NATIONAL UNIVERSITY OF LESOTHO

Resignation (with immediate effect) and forfeiture of severance pay in Lesotho: possible lessons from South Africa

BY

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DECLARATION

I, the undersigned, **RELEBOHILE LESHOLU**, do hereby declare that this dissertation is submitted to the National University of Lesotho, Faculty of Law, in partial fulfillment of the requirements for the degree of Master of Laws, and has not been previously submitted by me for a degree at this University or any other institution in its entirety or in part, that the work contained therein is my own, original work, that I am the authorship thereof.

RELEBOHILE LESHOLU **DATE: 31 MAY 2023**

DEDICATION

This dissertation is dedicated to my parents Mr. Mohanoe P. Lesholu and Mrs. ‘Marelebohile D. Lesholu who have given me their unwavering and relentless support throughout my studies.

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Table of Contents

Declaration i
Dedication ii
Acknowledgements iii
CHAPTER 1: INTRODUCTION 1
1.1 Introduction 1
1.2 Severance Pay and Asset Forfeiture: Historical Background 2
1.3 Statement of the Research Problem 6
1.4 Research Question 9
1.4.1 Summary of Research Questions 9
1.5 Significance and Contribution of the Study 10
1.6 Scope and Purpose of the Study 10
1.7 Literature Review 11
1.8 Hypothesis 14
1.9 Methodology 15
1.10 Aims and Objectives 15
1.11 Summary of Chapters 15
Chapter one: Introduction 16
Chapter two: The Legal and Institutional Framework on Severance Pay, Resignation and Asset Forfeiture 16
Chapter three: Comparative Analysis: South Africa 16
Chapter four: Conclusion and Recommendations 16
CHAPTER 2 17
2. The Legal and Institutional Framework in Lesotho on Severance Pay, Resignation and Asset Forfeiture 17
2.1 Introduction 17
2.2. Definition and Protection of Wages 17
2.3. Historical Development of Severance Pay in Lesotho 18
2.4 The Labour Code and the Requirements for entitlement to Severance Pay 20
2.6 The Concept of Resignation and Requirements thereof 23
2.7 Critical Analysis of Mahamo v Nedbank 25
2.8.1 Prevention of Corruption and Economic Offences Act 27
2.8.2 Money Laundering and Proceeds of Crime Act 28

2.8.3 The Main Features of Part IV of the Money Laundering and Proceeds of Crime Act... 29
2.8.4 The Main Features of Part V of the Money Launderig and Proceeds of Crime Act..... 29
2.8.5 Remedies in Part IV and V of the Money Laundering and Proceeds of Crime Act..... 30
2.8.6 The Broad Structure of Part IV of the Money Laundering and Proceeds of Crime Act 30
2.8.7 Restraint Orders under the Money Laundering and Proceeds of Crime Act..... 31
2.8.8 Confiscation and Pecuniary Penalty orders under the Money Laundering and Proceeds of Crime Act…. 34
2.8.9 The Broad Structure of Part V of the Money Laundering and Proceeds of Crime Act 35
2.8.10 Preservation and Seizure Orders under the Money Laundering and Proceeds of Crime Act…… 36
2.8.11 Forfeiture Orders under the Money Laundering and Proceeds of Crime Act 38
2.8.12 Institutional Framework on Asset Forfeiture in Lesotho 39
2.9 The Applicability of Asset Forfeiture in *Nedbank v Mahamo* 42
2.9.1 The Constitutionality of Asset Forfeiture in Lesotho..... 47
Summary 49
CHAPTER 3 50
COMPARATIVE ANALYSIS: SOUTH AFRICA 50
3.1 Introduction..... 50
3.2 Asset Forfeiture in South Africa: Legal Framework..... 50
3.3 Restraint and Confiscation Orders under *POCA*..... 51
3.4 Restraint Orders under *POCA*..... 51
3.5 Confiscation Orders under *POCA*..... 53
3.6. The Constitutionality of Asset Forfeiture in South Africa..... 55
3.7 Does the Concept of Asset Forfeiture constitute Double Jeopardy?..... 56
3.8 Resignation and Disciplinary Hearing in South Africa..... 58
Conclusion 63
CHAPTER 4 65
CONCLUSION AND RECOMMENDATIONS..... 65
4.1 Introduction..... 65
4.2 Finding of the Research Work 65
4.3 Conclusion 67
4.4 Recommendations…….....76

CHAPTER 1: INTRODUCTION

1.1 Introduction

Employees are for all intents and purposes financially reliant on their employers. One of the most critical tests to be applied when establishing whether a person is an employee or not within the workplace is whether that person is economically dependent on their employer.[1] In the same vein, employers are duty bound to remunerate their employees for services rendered. It is a fact of life that the relationship between an employer and employee shall inevitably come to an end for various reasons.

This could be due to ill-health or death of an employee, dismissal of the employee, resignation by the employee, retrenchment, closing down of the employer's place of business and so on and so forth. It is well established by labour laws that at the end of the employment, qualifying employees should be given severance pay or any other terminal benefits, the amount being determined by factors such as the duration of the employment and the remuneration that the employee received during the time of his employment.[2]

Severance pay is meant to alleviate the adverse impact of unemployment that comes after employment has come to an end as a gratuity to employees for services they have rendered. There is life after employment, there are daily expenses to be incurred and there are dreams to be achieved: severance pay is meant to cater for all the aforementioned expenses. Further, it is also meant to indemnify employees who have lost their employment without their fault. It is also said that it is meant to discourage employers from recourse to retrenchment easily.[3]

Regardless of the remuneration and severance pay which employees are entitled to, employers are not immune from their employees' criminal activities committed against them. Employees are constantly committing criminal offences against their employers. Such crimes may include theft, fraud, money laundering, forgery, corruption and many other economic offences that are detrimental to employers.

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[1] *State Information Technology v CCMA* (2008) 2234 (LAC).
[2] *Labour Code Order* 1992, s 79 (1): "An employee who has completed more than one year of continuous service with the same employer shall be entitled to receive, upon termination of his or her services, a severance payment equivalent to two weeks' wages for each completed year of continuous service with the employer." (*Labour Code*).
[3] John Grogan, *Workplace Law* (12 edn Juta, 2017) 315.

In recent decades, it has become increasingly clear to the international community that the criminal justice system does not live up to the adage that "crime does not pay". Criminals are for a variety of reasons able to keep and enjoy the spoils of their crimes. This phenomenon is offensive to public morality and is in itself a powerful incentive for crime. The international community has accordingly taken steps to address this problem. The foregoing steps were initiated at an international level and implemented at domestic level, both in Lesotho and in many other jurisdictions across the globe. As it will be apparent from the historical background of asset forfeiture, the *Money Laundering and Proceeds of Crime Act* 2008 as amended (hereafter '*MLPCA*') is part of the domestic implementation within Lesotho.

1.2 Severance Pay and Asset Forfeiture: Historical Background

The essential provenance of severance pay was the introduction and link to the labour codes in the industrializing countries of the North in the nineteenth century.[4] The second main factor for the development and tenacity of severance pay was technological developments of the late 1800s and the high unemployment rate brought about by the great depression in the 1930s. In the United States of America, the railroad industry appeared to be the first industry where issues of job protection came to light. This is evidenced by the fact that in the 1870s and 1880s there were numerous railroad dismissal cases before the courts; the judgments of which were important for the beginning of the creation of severance pay.[5] The introduction and expansion of the welfare state after World War II also influenced the inception of severance pay.[6]

In 1919, the International Labour Organization (hereafter ILO) was created as part of the Treaty of Versailles that ended World War I.[7] In 1945, the ILO introduced the *Protection of Wages Convention*,[8] and even though it does not refer to severance pay in direct terms it encourages state parties that, upon termination of a contract of employment, a final settlement of all wages due should be effected in accordance with national laws or regulations, collective agreements or

[4] Robert Holzmann and Milan Vodopivec, *Reforming Severance pay* (World Bank Pubishing Unit 2012) 18.
[5] Holzmann and Vodopivec (n 4).
[6] Holzmann and Vodopivec (n 4).
[7] History of ILO <http://www.ilo.orglang--en>accessed 10 November 2022.
[8] *Protection of Wages Convention* (1945).

arbitration awards or in the absence of such, within a reasonable period of time regard being had to the terms of the contract.[9] It is evident from the above Convention that employers must pay wages as a form of terminal benefits to employees. It is apposite to mention that, Lesotho has not ratified this convention.

In 1982, the ILO adopted the *Termination of Employment Convention*[10] and it states in clear and unambiguous terms that, an employee whose employment has been terminated shall be entitled to severance pay or other separation benefits based on the length of service and level of wages.[11] The Convention further provides that, an employee shall be entitled to benefits from unemployment insurance or assistance or other forms of social security[12] or a combination of such allowance and benefits.[13]

The afore-going Convention also stipulates that, an employee who does not fulfil the qualifying conditions for unemployment insurance or assistance under a scheme of general scope need not be paid any severance pay or other separation benefits envisaged under Article 12 (1) (a) solely because he is not receiving an unemployment benefit under Article 12 (1) (b).[14] The Convention also leaves room for national methods of limiting the above entitlements for employees where their employment has been terminated for serious misconduct.[15] Lesotho ratified the abovementioned Convention in 2001.

With respect to the historical background of asset forfeiture, the United Nations (hereafter UN) introduced several conventions to enable the tracing, freezing, seizing, forfeiture and return of stolen assets through criminal practices. The first major international instrument to deal with the problem of international crime was the *United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988* also known as the *Vienna Convention*.[16] It recognised the international dimension of the drug trade and its associated money-laundering activities. Parties to the Convention were obliged to put in place, laws which criminalised drug-

[9] Ibid art 12 (2).
[10] *Termination of Employment Convention* (1982).
[11] Ibid art 12 (1) (a).
[12] Ibid (n 10) art 12 (1) (b).
[13] Ibid (n 10) art 12 (1) (c).
[14] Ibid (n 10) art 12 (2).
[15] Ibid (n 10) art 12 (3).
[16] *United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances* (1988).

related offences, money laundering and to enable them to trace, restrain and ultimately retrieve and confiscate the proceeds of drug trafficking.[17]

Lesotho acceded to the Convention on 28th March 1995. Upon ratification of the Convention, she had to enact legislation indicating that she had assumed her international obligations under the Convention including those relating to the restraint, retrieval and ultimate confiscation of the proceeds of drug trafficking. Although the *Vienna Convention* specifically addresses drug-related offences, it was followed by an international trend to extend the application of its tools for the restraint and ultimate confiscation of the proceeds of drug-related crimes and the combating of other crimes as well. This trend was manifested by the creation of a number of other international instruments.

In 1989, the Group of Seven countries set up the *Financial Action Task Force on Money Laundering* (hereafter FATF). The task force produced a report which included some 40 recommendations for the implementation of anti-money laundering measures. Considerable pressure was brought to bear on countries trading within the Group of Seven countries to comply with these recommendations. Recommendation 3 requires those countries to –

> enable their competent authorities to confiscate property laundered, proceeds from, instrumentalities used in or intended for use in the commission of any money laundering offence, or property of corresponding value .... Such measures should include the authority to ... carry out provisional measures, such as freezing and seizing, to prevent any dealing, transfer or disposal of such property …

Today, FATF is a permanent body with thirty seven (37) member countries and two (2) regional organisations.[18] The FATF recommendations have been strengthened over the years. FATF is the primary mechanism for ensuring that states comply with anti-money laundering measures including the need for a proper confiscation regime. Lesotho is not a member of FATF but it is a member of the Eastern and Southern African Anti-Money Laundering Group (ESAAMLG), a FATF-style regional body.[19]

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[17] Ibid art 5.
[18] Members and Observers – Financial Task Force<https://www.fatf-gafi.org>about> accessed 15th November 2022.
[19] Mutual Evaluation of Lesotho <http://www.faft-gafi.org>documents> accessed 15th November 2022.

The *United Nations Convention Against Transnational Organised Crime* (hereafter UNTOC)[20] was approved by 121 delegates to the UN in July 2000 and was formally adopted by the UN General Assembly in November 2000.[21] The Convention represents a major step forward in the fight against transnational organised crime and signifies the recognition by member states of the seriousness of the problems posed by it, as well as the need to foster and enhance close international cooperation in order to tackle those problems. States that ratify this instrument commit themselves to taking a series of measures against transnational organised crime, including the creation of domestic criminal offences (participation in an organised criminal group, money laundering, corruption and obstruction of justice); the adoption of new and sweeping frameworks for extradition, mutual legal assistance and law enforcement cooperation; and the promotion of training and technical assistance for building or upgrading the necessary capacity of national authorities.[22] Lesotho signed and ratified this Convention on 16 September 2003.[23]

In 2004, the UN adopted the *United Nations Convention against Corruption* (hereafter UNCAC)[24] which is the only instrument containing a specific provision on non-conviction based asset forfeiture. The Convention encourages member states to consider taking measures that maybe necessary to allow confiscation of tainted property or instrumentalities of crime without a criminal conviction in cases where the offender cannot be prosecuted by reason of death, flight, absence or other appropriate cases.[25] Lesotho signed and ratified the *UNCAC* on the 16 September 2005.[26]

[20] *United Nations Convention Against Transnational Organised Crime* (2000).
[21] United Nations Convention on Drugs and Crime < https://www.unodc.org>UNTOC> accessed 15th November 2022.
[22] Ibid (n 20) arts 12 and 13.
[23] Signature and Ratification Status <https://www.unodc.orgcorruption> accessed 15th November 2022.
[24] *United Nations Convention against Corruption* (2004).
[25] Ibid art 54 (1) (c).
[26] United Nations, 'Implementation Review Group Resumed Fourth Session: Review of Implementation of the United Nations Convention against Corruption' (Conference of the States Parties to the United Nations. Convention against Corruption, Panama City 26-27 November 2013).

It is now widely accepted in the international community that criminals should be stripped of the proceeds of their crimes. The purpose is not to punish them but to remove the incentive to commit crime. Lesotho's international obligations require it to enact measures for the confiscation of the proceeds of crime. Those obligations were imposed under the *Vienna Convention*, *UNTOC* and *UNCAC* Conventions. Lesotho fulfilled its obligations under these Conventions and enacted the *Money Laundering and Proceeds of Crime Act* No. 19 of 2008 (hereafter *MLPCA*) which provides for both conviction based and non-conviction based asset forfeiture, as it will be seen in more detail in the next chapter.

1.3 Statement of the Research Problem

Resignation has been defined as a one-sided act by the employee indicating that the employment has or will come to an end at his accord after the expiry of the notice provided for in the contract or in terms of the law. Furthermore, while a contract of employment only comes to an end upon expiry of the notice period, because resignation is a unilateral act which cannot be withdrawn in the absence of the employer's consent, it is as a matter of fact terminates the contract of employment. The fact that the employee is contractually obligated to work for the required notice period if the employer requires him to do so does not change the legal effects of the resignation.[27]

Therefore, it follows that once an employer tenders his resignation (with immediate effect) to the employer, the contract of employment is at that juncture terminated. The employer cannot force the employee to remain nor reject the employee's resignation because that would mean the employer is keeping the employee against his will. This would turn the employment relationship to some form of forced labour.

The problem statement of this research is premised on the principle that has developed and remains the law in relation to resignation prior to disciplinary hearing proceedings by the employee and the effect of such on severance pay. The position of the law in Lesotho was

[27] *SALSTAFF obo Bezuidenhout v Metrorail* [2001] 9 BALR 926. There is recent case law that suggest otherwise which shall be discussed later in this study.

laid down by the Labour Appeal Court in the case of *Mahamo v Nedbank Lesotho Limited.*[28] In that case, the Appellant employee was suspected of gross dishonesty and or theft in the amount of four thousand maloti (M4 000.00). The Appellant resigned before her disciplinary hearing could commence and refused to attend the said disciplinary hearing when she was asked to by the employer. The Appellant's refusal was based on the argument that she was no longer the Respondent's employee. On the day of the disciplinary hearing, the Appellant did not show up and as a result, the Respondent proceeded with the disciplinary hearing in the absence of the Appellant. She was found guilty and dismissed.

The Appellant then approached the Directorate of Dispute Prevention and Resolution (hereafter DDPR) claiming unfair dismissal, twenty five years' salary as compensation and severance pay. She was unsuccessful in both the DDPR and the Labour Court hence the matter went to the Labour Appeal Court. The Court was faced with several issues, firstly, whether it was competent for the Appellant to resign when there was a pending disciplinary action against her. Secondly, if it was not competent for the Appellant to resign whether, her dismissal was fair. Thirdly, whether, the dismissal had any effect on her entitlement to severance pay.

The Court held that resignation is a unilateral act by the employee which cannot be rejected by the employer. Moreover, that the Appellant was no longer an employee of the Respondent so it could not discipline her or dismiss her as she had already resigned. On the issue of severance pay, the Court found that since the Respondent could not find the Appellant guilty of the offence charged as she had already resigned the Appellant, was entitled to her severance pay. The appeal was accordingly upheld with costs.

The effect of this judgement is that the employer is duty bound to pay the employee severance pay if an employee resigns irrespective of whether the said employee has a pending disciplinary hearing. The problem with this approach is that employees who resign cannot be held accountable; as long as the employee resigned before his disciplinary hearing he is entitled to severance pay.

[28] LAC/CIV/04/11.

This presents a problem because, as indicated before, employees commit criminal activities against employers. Employers are not financially protected against criminal employees because, while these crimes are committed against them, they will be bound to pay the same criminal employees their severance packages after their resignation prior to their disciplinary hearings.

As it has been highlighted, asset forfeiture is a tool meant to ensure that victims of crime are compensated and to remove the incentive for perpetrators to commit crime. However, the principle in the *Mahamo* case appears to be an incentive for employees to commit crime against their employers. It defeats the purpose of asset forfeiture and unfortunately leads to uncompensated financial loss against employers. Once the severance pay is paid to the offending employee, it may be very difficult to recover any monies lost by the employer. The question of whether asset forfeiture is or can be applied into the labour sphere and to what extent will be addressed in the next chapters.

Employees are constantly misusing this principle to their advantage and they get away with ill-gotten gains to the detriment of their employers. It has become a trend that when an employee is suspected of misconduct he resigns immediately to avoid disciplinary hearing and forfeiture of severance pay. These factors call attention to the shortcoming in the law specifically the principle in question, therefore this study seeks to determine the extent to and/or circumstances in which employees can forfeit their severance pay regardless of resignation before their disciplinary hearing.

The jurisdiction of South Africa as will be seen in the following chapters is more advanced with the concept of asset forfeiture. It has demonstrated that not only illegally obtained property can be forfeited but also legitimate assets to substitute or replace the squandered ill-gotten gains. It is therefore, important to look at South Africa and the possible lessons that Lesotho can learn from it in order to answer the research question (referred to in the preceding paragraphs above). South Africa will be looked at in more detail at a later stage in this study.

Asset forfeiture has been challenged as being unconstitutional. It has been argued that it violates fundamental human rights, for instance, the right to fair trial particularly the presumption of innocence in that a person's property is forfeited before he is found guilty.[29] It has also been attacked by arguing that it violates a person's right to remain silent in that a person will be faced with both civil proceedings of asset forfeiture and criminal proceedings of the offence committed so when reacting to forfeiture proceedings, he might incriminate himself in criminal proceedings.[30] Asset forfeiture has been lambasted for violating the right to freedom from arbitrary seizure of property by forfeiting property without a successful conviction or guilty verdict on the part of the owner of the said property.[31] It has also been said that, it constitutes double jeopardy in that it punishes the offender twice, that is to say, a person convicted is sentenced and at the same time his property is forfeited for the same crime. The above criticisms against asset forfeiture will be addressed by analysing how courts of law have dealt with the said criticism and recrimination.

1.4 Research Question

In what circumstances and/or to what extent can employees forfeit their severance pay despite resignation (with immediate effect) prior to their disciplinary hearings?

1.4.1 Summary of Research Questions

In addition to the main research question "In what circumstances and/or to what extent can employees forfeit their severance pay despite resignation prior to disciplinary hearings" this research shall also employ guidance from the following sub-questions in order to assist in answering the main research question of this research:

[29] *Motloheloa v COMPOL* Constitutional Case No.19/2017.
[30] *Lephoto v DCEO* (Const. Case No. 11/2017) [2017] LSHC Const. 10 (17 March 2022).
[31] Ibid (n 29) para [6].

a) What is the legal framework that pertains to asset forfeiture and how is it expressed in our domestic laws including relevant statutory and institutional framework?

b) Is the concept of asset forfeiture constitutional?

c) Does the asset forfeiture mechanism constitute double jeopardy in that it punishes the offender twice?

d) Are the laws dealing with asset forfeiture in Lesotho adequate to solve the legal problem of this research work or they need to be developed?

1.5 Significance and Contribution of the Study

Undertaking this study will assist and contribute positively in both the fields of labour and criminal law in that employers will be more protected against the criminal activities of their employees. As far as can be gathered, this will be the first study of its nature in Lesotho. Employees steal from their employers; this is a regular occurrence. Thus, it is important to determine the position of the law with respect to assert forfeiture in such circumstances.

1.6 Scope and Purpose of the Study

This study shall look into the legal and institutional framework on asset forfeiture as well as the legal principles that govern resignation and entitlement to severance pay in Lesotho. It shall also look at the same legal framework of South Africa.

The purpose of this study is to critically discuss the extent to and/or the circumstances in which employees can forfeit their severance pay regardless of resignation before their disciplinary hearings.

1.7 Literature Review

Several studies on forfeiture of severance pay have been conducted by different researchers and authors. It is therefore safe to say that, there is existing literature on the issue of forfeiture of severance pay. This section of the research will look at how these researchers and authors discussed the forfeiture of severance pay and then draw a distinction between the already existing literature on forfeiture of severance pay and this research work.

Mcgregor[32] discusses one of the conditions which can lead to an employee forfeiting his or her severance pay. She highlights the fact that while in terms of the law, the employer has an obligation to pay severance pay to employees such rights, cannot be understood to be boundless or absolute. She avers that if an employee, without good cause shown and plausible explanation on his part declines alternative employment with their employer or any other employer, such employee will forfeit entitlement to severance pay.

To strengthen her assertion on the above point, she refers to the case of *Astrapak Manufacturing Holdings (Pty) Ltd t/a East Rand Plastics v CEPPAWU*[33] where retrenched employees refused the employer's offer of alternative employment on the same or increased salary. The court found that they acted unreasonably and forfeited their severance pay. She on the other hand, emphasizes the fact that employees who were offered alternative employment but with a decrease in salary would not forfeit their severance pay if they refuse alternative employment.[34]

John Grogan similarly holds the view that severance pay is not unlimited but has certain limitations as a right of employees. He discusses the extent to which an employee who has taken a significant break in service of employment is entitled to severance pay. He emphasises that an employee is not entitled to severance pay on grounds of the years of service before the break. In support of this, he refers to the case of *Rogers v Exactocraft*[35] where an employee who had retired with full retirement benefits and was later given a two years fixed term contract for the

[32] Marie Mcgregor and others, *Labour Law Rules* (2nd edn, Siber Ink 2014) 189.
[33] (2014) 35 ILJ 140 (LAC).
[34] Mcgregor (n 32).
[35] (2015) 36 ILJ 277 (LC).

same employer was held not to be entitled to severance pay when the said contract was terminated for operational requirements.[36]

According to Grogan, employees who are dismissed on the basis of incompetence to perform new work procedures will forfeit their severance payment. He further states that, such employees would only be entitled to severance pay if they can convince the court that they were as a matter of fact retrenched.[37] He supports this latter view with the case of *Department of Education: North-West v Van Eck* [38] where the court held that the respondent was entitled to severance pay after it was convinced that the dismissal in dispute was based on operational requirements as opposed to the respondent's inability perform a new work procedure.

He also elucidates the fact that, employees who are dismissed for what according to the employer is dismissal based on operational requirements, but who in reality were dismissed for some other undisclosed purpose which is regarded as automatically unfair, should forfeit their severance pay, but they should be entitled to compensation permitted for that type of dismissal.[39]

Grogan shares the same views with Mcgregor that, an employee who without genuine reason denies offers of alternative employment with the retrenching employer or any other employer forfeits their severance pay. However, Grogan takes this point further to say that, those employees who refuse reasonable alternative employment, are not entitled to resign and claim severance pay.[40] He further criticizes the ruling of the Labour Court in *Purefresh Foods (Pty) Ltd v Dayal & another* [41] where an employee who refused a reasonable offer of alternative employment was held to be entitled to severance pay because the said offer was made by a different employer. The fact that the retrenching employer was integral in facilitating the said offer did not persuade the court to hold otherwise.

[36] Grogan (n 3) 315.
[37] Grogan (n 3) 316.
[38] [2011] 4 BLLR 341 (LC).
[39] Grogan (n 37).
[40] Grogan (n 37).
[41] (1999) 20 ILJ 1590 (LC).

Grogan criticizes the above ruling and his criticism is based on the Labour Appeal Court's judgement in the case of *Irvin & Johnson Ltd v CCMA*[42] where employees had accepted transfer to a contractor to whom a division of the employer's operation was outsourced. The said employees at the end of their employment claimed severance pay from their former employer. The CCMA and the Labour Court held in favour of the employees in that they were entitled to severance pay from the former employer. The Labour Appeal Court held that the interpretation of section 41 of the *Basic Conditions of Employment Act* does not correspond with the intention of the legislature or purpose of severance pay in that the employees had not lost anything when they accepted the alternative employment.

The court emphasized the fact that to compel the former employer to pay severance pay would discourage employers to find alternative employment for retrenched employees. Grogan states that, where contracts of service of employees are transferred without the employees' consent from one employer to the other but the undertaking is a going concern, the employees' continuity of employment is not interfered with so in such cases employees cannot claim severance pay on the grounds that their contracts of employment were terminated for operational requirements if they retain similar or substantially the same work and benefits. It follows therefore that, the transferring employer need not pay severance pay.[43]

Honeyball equally shares the same sentiments with both Grogan and Mcgregor in that, employees who unreasonably refuse reasonable alternative offer of employment by their employers or any other employers will forfeit their severance pay. He takes this point further to indicate that it is irrelevant whether the employee is not contractually obliged to perform the duties in the alternative employment and that the said job may be appropriate for a short time and not permanently. [44] He expands this point with the authority of *Purdy v Willowbrook International*[45] where the court held that it was irrelevant that the alternative work offered was not within the scope of the employee's contractual duties. The court further held that employees must be prepared to take on work outside their normal contractual duties. It should however be

[42] (2006) 27 ILJ 935 (LAC).
[43] Grogan (n 3) 317.
[44] Simon Honeyball, *Honey & Bowers' Textbook on Employment Law* (13th edn Oxford University Press 2014) 300.
[45] [1977] IRLR 388 IT.

noted that, the views by all these authors on severance pay may not be applicable in Lesotho because of the wording of the *Labour Code* on forfeiture of severance pay.[46]

In Lesotho, an employee only forfeits severance pay if he has been found guilty of misconduct and dismissed fairly. The *Mahamo* case explains the position of the law in Lesotho that resignation with immediate effect terminates the employment relationship and as a result, the employer does not have the power to discipline an employee who has resigned with immediate effect. The general principles on asset forfeiture in Lesotho in terms of the *MLPCA*, as it will be seen in the next chapter are that, conviction-based asset forfeiture is invoked where a link cannot be established between the commission of the crime and the acquisition of property and forfeiture takes place after conviction of the perpetrator. However, where such a link is established, non-conviction based asset forfeiture can be initiated because it does not depend on a successful criminal conviction. This discussion will be discussed in more detail in the next chapter.

While the above literature deals extensively with the issue of forfeiture of severance pay, this research deals with the issue of forfeiture of severance pay from a totally different angle. As it is evident from both the title and legal problem of this research, this research examines the forfeiture of severance pay by an employee who has resigned with immediate effect while there is a pending disciplinary action against that particular employee in Lesotho. The current existing literature does not deal with this issue from that perspective.

1.8 Hypothesis

Asset forfeiture can and should be applied to employees who are suspected of serious offences against their employers but who resign before their disciplinary hearings.

[46] *Labour Code*, s 79(2): 'An employee who has been fairly dismissed for misconduct shall not be entitled to a severance payment.'

1.9 Methodology

This is a qualitative research and it is founded on literature review of relevant primary and secondary sources such as textbooks, law journal articles, statutes, case law and internet sources from reliable websites. These sources will be exposed to a critical analysis with the aim of determining the extent to which employees can and should forfeit their severance pay notwithstanding their resignation before their disciplinary hearing.

1.10 Aims and Objectives

The aims and objectives of this research are:

a) To critically discuss the concept of resignation and effects on entitlement to severance pay.

b) To analyse whether the current asset forfeiture law of Lesotho is sufficient to allow the forfeiture of severance pay mentioned above or whether it needs to be developed.

c) To critically discuss whether asset forfeiture is constitutional.

d) To critically discuss the circumstances and extent to which employees can and should forfeit their severance pay despite resignation before their disciplinary hearings.

e) To determine what lessons (if any) Lesotho can learn from the experiences of other countries, in particular South Africa.

1.11 Summary of Chapters

This dissertation comprises of 4 chapters in order to provide a convincing and sound response to the research question.

Chapter one: Introduction

This chapter will introduce the introduction and historical background of the research topic, the problem of the research, literature review on the existing literature, hypothesis, the aims and objectives of the study and the research methodology to be employed.

Chapter two: The Legal and Institutional Framework in Lesotho on Severance Pay, Resignation and Asset Forfeiture

This chapter will discuss in detail the legal and institutional framework on asset forfeiture and severance pay in Lesotho. It will also provide case law dealing with both concepts in order to clarify the current position of the law in Lesotho. The constitutionality of asset forfeiture in Lesotho will also be discussed in this chapter.

Chapter three: Comparative Analysis: South Africa

This chapter will discuss the legal framework governing asset forfeiture in South Africa and the principles on the concept of resignation and disciplinary hearing with the view of comparatively analysing those with Lesotho. Case law dealing with the above concepts will also be discussed in this chapter.

Chapter four: Conclusion and Recommendations

This chapter will answer the research question "In what circumstances and/or to what extent should employees forfeit their severance pay despite resignation prior to their disciplinary hearings." It shall also provide a summary of the research addressing issues raised in all chapters. Recommendations will also be made on the how the law can be applied and developed in order to ensure that the incentive to commit crime by employees against their employers is removed. Some recommendations will be based on what other jurisdictions have done that proved to be beneficial to them.

CHAPTER 2

2. The Legal and Institutional Framework in Lesotho on Severance Pay, Resignation and Asset Forfeiture

2.1 Introduction

This chapter will focus on the legal and institutional framework on severance pay and asset forfeiture in Lesotho. The first part will deal with the definition of wages, concept of resignation and severance pay and the second section of this chapter will be a study on the legal framework providing for asset forfeiture in Lesotho and the circumstances in which asset forfeiture can apply in the employment context. The last part will expound on the constitutionality of asset forfeiture in Lesotho followed by some conclusions.

2.2. Definition and Protection of Wages

The *Labour Code* defines wages in its section 3 which is the definition section of the Code as follows:

> 'wages' means remuneration or earnings, however designated or calculated, capable of being expressed in terms of money, fixed by law or by a mutual agreement made in accordance with the Code, and payable by virtue of a written or unwritten contract of employment to an employed person for work done or to be done or for service rendered or to be rendered.

The above definition is similar to the one provided by the *Protection of Wages Convention*.[47] The Convention provides that deductions from wages shall be permitted only under conditions and to the extent prescribed by national laws or regulations or fixed by collective agreements or arbitral awards.[48] The Convention prohibits any deduction from wages done with a view to ensuring a direct or indirect payment for the purpose of obtaining or retaining employment, made by a

[47] Ibid (n 8) art 1.
[48] Ibid (n 8) art 8.

worker to an employer or his representative.[49] The *Protection of Workers' Claims Convention*[50] provides for protection of wage claims in insolvency and bankruptcy by means of a privilege or through a guarantee institution.

Part VI of the *Labour Code* goes to great lengths to protect wages of employees in Lesotho. The *Labour Code* authorises employers to make deductions from employee's wages but provides that no other deductions that are unauthorized by the Code shall be permitted.[51] It is typical to find contracts of employment having clauses that provide that when the employment terminates, the employer may deduct, from the employee's terminal benefits, any amount that the employee owes the employer. The issue with these types of clauses is whether they conform to the requirements of the *Labour Code*.

A perusal of section 85 of the *Labour Code* from subsections (1) to (8) proves that it does not authorize any deductions of the employees' terminal benefits by the employer. This is to say the clauses that provide that when the employment terminates, the employer may deduct, from the employee's terminal benefits, any amount that the employee owes the employer are not in conformity with the requirements of section 85 and are accordingly illegal. This conclusion is derived from the express provision by section 85 that no deductions that are unauthorized by the section shall be permitted.

2.3. Historical Development of Severance Pay in Lesotho

In 1967, Lesotho enacted the *Employment Act*[52] and it only covered, amongst other things powers and duties of labour officers, labour contracts, recruiting and labour agents, wages, hours of work, paid leave and occupational health and safety. Part IX dealt with employment of women and children while Part X prohibited forced labour, except in connection with military service, serving of a penal sentence, work required during a national emergency or minor community service. The Act did not provide for severance pay.

[49] Ibid (n 8) art 9.
[50] *Protection of Workers' Claims (Employer's Insolvency) Convention, 1992 (No. 173).*
[51] *Labour Code*, s 85.
[52] *Employment Act 1967*.

The above, was the position in Lesotho until the introduction and promulgation of the *Wages and Conditions of Employment Order*[53] (hereafter '*WCEO*') in 1978. The Order provided that, an employee who has completed more than four years of continuous service with the same employer and whose employment is being terminated by the said employer for any reason other than summary dismissal, shall be entitled to receive severance pay upon termination of his employment which shall be equivalent to two week's wages for each completed year of continuous service with the same employer.[54] It is apparent from the above that, employees who resigned or retired did not receive severance pay because the requirement was that in order for an employee to receive severance pay, the termination of employment must be at the initiation of the employer not the employee.

The Order also afforded employers who operated pension funds, provident funds or gratuity schemes which provide advantageous benefits for employees than severance pay an opportunity to apply by way of a written application to the Minister to be exempted from paying severance pay.[55] The said application was required to incorporate particulars of the pension fund, provident fund or gratuity scheme operated by the employer accompanied by a certified copy of the rules of same.[56] If the Minister of Labour was satisfied after considering the abovementioned application that the pension or provident fund and or gratuity scheme operated by the employer offers better advantages to the employees than severance pay, then the Minister would exempt the employer from paying severance pay to his employees.[57]

The exemption could be withdrawn upon three months' notice to the employer.[58] The *WCEO* provided that service prior to the 1st January 1975 was not taken into account for purposes of severance pay contemplated by the Order.[59] Furthermore, the two week's wages referred to in the Order was wages at the rate payable as at the time the services are terminated.[60] It is evident from the reading of *WCEO* that in 1978, employees would only receive severance pay if they had

[53] *Wages and Conditions of Employment Order of 1978.*
[54] Ibid, para 10 (1).
[55] Ibid (n 53) para (2).
[56] Ibid (n 53) para 10 (3).
[57] Ibid (n 53) para (4).
[58] Ibid (n 53) para 10 (5).
[59] Ibid (n 53) para 10 (6) (a).
[60] Ibid (n 53) para (6) (b).

been in continuous employment with the same employer for four years or more and only upon termination of their employment in instances other than summary dismissal.

In 1991, Lesotho amended *WCEO* through the *Wages and Conditions of Employment (Amendment) Order*.[61] It repealed paragraph 10 (1) of the principal Order which provided for severance pay upon termination of employment and replaced it with the provision that in addition to termination, an employee who resigns from employment shall be entitled to receive severance pay upon resignation which shall be equivalent to two weeks' wages for each completed year of continuous service with the same employer.[62] It is crystal clear that, the Amendment Order included resignation to be a ground on which an employee could be paid severance pay, while under the principal Order termination by the employer was the only ground on which an employee could receive severance pay. The Amendment Order also reduced the threshold from four years as provided in the principal Order to one year completion of continuous service with the same employer to entitle an employee to severance pay.

2.4 The Labour Code and the Requirements for entitlement to Severance Pay

In 1992 the *Labour Code Order* 1992 was enacted which has already been referred to in Chapter 1. Severance pay is provided for in section 79 of the *Labour Code* and reads as follows:

> An employee who has completed more than one year of continuous service with the same employer shall be entitled to receive, upon termination of his or her services, a severance payment equivalent to two weeks' wages for each completed year of continuous service with the employer.[63]
>
> An employee who has been fairly dismissed for misconduct shall not be entitled to a severance payment.[64]

[61] *Wages and Conditions of Employment (Amendment) Order 1991.*
[62] Ibid para 4.
[63] *Labour Code*, s 79 (1).
[64] *Labour Code*, s 79 (2).

Thus, employees who are found guilty of misconduct and fairly dismissed thereafter are not entitled to severance pay.[65] The Code also provides that, regardless of an employee's length of service, the amount of severance pay payable to such an employee shall not exceed a sum which may be prescribed by the Minister time and again after consultation with the Wages Advisory Board.[66] The two weeks' wages referred to in subsection (1) payable to an employee shall be calculated at the rate payable at the time the services are terminated.[67] The *Labour Code* gives an employer the discretion to pay severance pay immediately or hold it in trust for twelve (12) months where the termination of the employment was at the initiative of the employee. The employer is obliged to pay the employee immediately upon the expiry of the twelve months where he opted to hold the severance in trust and such severance will include interest at the fair market rate prevailing in the period in question. The holding of the severance should be done in line with section 89 of the Code regarding the employer's security.[68]

In 1997, section 79 of the Labour Code was amended by the *Labour Code (Amendment) Act*[69], by adding three more subsections which read as follows:

> where an employer operates some other separation benefit scheme which provides more advantageous benefits for an employee than those that are contained in subsection (1) he may submit a written application to a Labour Commissioner for exemption from the effect of that subsection.[70]
>
> An application under subsection (7) shall contain full particulars of the scheme operated by the employer accompanied by certified copy of the rules.[71]
>
> If upon considering an application under subsection (7) the Labour Commissioner is satisfied that the scheme operated by the employer offers better advantages to the employee, the Labour Commissioner shall exempt the employer from the effect of subsection (1).[72]

[65] Ibid.
[66] *Labour Code*, s 79 (3).
[67] *Labour Code*, s 79 (4).
[68] *Labour Code*, s 79 (5).
[69] *Labour Code* (Amendment) Act 1997.
[70] Ibid, s 79 (7).
[71] Ibid (n 69), s 79 (8).
[72] Ibid, (n 69) s 79 (9).

2.5 Circumstances where the employee does not qualify for Severance Pay

From the analysis in the above paragraph of both the *Labour Code* and the *Labour Code (Amendment) Act* it is safe to conclude that there are circumstances or instances where an employee does not qualify for severance pay. The first instance is where the employer has been granted exemptions under the *Labour Code (Amendment) Act*[73] and the second instance is where an employee has been fairly dismissed for misconduct after being found guilty.[74]

The test for a fair dismissal for misconduct is whether the said dismissal was both procedurally and substantively fair.[75] A distinction between procedural and substantive fairness was drawn in the case of *Unitrans Zululand (Pty) Ltd v Cebekhulu*[76] where the Labour Appeal Court pointed that, in relation to a dismissal, procedural fairness relates to the procedure followed in dismissing an employee. Substantive fairness relates to the existence of a fair reason to dismiss. The Court went further to emphasize that, in relation to substantive fairness the question is whether or not, on the evidence before the Court, and not on the evidence produced during the consultation process, a fair reason to dismiss existed. Pertaining to procedural fairness, the question is not whether a fair procedure was followed in Court. The question is whether, prior to the dismissal, the employer followed a fair procedure.[77] In simple terms, for a dismissal for misconduct to be fair, there must be a valid reason for the said dismissal and the dismissal must be effected in a procedurally fair manner. This is to say, if an employee has been dismissed for misconduct and the said dismissal is both procedurally and substantively fair the employee shall forfeit severance pay.

It has been highlighted in chapter one and from the above discussion it becomes clear that, an employee who is facing disciplinary hearing can decide to resign before the said disciplinary hearing takes place in order to receive their severance pay. This is what happened in the case of *Mahamo v Nedbank.*[78]

[73] *Maluti Mountain Brewery v Ntahli Matete* C of A (CIV) No. 6/2014 at para [12] 8.
[74] Ibid (n 64).
[75] Grogan (n 3) 206.
[76] [2003] ZALAC 5.
[77] Ibid para [25]. See also *Standard Lesotho Bank v Morahanye* LAC/CIV/A/06/08.
[78] Ibid (n 28).

2.6 The Concept of Resignation and Requirements thereof

The concept of resignation was defined in the case of *SALSTAFF obo Bezuidenhout v Metrorail*[79] where the court said the following:

> a resignation is a unilateral act by which an employee signifies that the contract will end at his election after the notice period stipulated in the contract or by law. While formally speaking a contract of employment only ends on expiry of the notice period, the act of resignation being a unilateral act which cannot be withdrawn without the consent of the employer, is in fact the act that terminates the contract…The mere fact that the employee is contractually obliged to work for the required notice period if the employer requires him to do so does not alter the legal consequences of the resignation.[80]

It has also been held by the courts that, for resignation to be legally effective there must be a clear notice of intention to resign from the employment and to terminate the contract.[81] In addition, the employee must show the said intention not to continue with the employment by words or conduct that would lead a reasonable person to believe that the employee had such an intention.[82] Moreover, the said notice of intention to resign or terminate employment is a final unilateral act which once is given to the employer it cannot be withdrawn without the employer's consent.[83] This means that, it is not necessary in order for resignation to be valid, that the employer must accept it or concur with it. The employer is not entitled to refuse to accept resignation or decline to act on it.[84]

In the already cited case of *Mahamo v Nedbank* when addressing the concept of resignation the Labour Appeal Court had the following to say:

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[79] [2001] 9 BALR 926.

[80] Ibid, para [5] (Arbitrator Grogan).

[81] *Kragga Kamma Estates CC and another v Flanagan* 1995 (2) SA 367 (A) at 375 C).

[82] *Council for Scientific &Industrial Research (CSIR) v Fijen* (1996) 17 *ILJ* 18 (AD), and *Fijen v Council for Scientific & Industrial Research* (1994) 15 *ILJ* 759 (LAC).

[83] *African National Congress v Municipal Manager, George & others* (550/08) [2009] ZASCA 139 (17 November 2009) para [11].

[84] *Rosebank Television & Appliance Co (Pty) Ltd v Orbit Sales Corporation (Pty) Ltd* 1969 (1) SA 300 (T)).

> If a resignation to be valid only once it is accepted by an employer, the latter would in effect be entitled, by a simple stratagem of refusing to accept a tendered resignation, to require an employee to remain in employment against his or her will. This cannot be – it would reduce the employment relationship to a form of indentured labour. This is not to say that a resignation need not be communicated to the employer party to be effective – indeed, it must, at least in the absence of a contrary stipulation.[85] (References omitted)

The above view by the court that, refusal to accept a tendered resignation would amount to a form of forced labour was elucidated in the case of *Pekeche v Thabane and Others*[86] where the court pointed out that:

> Mr. Matsau for the Respondents submits that resignation is a unilateral act and that no person may be forced to remain in employment against his will. This submission is sound in law having regard to the provisions of Section 9 of the Constitution of Lesotho subsection (2) of which expressly provides that no person shall be required to perform forced labour. It follows therefore that it is the constitutional right of any employee to tender his resignation at any time and leave the employer with the remedy of damages as the case may be.[87]

It is inevitable from the above cited authorities to conclude that, refusal of resignation by an employer constitutes forced labour and therefore unconstitutional as it violates the employee's constitutional right of freedom from forced labour.[88] The ILO Conventions preclude and condemn any form of forced labour. According to *Forced Labour Convention*[89] all work or service which is exacted from any person under the threat of a penalty and for which the person has not offered herself or himself voluntarily constitutes forced labour.[90] The Convention also requires that illegal extraction of forced or compulsory labour to be punishable as a penal offence and that ratifying states should ensure that relevant penalties imposed by law are adequate and strictly enforced.

[85] Ibid (n 28) para [19] (Judge Mosito).
[86] CIV/APN/259/98.
[87] Ibid (Judge Ramodibedi) 25.
[88] See: section 9 (2) of the Constitution of Lesotho 1993.
[89] *Forced Labour Convention 1930 (No. 29).*
[90] Ibid , art 2.

The *Abolition of Forced Labour Convention*[91] requires state parties of the ILO which ratify the Convention to undertake to take effective measures to secure the immediate and complete abolition of forced or compulsory labour as specified in the Convention.[92] The *Protocol of 2014 to the Forced Labour Convention*[93] suppresses forced or compulsory labour by requiring each member to take effective measures to prevent and eliminate its use and to provide to victims protection and access to appropriate and effective remedies such as compensation and to sanction perpetrators of forced or compulsory labour.[94]

2.7 Critical Analysis of Mahamo v Nedbank

Having discussed the concept of resignation and requirements thereof and how it is an avenue for employees to avoid disciplinary hearing but at the same time get paid their severance pay, the burning issue becomes whether the *Mahamo* case was correctly decided. Based on the wording of section 79 of the *Labour Code* and from hereinabove discussions, an employee shall forfeit severance pay only if she is found guilty of misconduct. An employee will undoubtedly be found guilty if they attended a disciplinary hearing.

The facts of the case have already been meticulously explained in chapter one and it was said that Mahamo resigned before the commencement of her disciplinary hearing. The concept of resignation and the requirements thereof have been explored and it is undoubtedly clear that resignation is a unilateral act. This is to say, Mahamo's resignation was not subject to approval or rejection by Nedbank as rejection would amount to forced labour. It is unavoidable therefore, to conclude that, based on the wording of section 79 of the *Labour Code* the *Mahamo* case was correctly decided because Mahamo's resignation was valid and she had not been found guilty of misconduct and thereafter fairly dismissed as she resigned before the beginning of her disciplinary hearing.

[91] *Abolition of Forced Labour Convention, 1957 (105).*
[92] Ibid art 2.
[93] *Protocol of 2014 to the Forced Labour Convention, 1930.*
[94] Ibid, art 1.

At this juncture, having concluded that the *Mahamo* case was correctly decided, the issue to be addressed is whether there were remedies available to Nedbank for the purpose of recovering the money that Mahamo had allegedly stolen. The first remedy that was available to Nedbank since it was ordered to pay Mahamo her severance pay was for it to pay Mahamo the said severance pay and thereafter sue her for the stolen money in a civil court of law. Alternatively, Nedbank could have held Mahamo's severance pay under section 79 (5) of the *Labour Code* which gives an employer the discretion to pay severance pay immediately or hold it in trust for twelve (12) months where the termination of the employment was at the initiative of the employee. This would buy time for Nedbank while pursuing a civil claim against Mahamo in a civil court of law.

The issue for determination on the discussion of remedies that were available to Nedbank for the purpose of recovering money that was stolen by Mahamo is whether the abovementioned remedies are adequate. Regarding the first remedy that Nedbank should have paid Mahamo her severance pay and thereafter sue her in a civil court of law, in theory, Mahamo could have absconded after receiving her severance pay and left for another country and this would inevitably present a difficulty on the part of Nedbank to recover its money. On the other hand, Mahamo could use the said severance pay for any reasons including payment of legal fees in the said civil proceedings and be left with nothing upon conclusion of the civil case consequently there would be nothing for Nedbank to recover.

Nedbank would also have to incur legal expenses for the civil case it instituted against Mahamo the recovery of which would be almost impossible as courts of law seldom order costs on attorney and client scale but regularly order costs on an ordinary scale or no orders as to costs at all. This is to say, Nedbank might even run a loss in trying to recover its stolen money from Mahamo. In relation to Nedbank holding in trust Mahamo's severance pay under section 79 (5) of the *Labour Code,* the section gives the employer a time limit of twelve months to hold the employee's severance pay and provides that, upon expiry of such time the employer "shall immediately" pay the employee the held severance pay plus interest at the fair market rate prevailing at the time.

It is a fact that court processes take long and it is not abnormal in Lesotho for a civil case to drag more than twelve months. This is to say, if twelve months lapses and the civil case instituted in a civil court by Nedbank against Mahamo for recovery of its stolen money has not been finalised, Nedbank would be obliged to pay Mahamo her severance pay plus interest. Nedbank would have paid legal fees, then severance pay plus interest to Mahamo who thereafter as explained before might abscond or spend the said severance while awaiting conclusion of the case. In such instances, it is clear that Nedbank would have lost way more than it had to recover. The remedies that were available to Nedbank under civil law and under the *Labour Code* are therefore inadequate. This conclusion then attracts the issue of whether asset forfeiture could have been applicable in the Mahamo case and lead to her forfeiting her severance pay despite resignation before her disciplinary hearing and this will be discussed in the next paragraphs after discussing the concept of asset forfeiture in Lesotho.

2.8 Asset Forfeiture: The Legal Framework

In 1999, Lesotho enacted the *Prevention of Corruption and Economic Offences Act* of 1999 (hereafter '*PCEO*') and as it has already been elucidated in chapter 1, Lesotho ratified the *United Nations Convention against Corruption* (*UNCAC*) in 2005 and she domesticated the Convention by enacting the *Money Laundering and Proceeds of Crime Act* (*MLPCA*) in 2008. This Act as it will be seen in this chapter, has a chapter dedicated to asset recovery and it also provides for procedures of restraint, preservation, forfeiture and the confiscation of property. The Act complies with the *UNCAC* in that it provides for forfeiture of the proceeds of crime without a criminal conviction. Before studying the *MLPCA*, it is crucial to look at the *PCEO* as it came before the *MLPCA* with an intention to eradicate corruption and economic offences.

2.8.1 Prevention of Corruption and Economic Offences Act

The *PCEO* included the first general Lesotho legislative provisions authorising the courts to confiscate the proceeds of crime.[95] The relevant powers were limited to the proceeds of corruption and economic offences. Where an accused was convicted of such an offence, the court

[95] *Prevention of Corruption and Economic Offences Act* 1999 as amended, s 30 (4) (PCEO).

convicting the accused was empowered to make an order against him for payment to the state of an amount of money representing the benefit he derived from corruption or an economic offence.

The confiscation provisions in the *PCEO* suffered from a number of inadequacies. Firstly, the powers were only activated in the case of corruption and economic related offences.[96] Secondly, in practice, the confiscation powers were not in practice or exercised in an effective manner if at all, this led to the enactment of the *MLPCA*.

2.8.2 Money Laundering and Proceeds of Crime Act

The *MLPCA* provides not only for criminal forfeiture in Part IV but also for civil forfeiture in Part V. The reason for the addition of a regime of civil forfeiture was that criminal forfeiture on its own was perceived to be an inadequate law enforcement tool. One of the major shortcomings of criminal forfeiture is that it depends on a successful criminal conviction and in circumstances where leaders of organised crime are often able to avoid prosecution it might not achieve its intended goal.

Civil forfeiture provides an avenue through which such people can be prevented from benefiting from crime and the assets used in criminal activities can be removed. Civil forfeiture removes the profit from unlawful activities by targeting specific assets that are derived from or used for unlawful purposes. It provides a direct route to the asset base of crime, thereby allowing law enforcement agencies to strike a blow at the heart of the criminal enterprise.[97]

As the preceding analysis demonstrates, Part V of the *MLPCA* represents the culmination of a protracted process of law reform which has sought to give effect to Lesotho's international obligation to ensure that criminals do not benefit from their crimes. The intention behind is to remove the incentive to commit crime and live up to the saying that crime does not pay.

[96] *PCEO*, Part IV and V.
[97] Peter Lang, *Recovering Stolen Assets* (The British Library 2008) 147.

2.8.3 The Main Features of Part IV of the Money Laundering and Proceeds of Crime Act

Asset forfeiture under Part IV is purely conviction based because it applies only after a criminal conviction. A confiscation order in terms of Part IV is a civil judgment for the payment of an amount of money based on the value of the benefit that the defendant derived from a crime. It is not limited to the actual proceeds themselves but it seeks to deprive the defendant of the value of the benefit he or she derived from the crime.[98] A restraining order is applied for where the commission of the crime by the accused cannot be linked to the property he has acquired.[99] The purpose of the order is to restrain the concerned property until the criminal trial is over and if the accused is convicted it shall be forfeited to the state and thereafter returned to the victim but in the event that the accused is acquitted the property shall be returned to him. Although the proceedings under this chapter are civil proceedings, the forfeiture at which they are directed is commonly known as 'criminal forfeiture' because it is based on and follows a criminal conviction.

2.8.4 The Main Features of Part V of the Money Launderig and Proceeds of Crime Act

Part V provides for the forfeiture of the benefits derived from crime. Its mechanisms may be invoked even before the criminal proceedings are commenced. Part V provides for forfeiture of the proceeds of instrumentalities used in crime but it is non-conviction based forfeiture. It may be invoked even when there is no criminal prosecution it is for this reason that it is commonly known as civil forfeiture. Proceedings under this part are appropriate in circumstances where the commission of the crime can easily be linked to the proceeds of the said crime or the instrumentality that was used to commit the crime.

[98] *MLPCA*, s 40.
[99] *MLPCA*, s 67.

2.8.5 Remedies in Part IV and V of the Money Laundering and Proceeds of Crime Act

The remedies in Part IV and V differ in material respects. The remedy in Part IV is available only against someone convicted for an offence that is why it is referred to as conviction based asset forfeiture while the remedy in Part V is not dependant on a criminal conviction. This is why they are generally referred to as criminal forfeiture and civil forfeiture respectively. However, the labels are misleading because both are civil remedies.

Both remedies seek to deprive the defendant of the proceeds of crime. They differ however in that, each is wider than the other in some respects but narrower in others. Part V is narrower than Part IV for it is limited to the forfeiture of the actual proceeds of crime or assets representing those proceeds. It is however wider than Part IV in another respect, in that it also provides for the forfeiture of the instrumentalities of crime.

2.8.6 The Broad Structure of Part IV of the Money Laundering and Proceeds of Crime Act

Part IV is directed at the confiscation and pecuniary penalty orders. It creates three mechanisms towards that end. It provides for orders for the confiscation and pecuniary penalty orders, restraint orders and realization orders. The part provides for restraint, and confiscation of the following assets, realisable property, proceeds of crime and tainted property. The realisable property is referred to in section 2 which is the definition section of the Act and it defines realisable property as "any property held by an accused, any property possessed by a person to whom an accused has directly or indirectly made a gift under this Act."

Section 2 of the Act defines proceeds of crime as:

> 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 from the offence was later successively 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.

Section 2 defines tainted property as property "used in or intended for use in connection with the commission of a serious offence; derived, obtained or realised as a result of or in connection with the commission of a serious offence." These mechanisms may only be invoked by order of the High Court. The Court also exercises a high degree of supervision over their implementation.[100]

2.8.7 Restraint Orders under the Money Laundering and Proceeds of Crime Act

Proceedings under Part IV must commence with an application for a restraint order. The anti-money laundering authority may apply to the High Court for such an order by way of an *ex parte* application.[101] The High Court must satisfy itself that the jurisdictional requirements exist.[102] If that is the case, the High Court exercises the following powers; it must make a restraint order. This is an order prohibiting the accused or any person from disposing of, or otherwise dealing with, the property or such part thereof or interest therein as is specified in the order, except in such manner as may be specified in the order; and at the request of the authority, where the Court is satisfied the circumstances so require directing the Registrar or such other person as the Court may appoint, to take custody of the property or such part thereof as is specified in the order and to manage or otherwise deal with all or any part of the property in accordance with the directions of the Court; and requiring a person having possession of the property to give possession thereof to the Registrar or to the person appointed to take custody and control of the property.[103]

An order under subsection (1) may be made subject to such conditions as the Court thinks fit and, without limiting the generality of this sub-section, may make provision for meeting out of the property or a specified part of the property.[104] A restraining order remains in force until it is discharged, revoked or varied; or the period of 6 months from the date on which it is made or such later time as the Court may determine; or a confiscation order or a pecuniary order, as the

[100] *MLPCA*, ss 48, 67 and 68.
[101] *MLPCA*, s 67 (1).
[102] *MLPCA*, s 67 (8).
[103] *MLPCA*, s 68 (1).
[104] *MLPCA*, s 68 (2).

case may be, is made in respect of property which is the subject of the order.[105]

During the operation of restraint order, anybody with an interest in the property has the following remedies: they may apply to the High Court for an order for a review, variation or revocation of the conditions as the Court may deem fit.[106] They may apply to the High Court for the order to provide for their reasonable living, business and legal expenses.[107] It should be understood that a restraint order is an interim order and not a final order i.e. it is interim pending a confiscation order.

A Court considering an application of a restraint order under section 68 of *MLPCA* is not required to be satisfied of the guilt of the defendant but what is required, *inter alia*, is only that there should be reasonable grounds for believing that the defendant may be convicted.[108] Nugent JA (as he then was) put it aptly as follows in *National Director of Public Prosecutions v Rauterbach*[109]**:**

> It is plain from the language of the Act that the Court is not required to satisfy itself that the defendant is probably guilty of an offence or from unlawful activity. What is required is only that it must appear to the Court on reasonable grounds that there might be a conviction and a confiscation order. While the Court, in order to make that assessment, must be apprised of at least the nature and tenor of the available evidence, and cannot rely merely upon appellant's opinion (National Director of Public Prosecutions v Basson 2001 (2) SACR 712 (SCA) 712 (2002) (1) SA 419 in para [19] it is nevertheless not called upon to decide upon the veracity of the evidence. It need ask only whether there is evidence that might reasonably support a conviction and a consequent confiscation order (even if all that evidence has not been placed before it) and whether that evidence might reasonably be believed. Clearly that will not be so where the evidence that is sought to be relied upon is manifestly false or unreliable and to that extent it requires evaluation, but it could not have been intended that a Court in such proceedings is required to determine whether the evidence is probably true. Moreover once the criteria laid down in the Act have been met, and the Court is properly seized of its discretion, it is not open to the Court to then frustrate those criteria when it purports to exercise its discretion.[110]

[105] *MLPCA*, s 70.
[106] *MLPCA*, ss 71 (1) and (2).
[107] *MLPCA*, s 71 (2) (b).
[108] *National Director of Public Prosecutions v Rebuzzi* 2002 (2) SA 1 (SCA) 7 H-I.
[109] 2005 1 All SA 412 (SCA).
[110] Ibid para [25] (Judge Nugent).

The principles in the above quoted case apply in Lesotho. In dealing with the question of what degree of proof is required from the Applicant in order to obtain a restraint order in restraint proceedings in terms of chapter 5 of the Act, in the case of *National Director of Public Prosecutions v Phillips and Others*[111], Heher J (as he then was), stated as follows:

> In my view an application for a restraint order is analogous (although not identical) to an application for an interim interdict and attachment pendent 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 to silence. The prima facie case is proof of a reasonable prospect of obtaining both a conviction in respect of charges levelled against the respondent and a subsequent confiscation order under s 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.[112]

The principles in the above quoted case equally apply in Lesotho. It is clear from the above quote that the applicant might succeed in obtaining a restraint order on a less exacting standard of proof being that there are "reasonable grounds for believing" that a confiscation order or a pecuniary penalty order is likely to be made in respect of the property. It is safe to say that the purpose of the restraint order is to preserve the realisable property in respect of which a confiscation order may ultimately be made. The restraining regime is designed to prevent disposing of designated property and thereby preserving the assets for a future confiscation order in the event of a successful criminal prosecution.[113] It is now well established that the objective of the Act is to ensure that no person convicted of a criminal offence should benefit from his or her crime or any

[111] 2003(6) SA 447 (SCA).
[112] Ibid para [81 D-H] (Judge Heher).
[113] *The National Director of Public Prosecutions and Hlongwa: In Re The National Director of Public Prosecutions and Nkosi and Others* 2006 (2) All SA 486 (T).

related offence(s).[114] It is important to bear in mind that the objective of the restraint order procedure embodied in sections 67 and 68 of the *MLPCA* is to secure realisable property which may be used to obtain satisfaction of a confiscation order later upon finalization of the criminal proceedings. [115]

2.8.8 Confiscation and Pecuniary Penalty orders under the Money Laundering and Proceeds of Crime Act

Part IV of the *MLPCA* provides for confiscation and it is divided into three divisions. Division I is confiscation and pecuniary orders, division II is just confiscation and division III is pecuniary penalty orders. Confiscation under section 40 is in relation to tainted property while confiscation under section 48 is in relation to benefit. Section 68 (1) (c) is pellucid in fortification of this analysis. Under section 37, the term Confiscation encompasses both confiscation and pecuniary penalty orders. It has been clarified that a restraint order is an interim order as a result, if a restraint order is in force, the anti-money laundering authority may apply to the High Court where a person is convicted for a serious offence for confiscation or pecuniary penalty orders of the property, most importantly such application should be brought not later than 6 months after the said conviction.[116] The High Court must grant the confiscation or pecuniary penalty orders if it finds on a balance of probabilities that the property is tainted in respect of the offence or a pecuniary penalty order against the person in respect of benefits derived by the person from the commission of the offence.[117]

It is imperative to note however, that it is not required of the applicant to show that the assets which are subject to the restraint order had been derived from illegitimate sources in order to obtain a confiscation order. In this regard the helpful authority is *National Director of Public*

[114] *The National Director of Public Prosecutions v Kyriacou* 2003 (2) SACR 524 (SCA) and *National Director of Public Prosecutions v Mohamed no 2* 2003 (4) SA 1 (CC) 9 F-H para [16].
[115] *The National Director of Public Prosecutions v Rautenbach,* ibid (n 109) and *The National Director of Public Prosecutions v Phillips and Others,* ibid (n 111).
[116] *MLPCA*, s 37 (1).
[117] *MLPCA*, s 37(1)(a) and (b).

Prosecutions v Mcasa and Another[118] whereat Madlanga AJP and Kruger AJ said the following:

> In our view, for purposes of the point made here, it matters not that Chapter 5 authorizes the application of a restraint order even to a respondent's own property which is not the proceeds of crime because the idea is to reverse whatever benefit was derived from criminal activity to which no legal entitlement can appropriately be claimed.[119]

Nugent JA in *Rautenbach* said the following:

> Once it is shown that a material benefit accrued the offender may be ordered to pay to the State the monetary equivalent of that benefit even if that means that it must be paid from assets that were legitimately acquired. Thus the fact that some of Rautenbach's assets were acquired before the offences were committed, and were not themselves acquired from the proceeds of unlawful activity, is immaterial when determining whether a confiscation order might be granted.[120]

2.8.9 The Broad Structure of Part V of the Money Laundering and Proceeds of Crime Act

Part V is directed at the forfeiture of the proceeds of crime and the instrumentalities used to commit crime. It creates two mechanisms towards the end. Division 2 provides for orders for the preservation and seizure of property as an interim measure pending an application for their forfeiture. The purpose of such orders is to prevent property targeted for forfeiture from being disposed of, removed or destroyed, pending the determination of an application for their forfeiture.

Division 3 of the Act provides for forfeiture orders, that is, orders for the forfeiture of property subject to preservation and seizure orders. It provides in other words, for the final remedy at which the chapter is directed. This part provides for preservation, seizure and forfeiture of the

[118] 2000 (1) SACR 263 .
[119] Ibid, (Judge Madlanga) 268.
[120] Ibid (n 109) 425i – 426a.

following assets; the instrumentalities of an offence.[121] The instrumentality of an offence is any property which is concerned in the commission or suspected commission of an offence.[122] The other assets are proceeds of crime, that is, 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 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.[123]

The above mechanisms may only be invoked by order of the High Court and the court also exercises a high degree of supervision over their implementation. The proceedings under this part are deemed to be civil proceedings governed by the rules of evidence and procedure applicable to proceedings of that kind.[124]

2.8.10 Preservation and Seizure Orders under the Money Laundering and Proceeds of Crime Act

Proceedings under Part V must commence with an application for a preservation order. The Directorate on Corruption and Economic Offences (hereafter *DCEO*) may apply to the High Court for such an order by way of an *ex parte* application.[125] The High Court must satisfy itself that, there are reasonable grounds to believe that the property concerned is an instrumentality of a serious offence referred to in section 2 or the proceeds of unlawful activities.[126] If the court finds that this is the case, it must make a preservation order. This is an order prohibiting any person from dealing with the property in any manner.

[121] *MLPCA*, s 88(2) (b).
[122] See the interpretation of ''instrumentality of an offence'' in the *National Director of Public Prosecutions and R O Cook Properties(Pty) Ltd and National Director of Public Prosecutions and 37 Gillespie Street Durban (Pty) Ltd and National Director of Public Prosecutions and Seevnarayan* 2004(8) BCLR 844 (SCA).
[123] *MLPCA*, s 2(1) ''proceeds of crime''.
[124] *MLPCA*, s 87.
[125] *MLPCA* s 88(1).
[126] *MLPCA* s 88(2).

The court may however make the order subject to such conditions and exceptions as it deems appropriate.[127] The court must thereafter, make a seizure order which is an order authorising the seizure of the property by a police official.[128] If the property is so seized, it must be dealt with in accordance with the directions of the High Court.[129] The court may make such further ancillary orders which it considers appropriate for the proper, fair and effective execution of the preservation and seizure orders.

Once a preservation order is made, the anti-money laundering authority must as soon as practicable give notice of it to everybody known to have an interest in the property by publication of such preservation order in the government gazette.[130] Anyone with an interest in the property may then enter an appearance to oppose an application for forfeiture of the property or apply for the exclusion of their interest in the property from forfeiture.[131] The anti-money laundering authority must apply for a forfeiture order within 90 days after publication of the notice of the preservation order in the government gazette. If it does not do so, the preservation order will lapse. This was reiterated by Chinhengo AJA when defining a preservation order in *Sekoala v Directorate on Corruption and Economic Offence*s[132] where he said the following "The preservation of property order is by nature a temporary order which subsists pending the granting or refusal of a forfeiture order or for 90 days when it lapses unless an application for a forfeiture order has been made."[133]

During the operation of the preservation and seizure orders, anybody with an interest in the property has the following remedies; they may apply to the High Court for the imposition, variation or revocation of the conditions, exceptions, ancillary orders and directions that govern the preservation and seizure orders.[134] They may also apply to the High Court for the preservation order to provide for their reasonable living and legal expenses.[135]

[127] *MLPCA*, s 88(1) and (2).
[128] *MLPCA*, s 88(3).
[129] *MLPCA*, s 88(4).
[130] *MLPCA*, s 89(1).
[131] *MLPCA*, s 89(3).
[132] C of A (CIV) No. 61 /2017.
[133] Ibid para [19] (Judge Chinhengo).
[134] *MLPCA*, ss 88(1),(3) and (4) and 91(2).
[135] *MLPCA*, s 94.

Parties having interest in the property under a preservation and seizure order may apply to the High Court for rescission of the preservation and seizure orders insofar as they relate to immovable property.[136] The court may rescind the orders if it deems it necessary or in the best interests of justice to do so.[137] Moreover, they may apply to the High Court for rescission or variation of the preservation and seizure orders insofar as they relate to any other property.[138] The court may grant the above mentioned application if it is satisfied that the orders will deprive the applicant of the means to provide for their reasonable living expenses and cause them undue hardship which outweighs the risk that the property may be destroyed, lost, damaged, concealed or transferred.[139]

2.8.11 Forfeiture Orders under the Money Laundering and Proceeds of Crime Act

If a preservation order is in force, the anti-money laundering authority may apply to the High Court for forfeiture of the preserved property.[140] Anybody with an interest in the property, who has entered an appearance, may oppose the application or apply for its terms to be varied or their interest in the property to be excluded from it.[141] The High Court must grant the forfeiture order if it finds on a balance of probabilities that the property is an instrumentality of a serious offence referred to in section 2 or the proceeds of unlawful activities.[142] It may exclude the interests of the interested parties from any forfeiture order if they acquired those interests legally, in good faith and for value.[143] The court may do so at the time that it makes the forfeiture order or thereafter.[144]

[136] *MLPCA*, s 96 (5).
[137] *MLPCA*, s 96 (6).
[138] *MLPCA*, s 93(6).
[139] *MLPCA*, s 96(1).
[140] *MLPCA*, s 97(1).
[141] *MLPCA*, s 100 read with s 89(3).
[142] *MLPCA*, s 98(1).
[143] *MLPCA*, ss 100(2) and 102(3).
[144] *MLPCA*, ss 100(1) and 97.

2.8.12 Institutional Framework on Asset Forfeiture in Lesotho

In 2008 when the *MLPCA* was enacted, the reading of the definition section in as far as the authority to institute asset forfeiture proceedings was that of the Directorate on Corruption and Economic Offences (hereafter DCEO).[145] Section 11 of the Act is more specific in that it provides that there shall be an anti-money laundering authority that will be responsible for prevention, investigation and prosecution which is subject to consent of the Director of Public Prosecutions (DPP) of money laundering and terrorist financing offences and any other matters pertaining to money laundering and proceeds of crime.[146] The section further stipulates that the DCEO as established by the *PCEO* shall be the Anti-Money Laundering Authority in terms of the Act and that the Director General of the DCEO shall be the Director-General of such Authority.[147]

In 2016, the *MLPCA* was amended by the *Money Laundering and Proceeds of Crime Act* No. 76 of 2016 and a new definition of "competent authorities" was inserted. The definition section of the *MLPCA* amendment Act defines competent authorities as the DCEO established by the *PCEO*, the Lesotho Mounted Police Services (LMPS) established by the Police Service Act No. 7 of 1998 and Lesotho Revenue Authority (LRA) established by the Lesotho Revenue Authority Act No. 14 of 2001.[148]

The *MLPCA* amendment Act also amends the principal Act by deleting section 11 and substituting it with a new provision that says that "a competent authority shall have the responsibility of prevention, investigation and subject to the DPP's consent but save for the Police, prosecution of money laundering and related offences, financing of terrorism offences and any other matters relating to money laundering and proceeds of crime."[149] The implication of the amendment Act is that the DCEO, LMPS and LRA (now known as Revenue Services Lesotho) are competent authorities to initiate asset forfeiture proceedings exercising the *MLPCA*.

[145] *MLPCA*, s 2 defines "authorized officer" as an officer of the Directorate on Corruption and Economic Offences and also "Directorate" as Directorate on Corruption and Economic Offences. It defines "Director General" as the Director General of the Directorate on Corruption and Economic Offences.
[146] *MLPCA*, s 11 (1).
[147] *MLPCA*, s 11 (2).
[148] *MLPCA Amendment*, s 3 (d).
[149] *MLPCA Amendment*, s 5.

Among the abovementioned three competent authorities, the DCEO seems more advanced and effective insofar as utilizing the asset forfeiture avenue to combat corruption and other serious economic offences. It is so far the only competent authority that has managed to initiate proceedings of asset forfeiture under both Part IV and V of the *MLPCA* before the courts of law. One could argue that, this is so because the DCEO was the only competent authority from 2008 until 2016 as it has been highlighted before. However, the LMPS assists the DCEO with its investigations in a number of asset forfeiture cases in as much as the DCEO has its own investigation department so it could be argued again that just because restraint, preservation, forfeiture and confiscation orders are obtained by DCEO in the courts, does not mean the LMPS as a competent authority under *MLPCA* is incompetent as it has also recently initiated asset forfeiture proceedings in the courts of law as will be shown.

The DCEO initiated asset forfeiture proceedings under Part IV of the *MLPCA* in the case of *DCEO v Tjabane & another*[150] where the first respondent was an employee of Lesotho Post Bank holding a position of Manager of Information Technology. He together with his colleague who was the second respondent with a common purpose to defraud the bank manipulated the banking system by applying for debit cards with false names using them to withdraw money from the bank's auto teller machines and thereafter deleting such transactions on the postilion real-time database and core banking system database. There was a backup on the postilion office database which revealed all transactions made by the respondents. It was found from the backup database that they had withdrawn five million and four hundred thousand maloti (M5 400 000) belonging to the bank.

The DCEO was unable to link the commission of the crime with the acquisition of the respondents' properties in order to prove to the court on a balance of probabilities that the property concerned (held by the respondents) was proceeds of such unlawful activities of fraud. As a result, the DCEO applied for a restraining order on the grounds that the respondents were about to be charged with fraud so their properties must be restrained pending judgement of their criminal trial.

[150]CIV/APN/421/16 (Unreported).

The court granted a restraining order against realisable property of the respondents being a plot at Ha Lesia and Masowe belonging to the first respondent. Moreover, the court restrained a Toyota Hilux, Ford Ranger and Renault Megane belonging to the second respondent. The court also restrained both respondents' retirement benefits. This meant that, in the event that the respondents were found guilty at the criminal trial of the fraud charges, the DCEO would rely on that conviction when applying for a confiscation order as has been explained. The restrained property would then be confiscated, sold on auction and the proceeds therefrom would be used to compensate the bank who was the respondents' employer. However, if the respondents were acquitted the property would be returned to them. This is known as conviction-based asset forfeiture under Part IV of the *MLPCA*.

The DCEO initiated Proceedings under Part V of the *MLPCA* in *DCEO v Makamane*[151]where the respondent and his girlfriend named Mokone applied for a loan of M700 000.00 from First National Bank. The respondent claimed that Mokone was his spouse as a result of which she signed spousal consent form as one of the mandatory underlying documentation in support of the loan application. Furthermore, a deed of hypothecation in relation to immovable property, belonging to the respondent and his spouse namely 'Malengoasa was executed.

When witnessing to the power of attorney to register the foregoing bond, Mokone forged the signature of 'Malengoasa. On the basis of such forgeries and fraud, the respondent managed to receive a home loan from First National Bank and as a result thereof, he managed to secure immovable property at Ha Thetsane, a Toyota Hilux, a BMW 3 series and an amount of M5 996 50.00 in cash.

The DCEO was able to link the commission of the crime to the acquisition of the said property, it then applied for a preservation order against the aforementioned properties on the basis that it had reasonable grounds to believe that the property acquired by the respondent was proceeds of unlawful activities of the respondent being fraud and forgery. The respondent did not oppose the application for a forfeiture order as a result, the court granted a forfeiture order by default in

[151] CIV/APN/437/2015. (Unreported).

favour of the applicant. The forfeited property was auctioned and the proceeds thereof were used to compensate First National Bank. This approach that the DCEO adopted in this case is non-conviction based asset forfeiture.

There are instances where a competent authority can have reasonable grounds to believe that the property in question is an instrumentality that was used to commit crime or proceeds of crime but fail to identify the victim. In such instances the proceeds are deposited into the criminal asset recovery fund established under the *MLPCA*.[152]

The LMPS through its Counter Commercial Crime Unit had its first asset forfeiture case in 2018 by launching proceedings under Part IV of the *MLPCA* in the case of *Counter Commercial Crime Unit and others v MF Petroleum (PTY) LTD and others*[153] where the respondents were suspected of theft and fraud amounting to seventeen million seven hundred and eighty five thousand nine hundred and sixty nine maloti nine lisente (M17, 785,969.09) from the Leribe Recurrent Expenditure Account. The LMPS was successful to obtain a restraining order against the respondents' properties and the court held that such restraining order would operate until the finalization of the respondents' criminal trial.

2.9 The Applicability of Asset Forfeiture in *Nedbank v Mahamo*

The concept of asset forfeiture has been extensively discussed in the previous paragraphs. The common requirement for asset forfeiture proceedings to be initiated whether conviction-based under section 67 or non-conviction based under section 88 of the *MLPCA* is that, there must be in existence a suspicion of a commission of a serious offence. The question that arises from the above is what is a serious offence in terms of the *MLPCA*?

The *MLPCA* defines a serious offence in section 2 as follows "any law in Lesotho for which the maximum penalty is death or imprisonment for life or other deprivation of liberty for a period of not less than 24 months and includes money laundering." In 2016, the *MLPCA Amendment Act*

[152] *MLPCA*, s 109. See also *DCEO v Sohail* CIV/APN/170/16 (Unreported).
[153] CIV/APN/422/18.

deleted the expression, "24 months" from the principal Act in section 2 above and substituted it with "12 months".[154] The issue to be dealt with upon defining a serious offence is whether Mahamo was suspected to have committed a serious offence based on the wording of the above section 2 of the *MLPCA*.

It is evident from the facts of the *Mahamo* case that she was suspected to have committed theft therefore, in order to answer the issue whether she committed a serious offence it is prudent to define theft in order to establish whether it falls within the definition of a serious offence. Theft is defined by the *Penal Code Act* No. 30 of 2010 (hereafter '*PCA'*) by stating that: "theft is the unlawful and intentional appropriation of property belonging to another".[155] Under the schedule of penalties of the *PCA*, theft is said to have a fine under level 4 or imprisonment up to 10 years or both.[156] Imprisonment is deprivation of liberty and the *MLPCA* provides that an offence which has the effect of depriving one's liberty for a period of not less than twelve (12) months is a serious offence. Clearly theft is a serious offence based on the wording of section 2 of the *MLPCA* because it has an effect of depriving one's liberty for up to ten years.

Having concluded that Mahamo was suspected of committing a serious offence based on the wording of section 2 of the *MLPCA* how then would asset forfeiture be applied in her case? As explained before, where it is easy to link the acquisition of the property with the serious offence committed, the appropriate asset forfeiture approach is non-conviction based which appears under Part V of the *MLPCA* initiated by an application of a preservation order and then followed by an application for a forfeiture order. Where a link between the commission of a serious offence and acquisition of the property concerned cannot be established, then the proper asset forfeiture approach is conviction-based asset forfeiture which is instigated by an application for a restraining order followed by an application for a confiscation or pecuniary penalty order after conviction of the suspect.

Coming back to the *Mahamo* case, it is undeniable that one cannot link Mahamo's alleged theft with her severance pay therefore the pertinent asset forfeiture approach would be conviction-

[154]*MLPCA* Amendment, s 3 (c).
[155] *Penal Code* 2010, s 57. (PCA).
[156]*PCA*, s 58 under schedule penalties.

based asset forfeiture. Nedbank should have reported Mahamo to the competent authority being either DCEO or LMPS. Section 67 of the *MLPCA* requires competent authorities to apply for a restraining order if, a person has been convicted of a serious offence, has been charged with a serious offence or is about to be charged with a serious offence. Mahamo had not been convicted of a serious offence, she was not yet charged with a serious offence but it would suffice for the competent authority to charge her criminally with theft and in the application for a restraining order mention that, she has been charged or to just state that she was about to be charged with a serious offence of theft then obtain a restraining order against Mahamo's severance pay.

If severance pay is restrained in terms of the restraining order obtained through an application under section 67 of the *MLPCA,* a person having interest in the restrained severance pay will have an opportunity to challenge it before the court which granted the said restraining order by filing their opposing papers. The order shall operate until it is discharged, revoked or varied, or until the period of six months from the date on which it is made or such later time as the court may determine.[157] However, a restraining order may be extended after the competent authority has applied to the court for such extension and if the court is satisfied that a confiscation or pecuniary penalty order may be made against the person charged with a serious offence, it shall extend the restraining order.[158] It should be recalled that, when a restraining order is in force, no one can deal with the restrained property in anyhow until there is another decision by the court which granted the restraining order.

In as much as the *Labour Code* provides that severance can either be paid immediately or the employer can hold it for a period of a year if termination of employment has been at the initiative of an employee,[159] when a restraining order against severance pay is in force, the employer or any other person is not supposed deal with the said severance in any manner. This means that, the employer cannot pay the said severance immediately as that would be a violation of the restraining court order, even if the employer decides to hold the severance pay for 12 months as provided by the *Labour Code*, if the restraining order is still in force upon expiration of the said

[157] *MLPCA*, s 70.
[158] *MLPCA* s 72.
[159] *Labour Code*, s 79 (5).

12 months, the employer cannot release the severance pay because it is subject to a court order. The severance pay will be subject to the restraining order until further directions by the court.

It therefore follows that, a restraining order can be in operation until the criminal court has decided the innocence or otherwise of the suspect of a serious offence as it happened in the *MF Petroleum*'s case.[160] This is to say, during the operation of a restraining order, Nedbank would hold Mahamo's severance pay on the basis of the said order until her criminal trial for theft is completed, that is why section 67 makes it important or mandatory that a suspect should have been charged or about to be charged with a serious offence when applying for a restraining order. The interesting part about this procedure is that once Mahamo was charged with a serious offence in the criminal court, if granted bail, she would be given conditions amongst others that, she surrenders her passport and stand the criminal trial to finality. This means that, her presence would be secured through a bail bond granted by the criminal court or she would be awaiting her criminal trial while she is in custody should she have been denied bail.

If Mahamo was found guilty of theft by the criminal court, she would be sentenced accordingly by the said court for theft in accordance with the *PCA*. Following that conviction, the competent authority that applied for a restraining order under section 67 of the *MLPCA* would apply for a confiscation or pecuniary penalty order under section 37 of the *MLPCA* against Mahamo's severance pay and rely on her conviction in motivation of the confiscation or pecuniary penalty orders application. It should be recalled that the proceedings of an application for a confiscation or pecuniary penalty order are civil and not criminal because the aim is to confiscate the property concerned (restrained property) and reverse the unlawful benefit derived from the commission of the crime as the criminal court had already found the offender guilty for his criminal charges. This, therefore, does not constitute double jeopardy as it may appear to do. A detailed discussion on asset forfeiture and double jeopardy will be made in the next chapter.

The interesting question that arises is this: if she was convicted of theft by the criminal court, would the competent authority apply for a confiscation or pecuniary penalty order. The distinction between confiscation and a pecuniary penalty order has been previously explained in

[160] Ibid (n 153).

this chapter. A confiscation order can be applied for if the property concerned is tainted in respect of the offence, that is, if the property was derived from the commission of a serious offence, on the other hand, a pecuniary penalty order is applied for against the person in respect of benefits derived from the commission of the serious offence, this is to say, against any benefit that the perpetrator gained from the commission of the serious offence. Put differently, the application is against the monetary equivalence of the money accrued to the convicted person.

In the *Mahamo* case, it is obvious that it cannot be said that her severance pay was tainted; she was suspected to have stolen Nedbank's four thousand maloti (M4000.00) meaning she benefitted from the commission of a serious offence by deriving a four thousand benefit from the commission of a serious offence of theft. Clearly, the relevant application to be made upon Mahamo's conviction would have been an application for a pecuniary penalty order against her restrained severance pay. The fairness of this procedure is that Mahamo's severance pay would be confiscated only to the extent of her benefit and not an amount which exceeds her benefit in terms of section 48 (1) of the *MLPCA*. As it will be clearer in the next chapter, there is no need for a link to be established between Mahamo's severance pay and the money she stole when applying for a pecuniary penalty order but the requirement is to establish how much she benefitted in order to recover that much even from legitimate money like severance pay, hence the intention behind such an order is the reversal of unlawful benefit. This means, in the *Mahamo* case, the competent authority upon obtaining a pecuniary penalty order against Mahamo's severance pay, Nedbank would deduct its four thousand maloti which Mahamo stole and pay her the remainder of her severance pay.

The advantage about this procedure is that Nedbank would not have spent a cent to recover its money, as it has been highlighted all the work would be done by the competent authority as an institution funded for purposes of amongst others asset forfeiture proceedings. The only thing Nedbank would have done is to report the commission of a serious offence against it by Mahamo, to the competent authority. The other advantage is that, the restraining order is capable of being extended until the conclusion of the criminal trial of the suspect unlike section 79 (5) of the *Labour Code* which is not extendable after twelve months. Furthermore, asset forfeiture provides for a dual approach of ensuring that a person is charged criminally and the assets are

restrained at the same time, bail or incarceration while awaiting trial secures the suspect until the completion of the criminal trial, however a civil suit does not do so.

As it has been previously discussed in paragraph 2.2 of this chapter, the *Labour Code* goes to great lengths to protect wages of employees. However, the above discussion makes it apparent that asset forfeiture conforms to the wording of section 85 of the Code to the extent that it provides that, deductions may be made from the wages of an employee for the purposes of any amounts which a court ordered.[161] As explained, deductions from severance pay will be made as a result of a pecuniary penalty order issued by the court which was faced with an application for such an order instituted by a competent authority.

Therefore, it can be concluded that the concept of asset forfeiture is appropriate in the labour context where there is in existence a commission of a serious offence as it has been thoroughly discussed above. The concept of asset forfeiture is necessary despite remedies that are available to the employer under the *Labour Code* as their inadequacies have been shown above. There are far more advantages to the employer under asset forfeiture proceedings than the remedies provided by the *Labour Code*. In a nutshell, asset forfeiture is applicable in the labour context where there is a commission of a serious offence by the employee against their employer and it does not violate section 85 of the *Labour Code* which authorizes deductions of wages of employees in line with the conditions provided thereunder. Another detailed discussion and emphasis on the applicability of asset forfeiture in the labour context will be done in chapter 4 after studying how the jurisdiction of South Africa has interpreted and applied the asset forfeiture concept.

2.9.1 The Constitutionality of Asset Forfeiture in Lesotho

Any concept which appears to be draconian and having an adverse impact on the rights of the citizens, often faces the constitutionality challenge. Asset forfeiture is no exception to those, as it has been challenged both in Lesotho and other jurisdictions for being unconstitutional. The challenge against the constitutionality of asset forfeiture in Lesotho first presented itself in the

[161] *Labour Code*, s 85 (2) (a) (iii).

case of *DCEO v Lephoto.*[162] The constitutional matter was heard in *Lephoto v DCEO*[163] and the Constitutional Court held that section 98 (4) of the *MLPCA* which was challenged to violate the right to silence, does not force a person faced with asset forfeiture proceedings to incriminate herself, what it rather does is, to leave her with a choice between leaving forfeiture proceedings unchallenged and substantively responding to the said proceedings. For this reason, the court held that section 98 (4) of the *MLPCA* is consistent with section 12 of the Constitution which provides for the right to fair trial and therefore constitutional.[164]

Another instance where the constitutionality of asset forfeiture in Lesotho was called into question was in the case of *DCEO v Motloheloa*.[165] The constitutional case proceeded in *Motloheloa v DCEO*[166] wherein the respondent argued that his freedom from arbitrary search or entry, when he was searched by the investigators at his house, right to respect for private and family life, when his wife was interrogated about the sum of money in her bank account and right to fair trial in that his car was preserved before he was convicted at a criminal trial and as such that violated his presumption of innocence under section 12 of the Constitution. The court held that, Part V of the *MLPCA* is intended to prevent criminal suspects from benefitting from the proceeds of crime furthermore that, this demonstrates that preservation and forfeiture applications are in *rem* (against property) since they target property that is either instrumental or proceeds of crime.[167] The court further stated as follows: "The background idea for a preservation order and ultimately its forfeiture dimension is to discourage suspects from risking committing the offence not necessarily to punish them. This highlights the civil nature of the encounter."[168]

From the above cases, the question of constitutionality of asset forfeiture in Lesotho is well settled that the concept is constitutional, however, as is evident from both cases the constitutionality of asset forfeiture was challenged only against Part V of the *MLPCA* and not Part IV. It may be argued that proceedings under Part IV have not been challenged to be

[162] CIV/APN/454/14 (Unreported).
[163] Ibid (n 30).
[164] Ibid para [25] 21.
[165] CIV/APN/413/16 (Unreported).
[166] Ibid (n 29).
[167] Ibid (n 29) para [43] 22.
[168] Ibid (n 29) para [44] (Judge Makara) 23.

unconstitutional because their final process follows after conviction as it is conviction-based asset forfeiture, however, in the next chapter it will be demonstrated that, proceedings similar to those under Part IV of the *MLPCA* have been challenged to be unconstitutional in South Africa and how the courts dealt with such a challenge.

Summary

This chapter has discussed legal principles in relation to severance pay, resignation and asset forfeiture. It has become clear that in Lesotho an employee can only forfeit severance pay if he or she has been found guilty of misconduct and dismissed fairly. Furthermore, immediate resignation in Lesotho terminates the employment relationship immediately, meaning the employer does not have power to discipline an employee who has resigned with immediate effect. Therefore, the employer is obliged to pay an employee who has resigned with immediate effect severance pay. Asset forfeiture has also been extensively discussed in this chapter, it has been clarified that the concept does not only apply to property linked to the commission of the crime but also extends to legally obtained property to reverse the unlawful benefit accrued to the perpetrator which he initially had no legal entitlement to. The applicability of asset forfeiture has in the employment context has also been demonstrated in that asset forfeiture is applicable in the employment relationship.

CHAPTER 3

COMPARATIVE ANALYSIS: SOUTH AFRICA

3.1 Introduction

In this chapter a comparative analysis will be made by looking at the legal framework on asset forfeiture in South Africa. The first part will discuss the South African regime of law providing for asset forfeiture and the focus will only be on conviction-based asset forfeiture as it has already been concluded in chapter 2 that non-conviction based asset forfeiture cannot be applied against severance pay. The second part will deal with the constitutionality of asset forfeiture in South Africa and whether the concept of asset forfeiture constitutes double jeopardy. The third part will discuss resignation and disciplinary hearing in South Africa. The last part of the chapter will provide some conclusions.

3.2 Asset Forfeiture in South Africa: Legal Framework

South Africa adopted the *Prevention of Organised Crime Act* No. 121 of 1998 (hereafter *POCA*) and it came into force on the 21 January 1999. The Act embodies an aggressive Parliamentary stance against rapid growth of organised crime, money laundering and criminal gang activities nationally and internationally. *POCA* is modelled very closely to a normal civil litigation process. As in a normal civil action, in terms of *POCA*, the State can obtain a monetary judgement or confiscation order against the accused for the amount of the benefit of the crime they have committed.

Unlike Lesotho, South Africa signed and ratified the *UNCAC* in 2004 after she had already enacted a legislation providing for civil asset forfeiture (*POCA*). *POCA* adopted a civil forfeiture model based on that of the United States of America, the American Racketeer Influenced and Corruption Organisations Act of 1970 (hereafter RICO) influenced guidelines upon which *POCA*

is based.[169] South Africa's *POCA* provides for non-conviction based asset forfeiture as a further innovative use of civil litigation to deal with crime committed for profit. It also deals with conviction based asset forfeiture in order to confiscate tainted property or benefit derived from commission of unlawful activities. *POCA*'s procedure for restraining and confiscation orders as will be seen below is in *pari materia* with the procedures of restraining and confiscation orders envisaged in Lesotho's *MLPCA*.

3.3 Restraint and Confiscation Orders under *POCA*

Restraint and confiscation remedies are provided for under chapter 5 of *POCA*. The Act makes it clear that proceedings under chapter 5 are civil and not criminal. Furthermore, civil rules of evidence apply in proceedings under chapter 5. Moreover, the Act provides that the standard of proof applicable in proceedings under chapter 5 is on a balance of probabilities.[170]

3.4 Restraint Orders under *POCA*

As explained in chapter 2, a restraint order is an interim order pending finalization of a confiscation order. In as much as the definition in chapter 2 was made in the context of Lesotho, similarly, in South Africa, their restraint order has the same effect as that of Lesotho. The restraint orders in terms of *POCA* are interim orders and are used to secure and preserve property pending confiscation of the said property.[171] The National Director of Public Prosecutions of South Africa (hereafter NDPP) may approach the High Court on *ex parte* basis with a restraint application to obtain a restraint order prohibiting any person from dealing with the property that is subject to the said restraint order.[172] The restraint order may be made in respect of any realisable property specified in the order, or held by such a person, or all property transferred to such person after the restrained order was made.[173] A restraint order that is made with immediate effect upon hearing of the aforesaid application, may be issued with a *rule nisi* calling upon the defendants to show cause, why the restraint order should not be made final.[174]

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[169] Van Jaarsveld IL, 'The History of *In Rem* Forfeiture-A Penal Legacy of the Past' (2006) *Fundamina* 137, 138.
[170] *POCA*, s 13.
[171] Ibid (n 111) para [24].
[172] *POCA*, s 26 (1).
[173] *POCA*, s 26 (2) (a) – (c).
[174] *POCA*, s 26 (3).

The High Court may make a restraining order when a prosecution for an offence has been instituted against a defendant but not concluded, and either a confiscation order has been made against that defendant or there are reasonable grounds to believe that a confiscation will be made, or when the court is satisfied that a person is to be charged with an offence and there are reasonable grounds for believing that a confiscation will be made against such person.[175] In *NDPP v Kyricou*[176], the respondent argued that, a restraint order could not be granted if the truth could not be established from the papers and that the discretion to grant a restraint should be used sparingly and accordingly only in the clearest of cases.

The court rejected the respondent's argument and held that, the discretion conferred upon a court in terms of section 25 (1) (a) of *POCA* to make a restraint order is based on the existence of reasonable grounds for believing that a confiscation order may be made.[177] It follows from the ruling of the court that, the applicant for a restraint order is not required to prove that a confiscation order will be made but to adduce evidence that satisfies the court that there are reasonable grounds for believing that a confiscation order may be made.[178] This requirement is similar to requirements under Part IV of the *MLPCA*.

Like *MLPCA*, *POCA* provides for remedies available to persons affected by restraint orders. A person affected by a restraint order can approach the High Court with an application to vary or rescind a restraint order if it unjustifiably deprives the applicant reasonable living and legal expenses related to any proceedings instituted against the said applicant. The court has to be satisfied that, the applicant has disclosed under oath that, the said expenses cannot be met out of unrestrained property.[179]

South African authorities on restraint orders were already referred to in chapter two under paragraph 2.8.7 therein, the reason as stated earlier is that, they are applicable in Lesotho and

[175] *POCA*, s 25 (1) (a) and (b).
[176] Ibid (n 114).
[177] Ibid (n 114) at para [10].
[178] See quotation from *NDPP v Philips* ibid (n 111).
[179] *POCA*, s 26 (6) (a) and (b).

because there are not enough authorities in Lesotho on restraint orders hence reliance on South African authorities for clarification.

3.5 Confiscation Orders under *POCA*

If a person is convicted of an offence, the public prosecutor may apply for a confiscation order following the said conviction. The court hearing the application for confiscation, being the court convicting the defendant may enquire into any benefit derived from an offence of which the defendant is convicted, as well as any criminal activity that is adequately related to those offences. The court may in addition to any punishment imposed pertaining to the offence, make an order against the defendant for payment to the state of any amount it may deem fit and appropriate to ensure the effectiveness and fairness of the order.[180] The amount referred to above, may not exceed the value of the defendant's proceeds of crime or the value of all realisable property whichever is the lesser.[181] Realisable property includes, the value of realisable property held by the defendant including the value of all affected gifts made by the defendant.[182] The amounts to be realised will only be finalised once all persons who have interest in the property concerned have been given an opportunity to make representations before the court in connection with the realisation of the said property.[183] If the property has been realised, the High Court has discretion to direct the manner in which proceeds will be distributed.[184]

A determination of whether a defendant has derived benefit in terms of section 18 (1) of *POCA* and failure to disclose legitimate source of income which is sufficient to justify interests in any property at the time of conviction or seven years previously, the court is inclined to accept this as *prima facie* evidence that such interests form part of such a benefit.[185] It is noteworthy to reiterate that, the purpose of a confiscation order is not to enrich the state but to preclude a convicted person from gaining or profiting from his ill-gotten gains or proceeds of his criminal activities.[186] It should be recalled that in chapter 2, it was emphasized that it is not a requirement

[180] *POCA*, s 18 (1).
[181] *POCA*, s 18 (2).
[182] *POCA*, s 20 (a) and (b).
[183] *POCA*, s 20 (5).
[184] *POCA*, s 31 (1).
[185] *POCA*, s 22. See also *NDPP v Kyriacou* (n 114) at para [114].
[186] *NDPP v Rebuzzi* (n 108) para [19] and *NDPP v Kyriacou* (n 114) para [13].

for the applicant of a confiscation order to show that the assets secured by a restrained order had been derived from unlawful sources in order to obtain a confiscation order.[187] Once it is established that the convicted defendant benefitted from an unlawful criminal activity, he may be ordered to pay monetary equivalence of that benefit to the State even if the payment will come from assets that were legitimately acquired.[188]

In the case of *S v Shaik*[189] the court was faced with an appeal where the validity of a confiscation order was challenged in relation to two benefits which the High Court had found to be proceeds of crime. The court indicated that one of the reasons for the wide scope of the definition of "proceeds of crime" which was applicable in *casu* was due to the following:

> That sophisticated criminals will seek to avoid proceeds being confiscated by creating complex systems of "camouflage".
>
> It is a notorious fact that professional and habitual criminals frequently take steps to conceal their profits from crime. Effective but fair powers of confiscating proceeds of crime are therefore essential.[190]

The Act provides for calculation of the value of the defendant's proceeds of unlawful activities.[191] In the *Shaik*[192] case the State had to establish on a balance of probabilities that the benefits which were alleged to be shareholding and dividends which were to be confiscated were linked or flowed from the bribes paid to the former President of South Africa Mr. Jacob Zuma.[193] It was the appellants' contention that, the confiscation order was disproportionate, however, O'Regan J, rejected the said argument and upheld the decision of the High Court and relied on sections 18 (1) and (2) of *POCA* in that the High Court according to the discretion conferred on it, might make a confiscation order: "in any amount it considers appropriate".[194] In the end, the court held that corruption is a serious offence or crime closely related or linked to organised crime of which the appellants were convicted as a result of Mr. Zuma's involvement and

[187] See quotation referred to in chapter 2 in *NDPP v Mcasa* (n 118).
[188] *NDPP v Rautenbach* (n 109).
[189] 2008 1 SACR 1 (CC).
[190] Ibid para [25] (Chief Justice Langa).
[191] *POCA*, section 19 (1).
[192] Ibid (n 189).
[193] Ibid (n 189) para [54].
[194] Ibid (n 189) para [76].

interventions on behalf of the appellants. *POCA* in clear and unambiguous terms permits that, all benefits that have been derived from the commission of unlawful criminal activities, whether directly or indirectly, may be confiscated.[195]

3.6. The Constitutionality of Asset Forfeiture in South Africa

The concept of asset forfeiture did not escape the constitutionality challenge when it presented itself in South Africa. Asset forfeiture proceedings in chapter 5 and 6 of *POCA* as will be seen have been challenged to be unconstitutional for various reasons. In *NDPP v Mohamed*[196] the South African Constitutional Court was faced with the issue of whether *POCA*'s *ex parte* statutory preservation provisions were unconstitutional because they denied a fair hearing under section 34 of the Constitution of South Africa.[197] The court held that the object of these provisions is not to punish criminals but to remove the incentive to commit crime[198]. The court held further that such a limitation was justified by section 36 of the Constitution of South Africa because it enables *POCA* to function for the legitimate and most important purpose for which it was designed and to reduce the dissipation of the proceeds and instrumentalities of organized crime.[199]

In *First National Bank of South Africa Ltd t/a Wesbank v Commissioner, South African Revenue Service*[200] the Constitutional Court of South Africa strongly pointed that a deprivation of property will be arbitrary when the law does not provide sufficient reason for the deprivation or is procedurally unfair.[201] The reason and purpose for forfeiture of property has been meticulously discussed and the fairness of procedure both in this chapter and previously in chapter 2. The

[195]Ibid (n 189) paras [80] and [81] The court held that the appellants failed to prove that the High Court's discretion was, improperly exercised in determining the amount to be confiscated nor the shareholdings and the dividends were enormously inappropriate.
[196]Ibid (n 114).
[197] Section 34 of the Constitution of South Africa provides that "Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum."
[198]Ibid (n 114) at para [16].
[199]Ibid (n 114) at para [52].
[200] 2002 (4) SA 768 (CC).
[201]Ibid at para [100].

Constitutional Court in *NDPP v Mohunram*[202] approved the view that the state is constitutionally authorised to use forfeiture in addition to criminal sanctions.[203] In addition, the property rights of those who are actually involved in the commission of crime may therefore, be forfeited provided that the requirements of section 25 (1) of the Constitution have been met namely that, a proper balance between the public purpose of the deprivation and the interest of the affected persons must be established.[204] It is clear that asset forfeiture proceedings have been held to be constitutional by the courts in South Africa.

3.7 Does the Concept of Asset Forfeiture constitute Double Jeopardy?

It can be argued that conviction-based asset forfeiture constitutes double jeopardy because a person is convicted and at the same time their property is forfeited. In as much as the above seems to constitute a double punishment, it is of vital importance to see how the courts have dealt with the issue of whether the concept of asset forfeiture constitutes double jeopardy. In *NDPP v Phillips*[205] the applicant had successfully applied *ex parte* for a restraint order in terms of section 26 of *POCA*, averring that the respondents and the first respondent in particular, were involved in various breaches of the law relating to sexual offences and immigration offences. On the return day, the respondents opposed the application on a number of grounds *inter alia* that, they had a legitimate expectation that the first respondent would not be prosecuted for activities carried on at premises relevant to the application. It was the first respondent's argument that such criminal prosecution would constitute double jeopardy as he was already facing confiscation proceedings. The respondents further contended that, the provisions of *POCA* on which the charges were based were unconstitutional, in support of their constitutional challenge the respondents relied on section 35(3) of the Constitution of South Africa and further that they were denied the right to a fair trial by the provisions of *POCA*.

On the argument of double jeopardy, the court held, that the mere fact that an application for a confiscation order followed upon a criminal conviction and culmination in a judgment against a

[202] 2007 (2) SACR 145 (CC).
[203] Ibid para [58].
[204] Ibid (n 202) para [86].
[205] 2002 (4) SA 60 (W).

defendant for payment to the State, of an amount based on the benefit he had derived from his crimes, was not sufficient in itself to constitute the proceedings criminal and render the confiscation order criminal punishment.[206] The court further underscored that, the mere fact that an application for a confiscation order flowed from the defendant's criminal conviction and culminated in a judgment against him did not make him an "accused person" within the meaning of section 35(3) of the Constitution.[207]

The court went further to state that, a confiscation order by which a criminal is deprived of the spoils of his crime merely gave expression to the principle that no one should be allowed to benefit from his own wrongdoing. The court added that, Chapter 5 of *POCA* extended this principle to the proceeds of crime in that the confiscatory order merely deprived the criminal of the benefit to which she or he was not entitled in the first place under the general principles of the law, it stripped him or her of the proceeds of the crime and did not punish him or her for it.[208] The court held that, an application for a confiscation order was properly characterised as civil proceedings because a defendant against whom such an order was made was not an accused person within the meaning of section 35(3) of the Constitution and a confiscation order did not punish her or him for his or her crimes.[209]

On the respondents' contention that they were denied a fair trial by the provisions of *POCA* the court held that, even if the proceedings were subject to section 35(3) of the Constitution, there would be no violation of the right to a fair criminal trial. The court substantiated this reasoning by stating that, the proceedings for a confiscation order commence only after a defendant's conviction, his guilt or innocence is not in issue in those proceedings and it follows that the presumption of innocence has no role to play.[210]

It is therefore safe to conclude from the above *Phillips'* case that, asset forfeiture proceedings do not constitute double jeopardy because a person is charged for a crime that he has committed and

[206]Ibid para [39].
[207]Ibid (n 205) para [40].
[208]Ibid (n 205) para [43].
[209]Ibid (n 205) para [45].
[210]Ibid (n 205) para [46] the court under this paragraph extensively demonstrated how proceedings in chapter 5 of *POCA* do not violate section 35 (3) of the Constitution.

punished for the said crime in a criminal trial. The purpose of the confiscation order under asset forfeiture proceedings is to remove the benefit derived by the convicted person from the commission of the crime. The *Phillips*' case is also helpful as it has declared proceedings under chapter 5 of *POCA* constitutional meaning proceedings under Part IV of *MLPCA* are equally constitutional as the two Acts are similar.

3.8 Resignation and Disciplinary Hearing in South Africa

The definition of resignation has previously been provided in chapter 2.[211] Unlike in Lesotho, there has been a series of conflicting Labour Court decisions on the issue of whether an employer has the power to proceed with a disciplinary hearing of an employee who has resigned with immediate effect in South Africa. In Lesotho, it should be recalled in terms of the discussion in chapter 2 that, the principle is well-settled on this issue in accordance with the *Mahamo* case that, an employer does not have the power to hold a disciplinary hearing of an employee who has resigned because there is no employer employee relationship post resignation. This section of this chapter will look into the South African position on the issue of resignation by employees with immediate effect and the authority conferred on the employers to hold a disciplinary enquiry under those circumstances.

In the case of *Mtati v KPMG Services (Pty) Ltd*[212] the applicant was informed by her employer that she was being investigated for allegations of conflict of interest. Upon receiving such information, the applicant tendered her resignation letter. During the serving of her notice period, the applicant was informed that disciplinary hearing proceedings against her were going to be initiated, the applicant then resigned again but this time with immediate effect. The employer rejected the second resignation and nonetheless proceeded with the disciplinary hearing on the set hearing date which was before the applicant's notice period's expiration. The applicant argued that, the chairperson of the disciplinary hearing lacked jurisdiction to discipline her in light of the second resignation because she was no longer an employee of the respondent, the chairperson rejected the applicant's argument and proceeded with the disciplinary hearing and ultimately found the applicant to be guilty. The applicant then approached the Labour Court for

[211] Ibid (n 80).
[212] [2017] 3 BLLR 315 (LC).

an interdict of her disciplinary hearing. The court was faced with the issue of whether the employer had power to discipline the employee following resignation with immediate effect. In deciding the matter the court had the following to say:

> In summary, the principle to discern from the above is that an employer has no authority or the power to discipline an employee who resigns from his or her employment once the resignation takes effect. In other words where the resignation is with immediate effect, the employer loses the right to discipline the employee, also with immediate effect.[213]

Based on the above quotation the court held that, the disciplinary hearing which was commenced after the second resignation with immediate effect was null and void and set it aside.[214] In *Naidoo and another v Standard Bank of SA Ltd and another*[215], the applicants had resigned with immediate effect upon service of charges pertaining to a suspected financial transaction on their part. Their employer informed them that it would hold them to their twenty eight days' notice and their disciplinary hearings would continue either in their presence or absence. The applicants approached the Labour Court on urgent basis for a relief of restraining the continuance of their disciplinary hearing.

The issue that the court had to deal with was whether the applicants' resignations with immediate effect terminated their employment relationship with their employer and whether the employer had the right to hold the applicants to their notice periods and if it had, whether the employer also had power to proceed with the applicants' disciplinary hearings regardless of their resignation with immediate effect. On the first issue, the court held that mere resignation does not bring an end to the employment relationship. Furthermore, in terms of the contract and statute it is a requirement that an employee must serve his notice period and that, it is only upon service of the said notice period that it can be concluded that, resignation has taken place.[216] The court on the second issue emphasized that, in a situation where the employee has resigned with immediate effect without giving notice as was the case in *casu*, the applicants were in breach of

[213] Ibid para [15] (Judge Molahlehi).
[214] Ibid (212) 323.
[215] [2019] 9 BLLR 934 (LC).
[216] Ibid para [17].

contract. The court relying on the case of *Vodacom (Pty) Ltd v Motsa and another*[217] held that, the employer had contractual remedies such as seeking specific performance against the applicants in order to hold them to their contracts to serve their notice periods.[218] However, since there was no prayer for specific performance, the court was not in a position to make such an order.

On the last issue of whether the employer had authority to proceed with the applicants' disciplinary hearings regardless of their resignation with immediate effect, the court had the following to say:

> Whilst I concur with both *Coetzee* and *Mzotsho* on contractual principles, I do, however, disagree with the view that the employer may proceed with the disciplinary hearing without first approaching the Court for an order for specific performance. There is no legal basis for such an approach.[219]

Clearly, the answer to the last issue as reflected in the quote by the court above is that, an employer does not have power to proceed with the disciplinary hearing of the employee who has resigned with immediate effect if the employer does not firstly seek an order for specific performance before a court of law to hold the employee to their notice period. In *Coetzee v The Zeitz Mocca Foundation Trust and others*[220] the court reiterated the principle that was laid down in *Toyota SA Motors* (*Pty*) *Ltd v Commission for Conciliation, Mediation & Arbitration and others* [221] that, where an employee has resigned with immediate effect, the employment relationship comes to an end at the end of the employee's notice period, that is resignation takes effect at the end of the notice period.[222] The court also asserted that, the principle in *Mtati* was no longer persuasive since it was in conflict with the above principle. This means that, the court in *Coetzee* differed with the view in *Mtati* that an employer does not have authority to discipline an employee who has resigned with immediate effect because in *Coetzee*, the court was of the view

[217] [2016] 5 BLLR (LC).
[218] Ibid (n 215) para [20].
[219] Ibid (n 215) para [25] (Judge Nkutha-Nkotwana).
[220] [2018] 9 BLLR 909 (LC).
[221] (2016) 37 ILJ 313.
[222] Ibid para [5].

that, resignation takes effect at the end of the notice period of the employee and this means during the employee's notice period, there is no bar on the part of the employer to hold the employee's disciplinary hearing as was submitted by the respondent.[223]

In *Mthimkhulu v Standard Bank of South Africa*[224] the court disagreed with the principle in *Naidoo* that the employer cannot proceed with a disciplinary hearing of an employee who has resigned with immediate effect without first seeking an order of specific performance. The court held that the correct legal position is that, when an employer resigns with immediate effect without serving his contractual notice, an employer has two options which are, either to accept the resignation and rescind the contract of employment or to refuse resignation and keep the contract alive or in subsistence. Moreover, if after the refusal of resignation by the employer, the employee persists with his resignation, the employer may approach a court of law on the basis of the contract of employment, to compel the employee to comply with the contract as far as notice period is concerned.

The court held that, the election of the employer is what keeps the employment contract in subsistence and not an order of specific performance. To substantiate this, the court went further to indicate that specific performance is a contractual remedy and not a right available to an employer, however, an election by the employer is a right available to it.[225] Based on the above analysis, the court in *casu* held that the employer was entitled to proceed with a disciplinary hearing of the applicant who had resigned with immediate effect, pending the outcome of the disciplinary hearing because the respondent elected to keep the contract of employment alive.[226]

The above authorities visibly present confusion on what is the generally accepted legal principle on resignation with immediate effect and the authority to proceed with a disciplinary hearing thereafter by the employer. Fortunately, this difference in opinion which has undeniably resulted in a legal quagmire has been resolved by the Labour Appeal Court of South Africa in the case of

[223] Ibid (n 220) para [3].
[224] [2021] 1 BLLR 86 (LC).
[225] Ibid para [13].
[226] Ibid (n 224) para [15].

Standard Bank of South Africa Limited v Chiloane[227], an appeal against the decision of the Labour Court where it held in favour of the employee who had terminated her employment relationship with her employer by tendering her resignation prior to her disciplinary hearing and declaring the subsequent disciplinary hearing as null and void. The issue before the Labour Appeal Court was whether resignation terminates the employment relationship and whether the employer under those circumstances has the authority to proceed with the employee's disciplinary hearing.

The court disagreed with the argument that employment comes to an end when an employee resigns and that the employer cannot compel the employee to continue working because the resignation is a unilateral act that takes effect upon the employee's resignation.[228] The court further clarified that, resignation which does not comply with the contractual notice requirement does not validly terminate the employment contract unilaterally but resignation which complies with the requirements of the contractual notice, is the one which validly terminates the contract of employment unilaterally.[229] The court stated that, where a contract of employment provides for a notice period, the employee who resigns is obliged to serve the notice period as stated in the contract. In addition, the contract of employment shall terminate when the said notice comes to an end. However, in circumstances where the contract of employment does not have a provision of a notice period, the court indicated that the parties are bound by the notice which appears in the *Basic Conditions of Employment Act*, 1997 (hereafter *BCEA*).

On the issue of whether the employer had the authority to proceed with the disciplinary hearing of the employee post her resignation with immediate effect, the Labour Appeal Court had the following to say:

> In this matter, the employee's narration that her resignation was with "immediate effect" was of no consequence because it did not comply with the contract which governed her relationship with her employer and the employer was thus correct to read into the

[227] [2021] 4 BLLR 315 (LC).
[228] Ibid para [15].
[229] Ibid (n 227) para [19].

resignation a four week notice period within which period it was free to proceed with the disciplinary hearing.[230]

From the above, it is safe to conclude that, in South Africa where an employee has resigned with immediate effect, the employment contract does not immediately come to an end and the employer can compel the said employee to continue working until the notice period has expired. In addition, the employer has the authority to continue with the disciplinary hearing during the notice period of the employee because the employer employee relationship still exists. The burning question at this juncture is what are the implications of the *Chiloane* case on the decision of the Lesotho Labour Appeal Court in the *Mahamo* case? If the principle in *Chiloane* was followed in the *Mahamo* case, it would mean that the employer could have proceeded with Mahamo's disciplinary hearing if she had not served the required notice period in terms of her employment contract. Clearly, if she had been found guilty, she would have forfeited her severance pay in terms of section 79 (2) of the *Labour Code*, consequently, there would be no need to invoke asset forfeiture proceedings under those circumstances. However, whilst South African decisions may be persuasive, they are not binding on Lesotho courts this is to say, as far as Lesotho is concerned, the *Mahamo* case represents the position of the law in Lesotho.

Conclusion

This chapter has rigorously explored the concept of asset forfeiture in South Africa by examining its legal framework. The constitutionality of asset forfeiture in South Africa has also been analysed in order to answer the research question of whether asset forfeiture is constitutional. Most importantly, the constitutionality of conviction-based asset forfeiture has been discussed. The question of whether the concept of asset forfeiture constitutes double jeopardy has also been addressed. The application and interpretation of asset forfeiture in South Africa has been methodically demonstrated in this chapter. It is inexorable to conclude that asset forfeiture is internationally recognized and utilized to combat crime. It is constitutional and does not constitute double jeopardy as this has been made perceptible in this chapter. Resignation and disciplinary hearing legal principles have been thoroughly discussed and it can be concluded that

[230] Ibid (n 227) para [23] (Judge Waglay).

in South Africa, the position of the law is that an employment relationship comes to an end at the end of the employee's notice period not when they immediately resign hence the employer has power to discipline the employee during the notice period. The next chapter will identify lessons that Lesotho should adopt from South Africa when applying asset forfeiture to the labour relationship in accordance with what this study is proposing and pertaining to resignation with immediate effect and the power of the employer to hold a disciplinary hearing under those circumstances.

CHAPTER 4

CONCLUSION AND RECOMMENDATIONS

4.1 Introduction

This chapter is going to provide a conclusion and recommendations to this research work. The first part will discuss the findings of the research work and the second section of the chapter will provide a conclusion which will be an answer to the main research question of this study. The third division of this chapter will be recommendations which will finalise this study.

4.2 Finding of the Research Work

The main research question that this study intends to answer is, in what circumstances and/or to what extent, should employees forfeit their severance pay despite resignation prior to their disciplinary hearings? The findings of this research reveal that the remedies provided by the *Labour Code* to protect employers from criminal activities of their employees are inadequate and inept as it has been highlighted in chapter 2. The current position of the law in Lesotho is that, if an employee resigns immediately prior to their disciplinary hearing, the employer must pay that employee's severance pay without any exceptions.

The *Labour Code* provides that:

> Where the termination of employment has been at the initiative of the employee, the employer may either make the severance payment immediately or may hold it in trust for a maximum period of 12 months. When the employer has held the severance payment in trust, the employer shall, immediately upon expiry of the period for which it has been held, pay the employee the sum of the severance payment plus interest at the fair market rate prevailing in the period in question. The placement of any severance pay in trust shall be subject to the provisions of section 89 regarding security from the employer.[231]

[231] *Labour Code*, s 79 (5).

Resignation is termination of employment at the initiative of the employee contemplated by the above section. The *Labour Code* gives the employer two options, namely, to pay severance immediately or to hold severance pay for up to a year in trust. Upon expiry of such time, it is peremptory for the employer to pay the severance pay to the employee added to it, interest at the market rate prevalent at the time of payment. It is said to be peremptory because the section uses the word "shall". The *Interpretation Act* No. 19 of 1977 provides that "in an enactment passed or made after commencement of this Act, "shall" shall be construed as imperative and "may" as permissive and empowering."[232] It is therefore clear that, after the expiry of 12 months it is compulsory for the employer to release the severance pay from the trust and pay the employee with interest added.

From the above analysis of the *Labour Code*, assuming the employer pays the employee severance pay immediately and such payment is made to an employee who has resigned and has committed a serious offence resulting in loss of money by the employer. Thereafter, the employer institutes a civil action to recover the said money. That would not guarantee recovery or compensation on the part of the employer because the employee could spend the said severance together with the illegally obtained money from the employer before the finalisation of the civil case. There are legal expenses to be incurred both by the employer and the employee and the employee most possibly would use the same money to pay for such fees and might be bankrupt upon finalisation of the civil case. The employer might spend more than he has lost trying to recover the illegally obtained monies from the employee by paying heavy legal expenses. Secondly, the employee upon receiving the severance pay from the employer, could, flee the jurisdiction making it hard and impossible for the employer to recover the lost monies.

Should the employer choose the second option of holding the employee's severance in trust for up to twelve months, it is clear that, it is mandatory for the employer to pay the employee their severance pay with interest upon the expiry of twelve months regardless of whatever crimes the employee might have committed against the employer. This holding of severance pay for twelve months, does not guarantee any compensation to the employer for whatever money that he or she may have lost as a result of the employee's criminal activity. This is because, suppose while holding money in trust, the employer institutes a civil action against the employee, it is not

[232] *Interpretation Act* 1977, s 14.

uncommon for a civil case to drag more than a year in Lesotho, this could be caused by lawyers' technicalities or administration issues which lead to frequent postponements of cases. Upon expiry of a year without finalisation of the civil case, the employer would be compelled to pay the employee their severance pay.

To make matters worse, the employer would be obliged to pay the said severance pay with interest on top, not to mention the already spent monies for legal expenses. Upon receiving the severance pay, the employee could spend it on anything they so wish until it is wiped out, abscond from the jurisdiction or even use it to pay his or her legal expenses. This would result in the civil case instituted by the employer being a futile exercise which has resulted in more loss of money on the part of the employer. It is therefore opined that, the findings of this research prove that the remedies available to employers in order to be compensated against loss of money as a result of their employees' criminal conduct under the *Labour Code*, are deficient and scant.

4.3 Conclusion

It is concluded that, the recent South African decision in *Chiloane*[233] that resignation only terminates the employment relationship at the end of the employee's notice period and that before the end of such notice period the employer has power to discipline an employee represents the correct position of the law. In as much as South African decisions are persuasive, they are not binding to Lesotho courts of law as a result, the current authoritative decision on resignation and the power to hold disciplinary hearing thereafter is the *Mahamo* case.

The fact that the *Chiloane* case is not binding to Lesotho courts means that in Lesotho, employees who resign with immediate effect pending their disciplinary hearing are entitled to severance pay in line with the decision in the *Mahamo* case. This is because the *Mahamo* case still represents Lesotho's law on resignation and entitlement to severance pay. As it has been indicated previously in this study, remedies available to employers to recover lost money as a result of employees' criminal activities, under the *Labour Code* are inadequate.

[233] Ibid (n 227).

The way that the research question of this study has been framed suggests that, it is not in all instances where employees should forfeit their severance pay. This is to say, there are instances where employees should forfeit their severance pay and those instances will be the answer of the research question. In chapter 2 it was concluded that the applicable asset forfeiture approach to be applied in order for an employee to forfeit their severance pay is conviction-based asset forfeiture because severance pay cannot be linked to an employee's commission of crime against an employer.

In order to clarify the foregoing statement, it is imperative to revisit the provisions of the *MLPCA* on conviction-based asset forfeiture. Conviction-based asset forfeiture is provided under Part IV of the *MLPCA* and the Act provides that:

> The Authority may apply to the High Court for a restraining order against any realisable property held by the accused or specified realisable property held by a person other than the accused.[234]
>
> An application for a restraining order may be made *ex parte* and shall be in writing and accompanied by an affidavit stating-[235]
>
> Where the accused has not been convicted of a serious offence for which he or she is charged or about to be charged, grounds for believing that the accused committed the offence.[236]
>
> The grounds for the belief that the accused derived a benefit directly from the commission of the offence.[237]
>
> The grounds for the belief that a confiscation order or pecuniary order may be or is likely to be made under this part in respect of the property.[238]
>
> Subject to this section, where the Authority applies to court for a restraining order against property and the court is satisfied that-[239]
>
> The accused has been convicted of a serious offence or has been charged or is about to be charged with a serious offence[240]
>
> There is reasonable cause to believe that the property is tainted in relation to an offence or that the accused derived benefit directly or indirectly from the commission of the offence.[241]

[234] *MLPCA*, s 67 (1).
[235] *MLPCA*, s 67 (2).
[236] *MLPCA*, s 67 (2) (a).
[237] *MLPCA*, s 67 (2)(f).
[238] *MLPCA*, s 67 (2) (h).
[239] *MLPCA* s 68.
[240] *MLPCA*, s 68 (1) (a).

> There are reasonable grounds for believing that a confiscation order or pecuniary penalty order is likely to be made under this Part in respect of the property.[242]
>
> The Court may make an order –
>
> Prohibiting the accused or any person from disposing of, or otherwise dealing with the property or such part thereof or interest therein as is specified in the order, except in such manner as may be specified in the order….[243]

The above section shows that for criminal forfeiture proceedings to be initiated there must be a commission of a serious offence. A serious offence is defined by the *MLPCA* as "any law in Lesotho for which the maximum penalty is death or imprisonment for life or other deprivation of liberty for a period of not less than 24 months and includes money laundering."[244] As explained in chapter 2 the *MLPCA Amendment Act* deleted the expression "24 months" from the principal Act in above stated section and substituted it with "12 months". This is to say that, any offence that is punishable by death, life imprisonment or other dispossession of liberty for a period of not less than a year attracts conviction based asset forfeiture.

If an employee is suspected to have committed a serious offence against their employer and he has been charged or is about to be charged for that offence (at this stage the employee is charged by the competent authority not the employer), the DCEO or any other competent authority may apply for a restraining order against the employee's severance pay because severance pay is property of the accused. If the court grants the sought restraining order, then in accordance with section 68 (1) (e) (i) of the *MLPCA*, every person will be prohibited from dealing in any manner with the said severance pay including the employer. The next question is how long will the restraining order be in force?

The *MLPCA* provides for duration of the restraining order as follows:

> A restraining order remains in force until –
>
> It is discharged, revoked or varied; or[245]
>
> The period of 6 months from the date on which it is made or such later as the court may determine; or[246]

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[241] *MLPCA*, s 68 (1) (c).
[242] *MLPCA*, s 68 (1) (e).
[243] *MLPCA*, s 68 (1) (e) (i).
[244] *MLPCA*, s 2 on the definition of a serious offence.
[245] *MLPCA*, s 70 (a).

> A confiscation order or a pecuniary order as the case may be is made in respect of property which is subject of the order.[247]

The above section provides the answer to the previously raised question on the duration or time that, the restraining order remains in force. It is clear that, if severance pay is restrained in terms of the restraining order, the restraining order remains in force for a period of six months and that six months is extendable by the court. Unlike the *Labour Code* which only permits the holding of severance pay for twelve months without extension, the court has the discretion to decide that the restraining order shall remain in force until a confiscation order or pecuniary penalty order is made pertaining to the restrained severance pay in terms of section 70 (c) of the *MLPCA*.

If the employee is convicted of the serious offence he or she was charged with, it is prudent to look at the relevant sections of the *MLPCA* providing for the next step to be taken by the DCEO. The *MLPCA* provides as follows:

> Where a person is convicted of a serious offence, the authority may not later than 6 months after the conviction, apply to Court for one or both of the following orders-
>
> a confiscation order against property that is tainted property in respect of the offence;[248]
>
> a pecuniary penalty order against the person in respect of benefits derived by the person from the commission of the offence.[249]

The DCEO evidently has two options after conviction of an employee who was charged with a serious offence. The first option is, to apply for a confiscation order against tainted property in respect of an offence and the second alternative is, to apply for a pecuniary penalty order against the employee pertaining to benefits derived by him or her from the serious offence convicted of. In relation to a confiscation order, the *MLPCA* defines tainted property as property that is "used

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[246] *MLPCA*, s 70 (b).
[247] *MLPCA*, s 70 (c).
[248] *MLPCA*, s 37 (1) (a).
[249] *MLPCA*, s 37 (1) (b).

in or intended for use in connection with the commission of a serious offence;[250] derived, obtained or realised as a result of or in connection with the commission of a serious offence."[251]

Severance pay cannot for all intents and purposes be said to be property used or intended to be used in connection with the commission of a serious offence nor can it be identified as property derived as a result of or in connection with a commission of a serious offence. Therefore, in the context of a restrained severance pay and a convicted employee for a charge of a serious offence, the DCEO cannot apply for a confiscation order against severance pay because it does not fall within the scope of the definition of tainted property. Having ruled out the first option of applying for a confiscation order, it is vital to look at the second alternative, being to apply for a pecuniary penalty order.

The pecuniary penalty order is applied for against the person (who in this instance would be the employee) in relation to benefits derived by that person from the serious offence convicted of. Regarding pecuniary penalty orders, the *MPLCA* provides as follows:

> Subject to this section, where the authority applies to Court for a pecuniary penalty order against a person in respect of that person's offence the Court shall, if it is satisfied that the person has benefitted from that offence, order him to pay to the Government an amount equal to the value of his or her benefit from the offence or such lesser amount as the Court certifies in accordance with section 51 (2) to be the amount that might be realised at the time the pecuniary penalty order is made.[252]

The reading of the foregoing section makes it apparent that the DCEO can apply for a pecuniary penalty order against the employee to pay the equivalent of the money (benefit) derived from the commission of a serious offence convicted of. That is to say, if a person has committed theft of ten thousand maloti against their employer and their severance pay is twenty thousand maloti, upon conviction of theft and granting of a pecuniary penalty order against the said employee by a court in accordance with section 48 (1) of the *MLPCA*, then he should be ordered to pay ten thousand from his severance pay which is equivalent to the money he stole from his employer.

[250] *MLPCA*, s 2 on the definition of 'tainted property'.
[251] Ibid.
[252] *MLPCA*, s 48 (1).

The section also answers the most critical question or argument that, how could severance pay be restrained and forfeited yet it is not linked to the commission of a serious offence committed by the employee? The pecuniary penalty order is directed at reversing the illegally obtained benefit from the commission of the offence hence, the court will order payment of the equivalent of the benefit derived from the commission of an offence. The section is undeviating from the principles laid down in the South African decisions of *Mcasa*[253] and *Rautenbach*[254] which Lesotho courts should take lessons from when interpreting pecuniary penalty orders in that, they extend even to property that is not proceeds of crime or connected to crime, the objective behind them is, to reverse the material benefit accrued to the offender hence payment can be obtained from assets that were legitimately acquired such as severance pay.

The above anatomy reiterates the conclusion reached at in chapter 2 of this study that, asset forfeiture is applicable in the labour relationship or context and the question remains, in what circumstances and to what extent is it applicable? It has been mentioned in this chapter that asset forfeiture is prompted by the occurrence of a serious offence. White collar crimes such as theft[255], fraud[256] and bribery[257] as defined by the *PCA* and money laundering[258] as defined by the *MLPCA*, all fall under the category of serious offences because their penalties have an effect of depriving one's liberty for a period of not less than one year. It is therefore concluded that, employees should forfeit their severance pay despite resignation prior to their disciplinary hearings in circumstances where they have committed serious offences as defined by the *MLPCA* and to the extent of the benefit they have derived from the said serious offences.

It should be understood, as it is clear from the analysis of the law that, employees will forfeit their severance pay to the extent of the benefit derived from the commission of the serious offence against their employers. The conclusion or answer to the research question of this study, as stated above, is fair in that asset forfeiture cannot under any circumstances be invoked in the absence of a commission of a serious offence by an employee. For instance, if an employee is called to a disciplinary hearing for insubordination or for arriving late at work then he or she

[253] Ibid (n 118).
[254] Ibid (n 109).
[255] *PCA*, s 57. Under the schedule of penalties of the PCA theft has a penalty of a fine under level 4 which is between M10 000.00 and M15 000.00 and or imprisonment up to 10 years or both.
[256] *PCA*, s 68. Under the schedule of penalties of the *PCA* fraud has a penalty of imprisonment of up to 20 years.
[257] *PCA*, s 80. Under the schedule of penalties bribery has a penalty of imprisonment of up to 20 years.
[258] *MLPCA (Amendment)* 2016, s 25 (4) Money Laundering has a penalty of imprisonment not exceeding 25 years.

resigns before their disciplinary hearing is held, asset forfeiture proceedings against such employee's severance pay cannot be invoked under those circumstances because there is no commission of a serious offence as defined by the *MLPCA* on the part of the employee. In addition, there is no monetary benefit that has accrued to the employee for the said insubordination or late arrivals to work.

The obvious question that can be posed against the conclusion of this research work is that, what then would happen in instances where the employee's severance pay is less than the benefit derived by the employee from the commission of a serious offence against their employer? The simple answer to this question would be that, at the time of applying for a restraining order, severance pay together with any other property movable or immovable belonging to the employee should be included in the said application. Following conviction of the employee, their severance pay together with the restrained property will be forfeited under the confiscation order or pecuniary penalty order or both as the case may be. The other property other than severance pay, will be sold and the proceeds thereof coupled with the already forfeited severance pay, will be added together to add up to the equivalence of the benefit derived by the employee from the commission of a serious offence, in order to compensate the employer for the loss.

At first glance, asset forfeiture seems draconian, harsh and oppressive hence it was challenged to be unconstitutional and having a double jeopardy effect when it was introduced. However, as it was stated in this study, the rationale behind asset forfeiture is to deter crime, remove the incentive to commit crime, remove and reverse the illegally gained benefits and to compensate victims of crime amongst others. In this study, the biggest concern is to remove the incentive to commit crime by employees against their employers, to reverse whatever illegal monetary benefits accrued to employees derived from their serious offences against their employers and finally, to compensate employers as victims of serious crimes committed by their employees.

The *MLPCA* has established a criminal asset recovery fund[259] which consists of all monies that are obtained through executions of confiscation and forfeiture orders under the *MLPCA.*[260] Victims of serious crimes are compensated through this fund in connection with forfeitures or

[259] *MLPCA*, s 109 provides that: "The Minister shall establish a fund to be known as the Criminal Asset Recovery Fund."
[260] *MLPCA*, s 110 (a) provides that: "The fund shall consist of all monies derived from the execution of confiscation and forfeiture orders contemplated in this Act."

confiscation orders executed in relation to the said crimes. This is to say, employers will be compensated with the confiscated severance pay and should it be less than the benefit derived by the employee, then proceeds of sales of other properties of the employee which would have been deposited into the criminal asset recovery fund will be given the employer to compensate them the equivalence of the money lost as a result of the employees' serious offences. On the other hand, it is possible that the employee may ultimately be acquitted by the criminal court before which he or she was being prosecuted for a serious offence(s) he was suspected to have committed, in such circumstances, the acquitted employee shall claim severance pay plus interest based on the duration of the criminal trial against the DCEO and that employee will be compensated from the criminal asset recovery fund. It should also be recalled that, the court has discretion, on good cause shown, to order that, a person whose property is restrained be given money for reasonable living expenses in terms of the *MLPCA*. If for instance, the criminal trial is delayed as a result of the conduct of the prosecution or any other reason that is not the employee's fault, then the court can order that the employee be given money for reasonable living expenses and legal fees.

Conviction-based asset forfeiture proceedings make it a must that a person should be charged or at least about to be charged before they are instituted, this means that the employee will be remanded before a criminal court and either granted bail or not. The advantage is that, if granted bail, the employee may be given bail conditions amongst others that he or she surrenders his or her passport to the police in order to ensure that they do not abscond, if not admitted to bail, then he or she will await the trial while in custody, therefore, one way or the other, the employee's presence will be secured. The other advantage on the part of the employers is that they will be compensated without losing any money on legal fees or any other associated expenses which would be incurred while trying to recover the lost money. This is because the competent authorities have been funded to recover proceeds of crime and reverse illegally obtained benefits or profits. For instance, the DCEO has been allocated seventy four million maloti (M74 000. 000.00) for the 2023/2024 fiscal year to combat economic offences.[261] Therefore, competent authorities will use their own resources to initiate asset forfeiture proceedings and recover

[261] Honourable Retsilisitsoe Matlanyane, 'Budget Speech to the Parliament of the Kingdom of Lesotho for the 20223/2024 fiscal year: From Reconstruction and Recovery to Growth and Resilience' (Maseru, Lesotho 27th February2023)<http://www.finance.gov.ls/documents/Budget%20Formulation/budget%20speeches/Budget%20Speech%20Final%202023-24.pdf>accessed 19 May 2023.

monies lost on behalf of employers and this is impossible under the remedies provided by the *Labour Code*. It is therefore maintained that, asset forfeiture is the most effective enforcement tool to protect employers and to compensate them in the event of loss of money through their employees' criminal activities.

The prodigious protection of severance pay and deduction of employees' wages by the *Labour Code* and ILO Conventions is recognized, however, the *Labour Code* and ILO Conventions' protection of such cannot justifiably be interpreted to extend to serious offences committed by employees. Differently put, the protection afforded to employees' severance pay and deduction of wages is not unlimited. If the *Labour Code* or ILO Conventions would protect such deductions even in the event of them being made on the basis of employees' serious offences then such protection would clash with the UN Conventions and the *MLPCA*. The *Labour Code* would defeat the very purpose of the *MLPCA* to implement asset forfeiture against serious offences.

The *Labour Code* provides that:

> Subject to the limitations prescribed by the Code and sections 45 and 46 of the Subordinate Courts Order 1988, an employer may make the deductions from wages authorised by this section; no other deductions shall be permitted.[262] In accordance with obligations imposed by any written law or with the written consent of the employee deductions may be made from the wages of such employee for the purposes of[263] a payment by the employer on the employee's behalf of…….<u>any amounts which the court has ordered</u> or the employee has requested the employer to remit directly to the spouse or other dependant or relative of the employee.[264]

The above quoted section of the *Labour Code* is clear that, deductions of any amounts can be made from the employee's wages, if a court has ordered such deductions. It therefore cannot be said that, asset forfeiture violates section 85 of the *Labour Code* which provides instances where deductions from employees' wages can be made. This is because, the severance pay deductions will be a result of a pecuniary penalty order issued by a court. Therefore, the *Labour Code* is not in conflict with the *MLPCA* as it recognizes the possibility of courts to order deductions from employees' wages under section 85.

[262] *Labour Code*, s 85 (1).
[263] *Labour Code*, s 85 (2).
[264] *Labour Code*, s 85 (2)(a)(iii). (emphasis added).

It is accordingly concluded that, the answer to the main research question of this study is that, employees should forfeit their severance pay despite resignation before their disciplinary hearings in circumstances where, they have committed serious offences as defined by the *MLPCA* against their employers and to the extent of the benefit they have derived from the said offences.

As it has been mentioned in chapter 2, the DCEO successfully applied asset forfeiture in the employment relationship in the *Tjabane* case where the two employees were suspected to have defrauded their employer huge sums of money and the court restrained the said employees' retirement benefits upon application by the DCEO for a restraining order of such and other properties in terms of the *MLPCA*. The *Tjabane* case is proof that asset forfeiture proceedings are applicable in the employment relationship when there is a suspicion of commission of a serious offence. Therefore, it is also concluded that asset forfeiture could have been applicable in the *Mahamo* case.

4.4 Recommendations

It is recommended that section 79 of the *Labour Code* should be amended by adding a subsection that provides that "An employee who has been found guilty of a serious offence by a court of law shall forfeit severance pay to the extent of the benefit derived from that serious offence". The *Labour Code* should thereafter, include in its interpretation and definition section, the definition of a serious offence. It is suggested that the definition should read as follows: "a serious offence is an offence defined as a serious offence by the *Money Laundering and Proceeds of Crime Act* No. 19 of 2008 as amended."

The above amendment would readily inform the employees about consequences of their criminal activities. On the other hand, it would give employers some confidence that they are protected against potential criminal conduct of their employees. The amendment would also prove that the *Labour Code* is not in anyhow in conflict with the *MLPCA* and its purpose. This amendment would undoubtedly instil discipline on employees knowing well that should they be found guilty for their criminal conduct such would have an adverse impact on their severance pay. It is also recommended that, asset forfeiture should equally apply to employees in the public sector and

not only in the private sector. It should be invoked in a similar manner against employees' retirement benefits and pensions should they commit serious offences against the government of Lesotho. However, it is proposed that in order to avoid wasting of government resources, the DCEO should only invoke asset forfeiture proceedings in the employment context where the suspected money involved is not less than one hundred thousand maloti. For instance, the DCEO invoked asset forfeiture proceedings in the employment relationship in the *Tjabane* case where the employees were suspected to have defrauded their employer over five million maloti. In cases such as the *Mahamo* case involving a few thousands, the employers should resort to remedies available to them under the *Labour Code*. The *Mahamo* case was used as an example in this study, to demonstrate that in circumstances where the employee has resigned with immediate effect, pending their disciplinary hearing, it is possible to forfeit severance pay nonetheless through the invocation of asset forfeiture.

It is suggested that, Lesotho courts should take lessons from the *Phillips*' case on the justification of conviction-based asset forfeiture against the arguments of its constitutionality and double jeopardy effect should they arise in future. The case was discussed extensively in chapter 3 and it is very persuasive because perusal of the Lesotho's *MPLCA* and South African's *POCA* evidences that, the Acts are enormously similar. That case, as it was discussed held that, conviction-based asset forfeiture is constitutional and it does not constitute double jeopardy.

It is proposed that, employers and competent authorities should have a memorandum of understanding pertaining to commission of serious offences in the workplace. The memorandum of understanding should urge employers to report their suspicions of serious offences by their employees timeously in order for the competent authorities to take action by investigating and initiating asset forfeiture proceedings speedily. The DCEO for example, has four departments being Prevention, Education, Investigation and Prosecution. The Prevention and Education departments are urged to visit workplaces to edify employees about serious offences and the consequences that come with such should a person be convicted.

The aforesaid educational and preventive measures that will be applied by the DCEO in the workplaces would obviously decrease criminal activities in the workplaces. Crime is not only

eradicated through successful prosecution but prior education to employees as a preventive measure can be an effective strategy to combat crimes in workplaces. This would lead to a win-win situation because economic crimes in the employment sector would be decreased, employers would be protected and employees would desist from criminal activities. It should be noted that, the aim is not to punish employees but to remove the incentive to commit crime in order to minimize criminal activities in the workplace. Reduced crime rate in the workplace and in the entire employment sector would make Lesotho's investment climate conducive and attractive to domestic, foreign and direct investment which would ultimately improve the country's economy. Low crime rate in the employment sector would also mean more profits for employers and this would lead to more creation of jobs and improvement of the people's livelihoods.

It is recommended that, in future, where the issue of resignation with immediate effect and the power of the employer to proceed with the disciplinary hearing under those circumstances arise, the Lesotho Labour Appeal Court should consider revisiting its decision in the *Mahamo* case given the recent discussed developments in South Africa on the issue. It is also suggested that, as a safeguard, the *Labour Code* should have a statutory notice period like the *BCEA* which will be applicable in situations where the contract of employment did not have a provision on notice period. In this way, the *Labour Code* will have a remedy for employers to hold employees whose contracts of employment did not have a notice period and who resigned with immediate to statutory notice period. This would also minimize the invocation of asset forfeiture in the employer employee relationship.

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