terms of section 25 (1) (a) of the MLPCA

(e) Contravention of section 15 of the Accommodation, Catering and Tourism Enterprise Act, 1997 ("ACTE")

**[21] Procurement Breaches:**

When Victoria Hotel was sublet to the respondent company in 2002 procurement of public stores was governed by the provisions of Regulation 2101 of the Financial Regulations of 1973. This Regulation provides that:

> "(1) The purchasing of stores, the securing of services or the letting of contracts shall be undertaken as follows:
>
> up to M500 in total value, by local purchase order;
>
> between R501 and R2000, after obtaining quotation from at least three firms;
>
> ***over R2000, by contract after public tender***
>
> (2) Government proceedings and contracts are governed by Act 4 of 1965" (emphasis added)

And further under Regulation 2102, provision is made for mechanism for approving the awarding of contracts under Reg. 2101 in respect of each of the three categories of procurement methods above. Reg. 2102 provides that:

> "(1) The authority for approving the award of contracts as set out in the three sections of the previous regulation is:
>
> The Chief Accounting Officer or Head of Department;
>
> (ii)(a) where the lowest quotation is accepted, the Chief Accounting Officer or Head of Department
>
> (b) where the lowest quotation is not accepted, the Central Tender Board; and
>
> (iii) **The Central Tender Board."** *(emphasis added)*

**[22]** The letting of Victoria Hotel was above M2000 in value given the amount of monthly rental to be paid was M60,000. Accordingly, this procurement had to be dealt by the Central Tender Board. It is common cause that the letting of Victoria Hotel was not subjected to public tender nor approved by the Central Tender Board as was required by the above Regulations. Sobita was headhunted by the then Chief Accounting Officer of the Ministry of Finance Ms Mphutlane and approved by Dr Thahane as the Minister of Finance. There cannot be an argument with the conclusion that the procedure adopted for subletting this property was irregular. Dr. Thahane in his supporting affidavit- the view which is echoed by his former Cabinet colleagues in support of the respondent – would seem to suggest that because the GoL was engaged in an investment drive which was approved by Cabinet, the ordained procurement procedures could be ridden roughshod over. This view is mistaken. The Government investment drive did not excuse compliance with procurement precepts. It does not matter that Mphutlane's approach to Sobita's director was approved by Cabinet, as Cabinet did not have authority to break the law. In fact, the principle of legality behoves of Cabinet to act in accordance with the law. Mr Maleka S.C, for the respondent, had argued that because the decision to sublet Victoria Hotel has never been challenged on review, the legality of the procurement process cannot be inquired into in these proceedings. Reliance in this connection was made on the famous decision in ***Oudekraal Estates (Pty) v City of Cape Town and Others [2004] 3 ALL SA 1 (SCA) at para 29***. The principles espoused in this case were received in this jurisdiction in ***Mothobi and Another v The Crown LAC 92009-2010) 465 at 472***. At para.26 in the ***Oudekraal (***supra) the court said:

> "Until Administrator's approval (and thus also the consequences of the approval) is set aside by a court in proceedings for judicial review it exists in

fact and it has legal consequences that cannot simply be overlooked. The proper functioning of a modern state would be considerably comprised if all administrative acts could be given effect to or ignored depending upon the view the subject takes of the validity of the act in question."

**[23]** The invocation of the ***Oudekraal*** principle in this case is misplaced, for the following reasons: At the core of this principle is the consideration that an invalid administrative act cannot simply be ignored by the public official by taking the law into his/her own hands to override it without invoking the right procedure and remedy to have it set aside. The unlawful administrative act is effectual and therefore capable of producing validly legal consequences so long as it remains extant. The essence of the respondent's argument in this matter is to equate the DCEO with public official or body who ignores a presumptively valid administrative act. This argument loses sight of a very important role the DCEO is performing in this case. The DCEO is empowered by the MPLCA to seek preservation and consequently forfeiture of property which is an instrumentality of a serious offence or proceeds of unlawful activity. Whether the property in question is a product of an administrative decision or not, makes no difference. What falls for determination in these proceedings is whether it is an instrumentality of an offence or proceeds of an unlawful activity. The property may well be a product of an serious offence, such as robbery or fraud, but it does not mean that before civil forfeiture can be invoked the DCEO has to secure a conviction in relation to a serious offence first before it can proceed to have declared the instrumentality of crime or proceeds of crime. That approach runs counter to civil forfeiture machinery in the MLPCA with its stated purposes of removing the incentives for commission of a crime and depriving the offenders of the proceeds of crime etc. It follows, therefore that the respondent's objection should be rejected.

**[24] Breach of Finance Order 1988**

It is the applicant's argument that by not following proper procurement procedures, the Minister of Finance and his Chief Accounting Officer contravened the provision of section 36 (1) read with section 29 of the ***Finance Order, 1988***. Section 36 (1) provides that:

> "36 (1) No officer or other person shall use any public moneys or public stores for any purpose not authorised by this Order or any Law."

Breach of this section is punishable on conviction to a fine of M10,000.00 to imprisonment for 5 years or to both. So, clearly, Commission of an offence contained in s. 36(1) is a serious offence. However, it needs to be observed that the key word in s.36 (1) is the "purpose". Can it be said that Victoria Hotel was used by the then Minister of Finance for purposes not authorized by the law. The answer must be in the negative. Victoria Hotel was sublet for the purpose for which it was meant. It was being run as a hotel, and that is the purpose authorised by the law. It should be recalled that the DCEO has also sought bring the conduct of Dr Thahane and Ms Mphutlane within the provisions of s.29. The argument in this connection is that both individuals failed to ensure that Sobita paid rentals per the sublease agreement. However, the **Finance Order** does not have a penal provision is for breach of s.29, and therefore, its breach cannot be characterized as a serious offence. It follows therefore, that the DCEO has failed to prove on the balance of probabilities that Dr. Thahane and Ms Mphutlane breached s.36 (1) read with s.29 of the Finance Order 1988 when subleasing Victoria Hotel.

**[25] Breach of Corruption Act r/w Financial Regulations 1973.**

The DCEO further sought to link Dr Thahane and Ms Mphutlane's procurement breach to contravention of section 21 (3) (b) of the ***Corruption Act (as amended)***

read with Regulation 2101 of the ***Financial Regulation, 1973***. The argument being that "as the result of procurement breach and corruption, Sobita benefited unlawfully from the contract. It has acquired, possessed or used the property, being the proceeds from Victoria Hotel (both as rentals from tenants and profits from the hotel)."

Section 21 (3) (b) of the Corruption Act provides that:

> "(3) A person commits the offence of corruption
>
> (b) if he or she, intentionally, abuses the functions or position of his office, in the performance or failure to perform an act, in violation of any law, or in the discharge of his or her functions, **for purpose of obtaining an undue advantage for himself or herself or for another person.**" *(emphasis added).*

**[26]** Dr Thahane is not being truthful when he says that when Victoria Hotel was sublet it laid fullow for ten years. There is uncontroverted evidence that the late Mr Pinto was the one managing it two years prior to the impugned sublease. The intentions of Cabinet to find a sublessee who would bring the hotel to the acceptable standard cannot be questioned. The key words however, in s.21 (3) (b) are those emphasised. For the impugned conduct to fall within the definition of proscription of corruption for this section to be triggered, the purpose should be for obtaining an undue advantage for the public functionary ***or*** for another person. The word undue was defined to mean "improper, unwarranted, and inappropriate" in ***Lebotsa v The Crown C of A (Cri) No.13/2008 [2009] LSA 11 (23 October 2009) at para.17***

**[27]** I have carefully read the affidavits of both the Director General of DCEO, Adv. Manyokole and the Investigating Officer Mr Tsotang Likotsi, and have not seen evidence that the purpose for which Victoria Hotel was sublet was to for Sobita to obtain improper, unwarranted or inappropriate advantage other than that Sobita

never paid any rentals as per the agreement. Dr Thahane made it clear that his Principal Secretary had to headhunt Sobita for managing Victoria Hotel owing to its director's acumen as a successful hotelier. The purview of this section is not financial mismanagement nor procurement breach. This provision covers the situation where the public functionary abuses his position for purposes of obtaining undue advantage for himself or another person. The following remarks by Gauntlet JA in ***Lebotsa* (*ibid at para.17*)** are apposite:

> "The purpose of that Act – and the Prevention of Corruption and Economic Offences (Amendment) Act, 8 of 2006, which extended its ambit – is to Combat Corruption in the sense contemplated by s.21. In its essence, it involves a public officer permitting his or her conduct in that capacity to be influenced by some benefit, current or prospective, to himself or herself or another. Irregularity in financial administration not entailing an undue benefit is dealt with by other statutes, such as the Finance Order."

The views expressed above are applicable in the instant case. It is the uncontroverted evidence the GOL was engaged in an investment drive soliciting private investors to take over the earmarked State assets. Victoria Hotel was however excluded from privatization, and as already said, Dr Thahane and Ms Mphutlane directly approached Mr Tlelai to manage and renovate it on conditions. Other than that these individuals committed procurement irregularity by not putting the leasing of Victoria Hotel out to tender and possibly committing financial mismanagement by not seeing to it that Sobita paid rentals per the agreement, there is nothing by way of evidence that they allowed their conduct to be influenced for purposes of obtaining undue advantage for themselves or Sobita. I, therefore, find that the allegations of corruption have not been proved on the balance of probabilities. Furthermore, the

fact that it could not be ensured that it paid rentals due is financial mismanagement which does not fall under s. 21 (3) (b) of Corruption Act.

**[28] Breach of MLPCA**

Money Laundering in terms of s.25 of MLPCA is defined thus:

> "25. (1) A person commits the offence of money-laundering if the person -
>
> acquires, possesses or uses property; or
>
> (b) converts or transfers property with the aim of concealing or disguising the illicit origin of the property or of aiding any person involved in the commission of an offense to evade the legal consequences thereof; or
>
> (c) conceals or disguises the true nature; origin, location, disposition, movement or ownership of property;
>
> Knowing or having reason to believe that such property is derived directly or indirectly from acts or omissions -
>
> (i) in Lesotho which constitutes an office against this part, or another law of Lesotho punishable by imprisonment for not less than 24 months;
>
> (ii) Outside Lesotho which, had they occurred in Lesotho, would have constituted an offence under Lesotho Law, punishable by imprisonment for not less than 24 months
>
> (2) A person who commits this section commits an offence and shall on conviction be liable to imprisonment for a period not less than 10 years

or a maximum fine of not less than M50,000 or corporate a fine of not less than M500,000."

**[29]** The preceding discussion has shown how Dr Thabane and Ms Mphutlane's conduct could not be brought within the definition of proscription of a serious offence in terms of Procurement irregularities and sections 36 (1) of the **Finance Order**, and section.21 (3) (b) of the **Corruption Act**. In view of this reality, it cannot therefore, be seriously contended that when Sobita acquired Victoria Hotel following a sublease agreement, its director Mr Tlelai knew or had reason to believe that the sublease agreement was derived directly from acts which constitutes a serious offence in Lesotho in the manner alleged in the above laws. If the DCEO has failed to prove that the conduct of Dr Thahane and Ms Mphutlane fell within the definition of proscription of a serious offence under the Finance Order and Corruption Act one fails to see how Sobita could be said it knew or had reason to know that a serious offence had been committed before it acquired Victoria Hotel. The DCEO has failed therefore, to prove on the balance of probabilities that when Sobita possessed Victoria Hotel its director knew or had reason to belief that it was sourced from acts which constituted a serious offence.

**[30]** It is the applicant's contention further that rentals and revenue generated by Victoria Hotel were transferred from the two Sobita accounts to accounts belonging to companies based in South Africa. The respondent's uncontroverted evidence is that the monies from Sobita StandardLesotho bank accounts were transferred to the companies within the same group of companies based in South Africa. The movement of funds is clearly discernible, and Mr Likotsi, as an investigator plainly states that the monies were from rentals and other profits from the hotel. I fail to see how monies earned thus and transferred to bank accounts of companies within the

same group can be described as illicit or that its origin was being concealed. This line of argument defies business logic and has to be rejected.

**[31] Victoria Hotel operating without a license in Contravention of ACTE:**

It is the applicant's contention that Victoria Hotel's trading license was suspended on the 24 June 2019, and that, this notwithstanding, the hotel continued to operate contrary to s.15 of the ACTE, and that any monies received over this period constitutes proceeds of unlawful activity. Section 39 of ACTE criminalises trading without a license, and such conduct is punishable on conviction to a fine not exceeding M5,000 or to imprisonment for five years or both. Clearly, contravening s.15 is a serious offence for purposes of MLPCA.

**[32]** It is common cause that after being served with suspension-of- operations letter on the 24th June 2019, Sobita continued to trade regardless until 4th March 2020 when it ultimately lodged an appeal which should have been lodged within 14 days of being notified of suspension, in terms of s.24 of ACTE. Mr Tlelai's reason for ignoring or continuing to trade is that he only received the Inspection Report upon which the suspension was based, on 17th February 2020, therefore, Sobita could only exercise its right of appeal once it was in possession of the reasons which animated the decision. Apart from technical reasons whether or not Sobita could appeal without inspection report, it is clear that for more than eight months it traded without a license and that conduct brought it within s.15 read with s.39 of ACTE.

**[33]** It should be recalled that under the rubric of what the DCEO characterises as *'property'* for purposes of this application, is the Victoria Hotel itself, the revenue streams related to the operations of Victoria Hotel which are held in two of its business accounts. Considering the test of instrumentality, it is clear that Victoria Hotel was instrumentality of a serious offence. The hotel was a tool by means of

which s.15 of ACTE was contravened; it was an indispensable functionality by means of which the offence was committed. But as regards Sobita's revenue streams and funds held in its business accounts, those are, in my considered view not instrumentality, they are at best incidental to the commission of the serious offence. The ineluctable conclusion is that the DCEO has discharged the onus of proving on the balance of probabilities that Victoria Hotel is an instrumentality of a serious offense.

**[34]** The question that needs to be answered is whether Victoria Hotel, for being instrumentality of an offense should be declared forfeit. Adv Matekane, for DCEO, had argued that s.98 of MLPCA uses peremptory term "shall" when it decrees that "The High Court shall, subject to section 103, make an order applied for under section 97 if the Court finds that on the balance of probabilities the property concerned is an instrumentality of a serious offence, or is the proceeds of unlawful activities".

**[35]** To understand the purport of the word "shall" as deployed in this section, an interpretative exercise must be undertaken. It is trite that interpretation is a unitary process which seeks to ascribe meaning to words used in a statute, by having regard to the language used in the light of ordinary grammar and syntax, context of the provision and its purpose ***(Natal Joint Municipal Pension Fund v Endumeni Municipality [2012] ZASCA 13; 2012 (4) SA 593 (SCA) para. 18)***. Added to the requirements of contextualization of statutory provisions and construing their purpose, is an important requirement that "all statutes must be construed consistently with the Constitution" ***(Cool Ideas 1186 CC v Hubbard and Another [2014] ZACC16; 2014 (4) 474 (CC) at para. 28***.

**[36]** A blind adherence to what appears to be a peremptory nature of the provision is likely to lead to unconstitutional results: The purpose of civil forfeiture provisions of the MLPCA, as already seen above, is to disincentivize commission of crime by removing it from those people who allow their properties to be used to commit crimes and to "eliminat[e] or incapacitat[e] some of the means by which crime may be committed"***(National Director of Public Prosecutions v RO Cook Properties (PTY) Ltd above at para. 18)*** The all-or-nothing approach engendered by a literal adherence to *ex facie* peremptory nature of the provision which ignores the context, and treats all cases as being the same, is bound to breach the constitutional property clause. There are situations where, although the property may be an instrumentality of a serious offense, forfeiture of such property will not bear the rational relationship between the effects on the owner or possessor of same and the purpose which it is intended to serve, thereby constituting arbitrary seizure of property in terms of section 4 (M) of the ***Constitution of Lesotho 1993***. This is where the courts in dealing with a similarly worded legislation in South Africa developed a doctrine of proportionality. This doctrine serves to determine whether forfeiture in certain circumstances would not amount to arbitrary deprivation of property. The rationale for proportionality inquiry was stated as follows:

> "[58] Civil forfeiture provides a unique remedy used as a measure to combat organised crime [and individual wrongdoing]. It rests on the legal fiction that the property and not the owner has contravened the law. It does not require a conviction or even a criminal charge against the owner. This kind of forfeiture is in theory seen as remedial and not punitive. 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 of

property against the extent to which the property was used for the purposes of the commission of the offense, bearing in mind the nature of the offence." ***(Prophet v National Director of Public Prosecutions 2007 (2) BCLR 140 (CC); 2006 (2) SACR 525 (CC) at para. 58***

And at para.62 Nkabinde J in **(*Prophet (ibid)*** at para. 62 tabulated a non-exhaustive list of factors to be considered when undertaking proportionality enquiry:

*"*1. The relationship between the purpose of the deprivation and the purpose 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 towards proportionality as the effects increase; and

6. The inquiry takes full account of the relevant circumstances of each case."

**[37]** The conspectus of all these considerations points in the direction that the use of the word "shall" in section 97 is not decisive, but should rather be interpreted to mean "may", thus giving the court a discretion whether or not to declare a property forfeited to the state depending on the circumstances of each case. The facts of this

case are unique in that although the DCEO would like Victoria Hotel to be declared forfeit to the State, it is already a State property only leased out to private investors for its running for consideration. Given that Victoria Hotel is a State property, an order of forfeiture will be untenable in the circumstances.

**[38] Forfeiture of Proceeds of unlawful activities and Proportionality**.

The next pertinent question to be answered is whether the proceeds of unlawful activities are subject to proportionality scrutiny. A court which finds on the balance of probabilities that the property is proceeds of unlawful activities (s. 98 MLPCA) must declare it forfeit unless in terms of section 100 a person can show that he acquired the interest legally and that he neither knew or had reasonable grounds to suspect that the property in which the interest is held is the proceeds of unlawful activities. Once the respondent or the intervening party fails to satisfy these grounds for exclusionary reliefs in relation to the interest held in the proceeds of unlawful activities, proportionality does not come into play. This is essentially because "the purpose of the proportionality enquiry is to determine whether the grant of a forfeiture order would amount to an arbitrary deprivation of property in contravention ..… of the Constitution" (***Mohunram and Another v National Director of Public Prosecution and Others 2007 (6) BCLR 575 (CC); 2007 (4) SA 611; 2007 (2) SACR 28 (CC)*** above at para. 56). I fully embrace the views of Jafta J expressed in ***National Director of Public Prosecutions v Botha N.O and Another [2020] ZACC 6***, when he said:

> "[128]….If the acquisition of a property is illegal and the person who holds it does not have any legal right in the property concerned, it is inconceivable that in these circumstances it may be said that deprivation in section 25 (1) of the Constitution has occurred.

> [129] But the presence of deprivation alone is not enough for section 25(1) to be contravened. The deprivation must also be arbitrary. ….[A] deprivation of property is arbitrary if the law authorising it fails to provide sufficient reasons for the deprivation or it is procedurally unfair. POCA satisfies these requirements. It furnishes good reasons for deprivation of proceeds of crime while affording those who forfeit such proceeds procedural fairness."

These sentiments are fully applicable in the instant matter as regards the property clause in this country. As to interpretation of property clauses (s. 4(1)(m)) read with s.17 of the 1993 Constitution see: ***Lesotho Medical Association v The Minister of Health Constitutional Case N0.19 of 2019 (dated 24/06/2020)***.

**[39]** Undoubtedly, when Sobita operated Victoria Hotel without a license between 24th June 2019 and March 2020, all the proceeds it earned during this period were tainted with criminality. The DCEO did not tabulate or isolate the proceeds Sobita earned during this period. What DCEO did was simply to seek a blanket forfeiture order which covers everything Sobita may have earned even before the period of suspension of the licence. For this reason alone, a forfeiture order which gobbles up whatever Sobita has earned regardless of the period in which the proceeds were earned will be disproportionate and would amount to arbitrary seizure of property contrary to section 4 (M) of the **Constitution of Lesotho 1993**.

**[40]** Although Sobita traded for 9 months without a licence forfeiture of its entire revenue irrespective of when it was earned in relation to the period of suspension, would be disproportionate. Money being divisible property **(*Mohunram ibid at para. 96*)** unlike immovable in some cases, the DCEO should have tabulated how much was earned over this period of suspension. Sobita continued to trade illegally

for an extended period of time thereby constituting a criminal enterprise. My view is that the revenue it earned over that period should have been isolated and identified. I am fortified in this view by the definition of "proceeds of crime" in s.2 (1) of the MLPCA. S.2 defines the proceeds of crime as follows:

> "'Proceeds of crime' means any property derived or realised directly or indirectly from a serious offence **and includes, on a proportional basis**, property into which any property derived or realised directly from the offence was later successfully converted, transformed or intermingled, as well as income, capital or other economic gains derived or realised from such property at any time since the offence;" (emphasis added*).*

So, clearly, in terms of MLPCA, proportionality of taint plays an integral role in identifying the proceeds of crime and isolating them from untainted ones, instead of painting the whole proceeds with the same brush of criminality. The simplest exercise which complies with the Constitution would have been to isolate the proceeds to which the offender cannot lawfully claim to have a right over. An approach which does not isolate the bad from the good falls foul of the Constitutional decree against arbitrary seizure of property, and therefore, cannot be acceded to by this court.

**[41] Retrospectivity of MLPCA**

It is common cause that the sub-lease agreement in question was concluded in 2003, while MLPCA was enacted in 2008. It is also common ground that there is no provision in the MLPCA which stipulates that it covers acts which took place before its promulgation. At the core of the presumption against retrospectivity is the

consideration of fairness which has an interrelation with the hallowed principle of fair notice to the public ***(R v Nova Scotia Pharmaceutical Society [1992] 2 S.C.R: Sunday Times v The United Kingdom Appl. NO. 6538/74 judgment of 26 April 1979*** at para. 49). The basic postulate of this doctrine is that there must be certainty in the law to provide citizens with an opportunity to order their conduct accordingly. The citizens must foresee with reasonable certainty the consequences of their actions in relation to what is required by the law. It follows, therefore, that a citizen cannot be punished for conduct which was not a crime at the time of the act. It will be most unfair for the citizen to be punished in these circumstances. However, determining whether the statute is retrospective in effect is not a straightforward task; it is nonlinear. This much was captured by Lord Mustill in ***L'Office Cherefien des Phosphates and Another v Yamashita – Shinnihon Steamship Co. Ltd: [1994] 1 AC 486 at 525F– H*** where the following was said:

> "Precisely how the single question of fairness will be answered in respect of a particular statute will depend on the interaction of several factors, each of them capable of varying from case to case. Thus, the degree to which the statute has retrospective effect is not constant. Nor is the value of the rights which the statute affects, or the extent to which that value is diminished or extinguished by the retrospective effect of the statute. Again, the unfairness of adversely affecting the rights, and hence the degree of unlikelihood that this is what Parliament intended, will vary from case to case. So also will the clarity of the language used by Parliament, and the light shed on it by consideration of the circumstances in which the legislation was enacted. All these factors must be weighed together to provide a direct answer to the question whether the consequences of reading the statute with the suggested

degree of retrospectivity are so unfair that the words used by Parliament cannot have been intended to mean what they might appear to say."

**[42]** It is the applicant's argument that the respondent did not have an existing right not to have its property declared instrumentality of unlawful activity and consequently forfeiture of its unlawful proceeds. In the present matter we are not dealing with retrospectivity in a true sense whereby MLPCA provides under Part V that although this Act was enacted in 2008 it applies to conduct which occurred prior to its enactment, but rather, we are dealing with retrospectivity "in the weaker sense" where the question is whether a new statute interferes with or is applicable to rights which pre-existed it (***National Director of Public Prosecutions v Carolus [2000] 1 ALL SA 302 (A); 2000 (1) SA 1127 at para. 33***). In ***Yew Bon Tew v Kenderaan Bas Mara [1982] 3 ALL ER 833, P.C at 836*** Lord Brightman said the following:

"Apart from provisions of the interpretation statutes, there is at common law a *prima facie* rule of construction that a statute should not be interpreted retrospectively so as to impair an existing right or obligation unless that result is unavoidable on the language used. A statute is retrospective if it takes away or impairs a vested right acquired under existing laws, or creates a new obligation, or imposes a new duty, or attaches a new liability, in regard to events already past. There is however said to be an exception in the case of a statute which is purely procedural, because no person has a vested right in any particular course of procedure, but only a right to prosecute or defend a suit according to the rules for the conduct of an action for the time being prescribed."

**[43]** In ***United States of America v Certain Funds Located at the Hong Kong and Shanghai Banking Corporation et al (1996) 96 F 3d 20 (2nd (Cir): (1996) US App Lexis 23606 (****hereinafter* ***'Hong kong')***, a matter which concerned forfeiture of assets valued at millions of dollars located in Hong Kong, which were allegedly proceeds of conspiracy to smuggle drugs into the U.S and to launder them. The proceedings commenced in September 1991 without an issue regarding jurisdiction of the court being raised. A challenge to jurisdiction was only made in April 1992. The essence of this challenge was that the property was located beyond the borders of the United States of America (U.S) and therefore the court did not have jurisdiction over it. In October 1992 legislation conferring jurisdiction on the Federal Courts over this class of property was enacted (i.e. property located beyond the borders of U.S). The challenge to lack of jurisdiction grounded on retrospectivity was successful in the lower court, however that decision was reversed on appeal, and at p. 24, the court said:

> "[the amendment]…. Is not a forfeiture *per se*: It is a procedural statute. The *Landgraf* Court itself noted that procedural rules "may often be applied in suit arising before enactment without raising concerns about retroactivity," *Landgraf*, at 1502. There are "diminished reliance interests in matters of procedure… because rules of procedure regulate secondary rather than primary conduct." Id. (citations omitted). The secondary conduct here is the court's power – its jurisdiction over the res located overseas. Quintessentially procedural, jurisdiction statutes have often been accorded retroactive application. The Supreme Court has "regularly applied intervening statutes conferring or ousting jurisdiction, whether or not jurisdiction lay when the underlying conduct occurred or when the suit was filed." Id. at 1501. "Application of new jurisdiction rule usually 'takes away no substantive right

but simply changes the tribunal that is to hear the case.' Present law normally governs in such situations because jurisdictional statutes 'speak to the power of the court rather than to the rights or obligations of the parties,"

And in conclusion Gabranes J (*ibid* at p.24) said:

"We conclude that [the amendment] if applied in this case, would not take away any rights possessed by a party, increase liability, or attach new legal consequences to past conduct. The claimants never had any right to property resulting from illegal gains, and their alleged drug smuggling and money laundering have always carried criminal penalties. One of the legal consequences of drug smuggling or money laundering is that the resulting illegal proceeds are subject to forfeiture to the government …. The mere fact that people who commit crimes within the jurisdiction of the United States manage to secrete proceeds of those crimes out of the country does not mean that they enjoy any greater rights to those proceeds. Accordingly, it cannot be said that [the amendment] ever created any new legal consequences or impaired any existing rights….". **(**see also; ***United States of America v Four tracts of Property on the Waters of Leiper's Creek (1999) WL 377773 (6th Cir (Tenni.)*** ) at p. 9 where the court relying on the *Hong Kong* decision held that "it is obvious that the [applicant] never had a right to the proceeds of his illegal behavior… therefore, forfeiture of the defendant property as "proceeds" could not impair any vested rights."

**[44]** When MLPCA was enacted it brought with it a novel procedure for preservation and forfeiture of property which is an instrumentality of a serious offence or proceeds of unlawful activities. Naturally, when the inquiry into unlawful activity

is made, a historical exercise is carried out necessitating, at times, going to the period before the MLPCA came into being. Instrumentality of a serious offence is not defined in the Act (as we have seen) but what is clear from the jurisprudence reviewed is that there must be a functional relationship between the property and the commission of the serious offence.

**[45]** As regards the instrumentality of a serious offence, MLPCA does not impair existing rights or obligation nor creates a new obligation. The reasons for this conclusion is the following: instrumentality of a serious offences means that the property is functionality pivotal in the commission of an offence which will attract a sanction of 24 months imprisonment, a maximum of capital punishment, life imprisonment in Lesotho, and if committed beyond our borders against the law which would constitute an offence capable of attracting the sanctions outlined in the preceding line if committed here. In terms of section 46 of the Corruption Act ( before its amendment), once a person will have been convicted of corruption or cheating public or private revenue the Attorney General is given authority to apply for attachment of the convicted person's assets under section 322 of the Criminal Procedure and Evidence Act 1981, and even after its amendment, s.46 gives court the power to order forfeiture, on application by the prosecution, after conviction and on top of the sentence imposed on the accused : furthermore, in terms of section 57 of the Criminal Procedure and Evidence Act 1981 a court, *also* post-conviction of the accused, the court is empowered to order forfeited to the state the instrument used in the commission of a crime.

**[46]** This serves as a clear example that even before the advent of MLPCA, our law allowed for forfeiture of assets. The common feature of this type of forfeiture is that it is conviction–based. What the MLPCA did was to introduce a civil forfeiture

regime which is not conviction–based, but rather based on the fictional guilt of the property in the commission of a serious offence. The rationale being, as already said, to disincentivize commission of crime and to remove the proceeds of the serious crimes from possession from the offenders. The fact that the legislature in its wisdom chose to annihilate commission of crime before criminal conviction, cannot be taken as impairing any existing rights, or imposing any new obligation, it merely augmented the legal framework already in place at the time of its enactment, and to confer jurisdiction on the courts to deal with these matters. Regarding the proceeds of crime, the conclusion is much straightforward because based on the ***Hong Kong*** case, no person can claim to have a right to illegally gotten gains nor can anyone seriously claim not to have been aware that property instrumental in the commission of a crime was not susceptible to forfeiture under the Criminal Procedure and Evidence Act. I therefore find that retrospectivity was intended by the legislature under Part V of the MLPCA.

**[47] Costs**

Mr Maleka S.C submitted that in the event this court dismisses this application, it should award costs occasioned by employment of two counsel, on an attorney and client scale. Justification for this punitive award of costs is that the DCEO's case is vexatious and that when it approached this court *ex parte* it did not disclose to the court that the sub-lease agreement had not as yet been reviewed and set aside by the Court. He argued further, in motivation of vexatiousness, that Sobita had operated Victoria Hotel for almost twenty years and had expended M26,234,440.00 on improving the hotel and that there was no justification to have sought *ex parte* preservation order Sobita's funds which are relatively smaller than the amounts expended for its renovation. I have found that Sobita conducted business illegally

when its license was suspended, and that whatever it earned during that period constituted proceeds of crime, although not agreeing with the DCEO's approach of seeking forfeiture of every Cent in Sobita's bank accounts regardless of how it was derived. For this consideration I do not consider that the application was vexatious, it may have been unmeritorious in other respects but that does not mean that it was vexatious. The applicant was successful in having the proceeds of Sobita earned during the period of its suspension declared the proceeds of unlawful activity. The DCEO, however could not succeed in having those proceeds declared forfeited to the State. On the other hand, the respondent was successful in resting most of the reliefs sought by the DCEO. The respondent was a substantially successful on the merits.

**[47]** In the result the following order is made:

a) The application is dismissed with costs, such costs should include costs occasioned by the employment of two counsel.

**MOKHESI J**

**FOR THE APPLICANT:** **Adv. Matekane assisted by Adv. Lesholu from the Directorate on Corruption and Economic Offences.**

**FOR THE RESPONDENT:** **Adv. V. Maleka S.C assisted by Adv. T. Scott instructed by Harley & Morris Attorneys, Grosvenor House, Sentinel Park 15 United Nations Road, Maseru.**