CONFISCATION ORDERS IN TERMS OF THE
PREVENTION OF ORGANISED CRIME ACT

BY

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SUMMARY

The Prevention of Organised Crime Act brought major changes to the South African criminal law context. Through the Act, major confiscatory provisions were established. The Act does not only target convicted criminals, but also any person who is in possession of tainted property that was used in the commission of offences. Civil forfeiture is the most widely used procedure in forfeiture proceedings. In the dissertation the effectiveness of criminal and civil confiscation is outlined. The historical development of confiscation and forfeiture provisions in South African is discussed with reference to the common law, legislation and international instruments and how international developments have influenced local development. This treatise consist of an overview of the confiscation provisions in the Prevention of Organised Act 121 of 1998 as one of the measures the South African legislature put in place to deal with organised crime. Since the Prevention of Organised Crime Act was passed, the courts have given meaning to what is an instrumentality of an offence and the proceeds of unlawful activities as a measure to counter organised crime. This treatise refers to those cases given the definition of an instrumentality of an offence and the proceeds of unlawful activities. For the purpose of effectively dealing with organised crime, this treatise contains a discussion on the effectiveness of criminal and civil confiscation procedure. The justification for asset forfeiture is outlined.
CHAPTER ONE

Introduction

During the past decade, a number of far-reaching international, regional and subregional legal instruments and agreements have been developed to facilitate joint action against organised crime, corruption, money laundering and terrorism. Some of these include the United Nations (UN) Convention against Transnational Organised Crime (2000), the Southern African Development Community (SADC) Protocol against Corruption (2001), the Financial Action Task Force (FATP), established by the G7 Summit of 1989, and the International Convention for the Financing of Terrorism (1999). These instruments impose significant obligations on those states that ratify them, particularly on developing and least developed countries. ¹

The combating of organised crime, corruption and money laundering has been on national agendas for many years. International responses to these issues seem to develop when international concerns and pressures reach a momentum, which becomes self-propelling and then culminates in international agreements to take action. The concerns and priorities of developed countries are inevitably the main driving force behind the development of such international instruments. ² In South Africa, the dawn of human rights in the 1990’s was accompanied by violent and serious crime on a scale and distribution not seen before, as well as crime associated with

² Supra
international organised drug trafficking groups. The United States has been quick to assist South Africa with its programme aimed at organised crime. South Africa's Prevention of Organised Crime Act, an Omnibus Act which also includes provisions on criminal and civil forfeiture, is based on the controversial Racketeer Influenced and Corrupt Organisations Act (RICO) of the United States. Since the passing of the Prevention of Organised Crime Act the South African law enforcers were now in the position to hit criminals where it hurt most, that is to take the profit out of crime. ³

CHAPTER TWO

HISTORICAL DEVELOPMENT OF THE CONCEPT OF CONFISCATION

2.1 INTRODUCTION

For many centuries criminals have been taking steps to hide or disguise the true nature of the proceeds of their crime. Their main motives have been to avoid incrimination by their illgotten gains and to protect the proceeds against possible forfeiture. In the past, the law enforcement system has not paid particular attention to these acts. The main focus of the law and of law enforcement fell on the crime that gave rise to the proceeds and the acts in connection with those proceeds were either ignored or investigated solely in an attempt to link the criminal to the original crime.4

The return of South Africa to the international arena, the deregulation of financial markets and the advances in communication technology have brought a dramatic increase in organised crime. Although it is difficult to quantify the extent of drug trafficking, organised and white-collar crime, the then Minister of Justice, Mr Dullah Omar, stated at a money laundering seminar in 1995 that there were some 300 international crime syndicates operating in South Africa, involved mainly in drug trafficking and money laundering. The Minister also said that controls over money invested in South Africa were inadequate and that banks were being used to launder illicit profits.5

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LOCAL DEVELOPMENT: POSITION IN SOUTH AFRICA BEFORE LEGISLATION

The Common Law

The punishment inflicted by the criminal justice system in the past often failed to strip offenders of the profits of their economic crimes. Fines could be imposed and instruments and evidence of criminal activity, as well as illegal goods, could be forfeited to the State, but in many cases, even where those measures were applied, the offender was left with a substantial illicit profit. Criminals regularly spent lengthy terms in prison knowing that they would be able to enjoy the proceeds of their offenses and perhaps invest these criminal activities upon their releases. 6

Today our common law contains crimes and other provisions that may still be employed by investigators and prosecutors in money laundering cases, eg:

(i) Fraud;
(ii) Complicity (either as an accomplice or accessory after the fact); and
(iii) Defeating or attempting to defeat the ends of justice. 7

Legislation

The Drugs and Drug Trafficking Act 8 contained the first general South

\[^{5}\text{De Koker \\& Henning Money Laundering Control in South Africa (1998) 38 }\]

\[^{6}\text{De Koker \\& JL Pretorius: "Confiscation orders in terms if the Proceeds of Crime Act: Some Constitutional Perspectives": TSAR 1998 277-283}\]

\[^{7}\text{Van Wyk "Current situation and countermeasures against money laundering in South Africa": 117 International Seminar Papers Resource Material Serials No 58}\]

\[^{8}\text{140 of 1992}\]
African legislative provisions authorising South African courts to confiscate proceeds of crime. A specified money-laundering offence also first appeared on the South African statute book in the Drugs and Drug Trafficking Act. 9

The forfeiture provision is contained in Section 25(1) and reads as follows:

When a person is convicted of an offence under Drugs and Drug Trafficking Act, the court can after punishment declare any scheduled substance, drug or property by which the offence was committed of which was found in possession of the accused forfeited to the State. Any animal, vehicle, vessel, aircraft, container or other article which was used for in connection with the commission of the offence or for the storage, conveyance, removal or concealment of any scheduled substance, drug or property by means of which the offence was committed can be forfeited to the State.

The confiscatory powers of the courts only take effect after conviction and only in respect of offences committed under the Act.

South African law did not recognise the manipulation of the proceeds of crime in general as an offence. Where the Drug Act 10 did not apply, no offence would be committed unless the methods used to bring about the misrepresentation about the origin or nature of the illegal proceeds constituted another offence, such as fraud. Nor did the law provide for a procedure whereby the proceeds of crime in general could be confiscated. 11

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9 140 of 1992
10 140 of 1992
11 Itzikowitz "The Prevention and Control of Money-laundering in South Africa" THRHR
The legislative powers under the Drugs and Drug Trafficking Act were limited only to the proceeds of drug related offences.

Although this mechanism has been available since 30 April 1993, it has not been utilised effectively. Wider powers in this respect were investigated by the South African Law Reform Commission as part of a research project on international co-operation in criminal matters and its research led to the enactment of the Proceeds of Crime Act. 12

The Proceeds of Crime Act 13 criminalises the proceeds of any criminal activity and provides for restraint and confiscation orders in respect of such proceeds. 14 The Act, which came into operation in May 1997, provides for the recovery of the proceeds of crime. In terms of the Act, a court can enquire into any benefit which the accused may have derived from the offence of which she or he has been convicted. If such a benefit is found to exist, the court can make an order confiscating from the accused the proceeds of the offence. Any question of fact to be decided by the court in such an enquiry is decided on a balance of probabilities. Normally, disputes of fact have to be proved beyond reasonable doubt, a higher burden of proof against an accused in a criminal trial. The Act makes laundering a criminal offence. Business owners and managers, who have reasons to suspect that

12 De Koker & Pretorius "Confiscation Orders in terms of the Proceeds of Crime Act: Some Constitutional Perspectives" TSAR

13 76 of 1996

14 76 of 1996
any property which comes into their possession is the proceeds of crime, are obliged to report their suspicion. Failure to comply is a criminal offence. 15

The Proceeds of Crime Act 16 has repeated the chapter in the Drugs and Drug Trafficking Act 17 dealing with restraint and confiscation orders and was therefore the main South African legislative instrument regulating the confiscation of proceeds of crime. The confiscation provisions of the Proceeds of Crime Act were modelled on the confiscation of the Drugs and Drug Trafficking Act 140 of 1992 as these provisions, which have now been repealed by the Proceeds of Crime Act, reflect a strong influence by the English Drug Trafficking Offences Act 1986. The confiscatory provision (Section 8) in the Proceeds of Crime Act reads as follows:

When an accused (defendant) is convicted of an offence the court that convicted the defendant may, on application of the Prosecutor, enquire into any benefit which the accused may have derived from such offence or any related criminal activity and, if the court finds that the accused has so benefitted, the court may, in addition to any sentence which it may impose in respect of the offence, make an order against the accused for the payment to the State of such amount as it may consider appropriate. The amount shall not exceed the value of the accused proceeds of such offence or any related criminal activity as determined by the court in accordance with the provisions of the Act. If the court is satisfied that the amount which might be realised contemplated in Section 10 (1) of the Act is less than the value referred to in Section 8(1)(a), shall not exceed an amount which in the opinion of the court might be so realised.

English authority in respect of English confiscation provisions can provide some guidance in the interpretation of equivalent provisions in the Proceeds

15 Schöneich "How strong is the State's response to organised crime?" South African Security Review 1999 Vol 8 No 2

16 76 of 1996

17 140 of 1992
of Crime Act. The practical implementation of the Act was not successful. Between May 1997 and April 1998 only one confiscation order was issued in terms of the Act. Businesses such as pawnbrokers, attorneys profession, jewellers, second hand car dealers, and scrapmetal dealers were accused of neglecting their duties in terms of the Act. The Act was subsequently repealed and replaced by the Prevention of Organised Crime Act.

23 HOW INTERNATIONAL DEVELOPMENTS HAVE INFLUENCED LOCAL DEVELOPMENT

23.1 The Financial Action Task Force

The Financial Action Task Force (FATF) was established by the G-7 summit in Paris in July 1989 to examine measures to combat money laundering. Originally comprising the G-7 member states, the European commission, and eight other countries, the FATF was mandated to examine money laundering techniques and trends, review existing national and international legislation and enforcement and define measures needed to combat money laundering.

The FATF is an inter-governmental body whose purpose is to establish

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international standards, and develop and promote policies, both at national and international levels, to combat money laundering and terrorist financing. The FATF is a policy making body which works to generate the necessary political will to bring about national legislative and regulatory reforms in these areas. The FATF also regularly examines methods and techniques of money laundering and terrorist financing to ensure the continual relevance of its policies and standards.  

In 1990, the FATF formulated the Forty Recommendations to address the problem of measures to combat money laundering. The recommendations were accepted by the G-7 summit in Houston in July 1990. In 1991 it was decided to continue the FATF for another five years, subject to a mid-term progress review. The lifespan of the FATF has repeatedly been extended for similar limited periods. In 2004 its mandate was renewed until 2012. The current membership of the FATF comprises 31 governments and two regional organisations. The FATF membership increased to 33 when South Africa and the Russian Federation were allowed to join in June 2003. 

The Forty Recommendations are a comprehensive blueprint for action against money laundering. They cover the criminal justice system and law enforcement, the financial system and its regulation, and international co-operation. Each FATF member has made a firm political commitment to combat money laundering based on them. The Forty Recommendations have come to be recognised as the international standard for anti-money laundering.

laundering programmes. A number of non-FATF member countries have used them in developing their efforts to address the issue. 23

In respect of Recommendation 3, countries should adopt measures similar to those set forth in the Vienna and Palermo conventions, including legislative measures, to enable their competent authorities to confiscate property laundered, proceeds from money laundering or predicate offences, instrumentalities used in or intended for use in the commission of those offences, or property of corresponding value, without prejudicing the rights of bona fide third parties.

Such measures should include the authority to:

(a) identify, trace and evaluate property which is subject to confiscation;

(b) carry out provisional measures, such as freezing and seizing, to prevent any dealing, transfer or disposal of such property;

(c) take steps that will prevent or void actions that prejudice the State’s ability to recover property that is subject to confiscation; and

(d) take any appropriate investigative measures. 24

22 De Koker KPMG Money Laundering Control Service 2004 COM 1-11
23 WWW1.0ecd.org/fatf accessed on 18/5/2004
24 www2.oecd.org/paft accessed on 18/5/2004
Countries may consider adopting measures that allow such proceeds or instrumentalities to be confiscated without requiring a criminal conviction, or which require an offender to demonstrate the lawful origin of the property alleged to be liable to confiscation, to the extent that such requirement is consistent with the principles of their domestic law.  

2 3 2 The United Nations Convention against illicit traffic in narcotic drugs and psychotropic substances

The UN Convention requires states party to the convention to adopt forfeiture provisions. The United Nations Convention against illicit traffic in narcotic drugs and psychotropic substances was adopted by the UN conference at its 6th plenary meeting on 19 December 1988. South Africa was one of the African countries party to the convention. Most countries, including South Africa, that have adopted laws against organised crime reflect the provisions recommended by the convention, but have extended them to cover criminal activities other than drug offences.  

With regard to forfeiture in terms of article five of the convention, each party state must adopt measures to enable confiscation of proceeds derived from drug offences, or property of which the value corresponds to that of such proceeds, and narcotic drugs and psychotropic substances, materials and

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25 Supra

equipment, or other instrumentalities used in or intended for use in any manner in drug offences.

Such party state must adopt measures to enable its competent authorities to identify, trace, and freeze or seize proceeds, property, instrumentalities or any other things referred to in defining the drug offences, for the purpose of eventual confiscation.

In order to carry out the measures referred to in this article, each party state must empower its courts or other competent authorities to order that bank, financial or commercial records should be made available or seized. A party should not decline to act under the provisions of this paragraph on the ground of bank secrecy.

Proceeds or property confiscated by a party must be disposed of by such a party according to its domestic law and administrative procedures. If proceeds have been transformed or converted into other property, such property shall be liable to the annexure referred to in this article (Art5) instead of the proceeds.  

At the 11th Congress of the United Nations on Crime Prevention and teh Rehabilitation of Offenders, it was reported that since economic crimes, including money-laundering, are committed for the purpose of obtaining

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profit, tracing, freezing, seizing and confiscating the proceeds are the most effective measures against those criminal activities. The latest sets of measures that the international community agreed to take can be found in the Organised Crime Convention and more recently, in the United Nations Convention against Corruption, especially its chapter on asset recovery. There is an urgent need to enhance domestic and international efforts to further development and utilize those measures to the full. 28


In respect of section 26 of the Act that deals with restraint orders the National Director of Public Prosecutions may by way of an application apply to the High Court for an Order prohibiting any person from dealing in any manner with any property to which the Order relates.

Section 38 of the Act deals with the Preservation of Property in that the National Director of Public Prosecutions is empowered by way of an application, to apply to the High Court for an Order prohibiting any person, subject to conditions as may be specified, from dealing in any manner with

28 Qorodema "Tracing proceeds of crime in South Africa, Challenges and Milestones" 2006 I55 Monograph Series No 124 Page 121
any property. In respect of Section 41 of the Act any police official is empowered to seize any such property if he or she has reasonable grounds to believe that such property will be so disposed of or removed, in order to prevent property that is subjected to a preservation of property order from being disposed of or removed contrary to that Order. In terms of Section 38 of the Act, if a preservation of property is in force, the National Director of Public Prosecutions may apply to the High Court for an Order forfeiting the State all or any of the property that is subject to the preservation of property order.

In respect of Section 50 of the Act the High Court can make an order applied for under Section 48(1) if the court finds on a balance of probabilities that the property concerned is an instrumentality of an offence, is the proceeds of unlawful activities, or is the property associated with terrorist and related activities.

25 CONCLUSION

Since entering the international arena in 1994 after decades of isolation and with the new political dispensation, there was a need for South Africa to change its forfeiture laws, that was mainly confined to the Drugs and Drug Trafficking Act. 29 Confiscation was only limited to after conviction proceedings. The Prevention of Organized Crime Act 30 extended the confiscatory powers of courts to make forfeiter orders even before convicting

29 140 of 1992
an accused. It may not be the accused person that the court makes a confiscation order but any other person. In the next chapter the confiscatory provisions will be evaluated in more detail.
CHAPTER THREE
AN OVERVIEW OF THE CONFISCATION PROVISIONS IN THE PREVENTION OF ORGANIZED CRIME ACT

3 1 INTRODUCTION
This chapter deals with the Prevention of Organized Crime Act \(^{31}\) in details as far as the confiscatory provisions is concerned. The confiscatory provisions is outlined in detail. An overview is given as to what is civil confiscation and criminal confiscation in terms of the Act. The chapter deals further with the purpose of the Prevention of Organised Crime and why it was put in place. The chapter further discussed the making of a preservation order and the creation of the Asset Forfeiture Unit. This chapter basically outlines and gives an overview of the confiscatory provisions in the Prevention of Organised Crime Act.

3 2 THE SOUTH AFRICAN GOVERNMENTS INITIATIVES TO COMBAT ORGANISED CRIME
The growth of organised crime is an international phenomenon, its rapid growth in South Africa post 1990 is a matter of serious concern. At security level the Government has taken a number of positive initiatives to deal with the problem. The establishment of the Scorpions, as well as the introduction of legislation allowing for the assets of people involved in organised crime to be seized to the State, are two such initiatives. The factors contributing to organised crime as well as the expansion of the operations and activities

\(^{31}\) 121 of 1998
of organised crime groups clearly point to the need for this problem to be addressed at all levels of government.  

The main focus of concern (and the main reason behind the Prevention of Organized Crime Act is the fact that South African common and statutory law is simply not geared to deal effectively with organised crime and criminal gang activities.  

3 3  THE PREVENTION OF ORGANISED CRIME ACT NO 121 OF 1998  
(GENERAL OVERVIEW)  
The Act provides for the recovery of the proceeds of unlawful activity, for the civil forfeiture of criminal property that has been used to commit an offence, property that is the proceeds of unlawful activity of property that is owned or controlled by or on behalf of, an entity involved in terrorist and related activities and to provide for the establishment of a Criminal Assets Recovery Account.  

3 4  THE PURPOSE OF THE PREVENTION OF ORGANISED CRIME ACT  
The Bill of Rights in the Constitution of South Africa enshrines the rights of all people in South Africa and affirms the democratic values of human dignity, equality and freedom. The Constitution places a duty on the state to protect, promote and fulfil the rights in the Bill of Rights. There is a rapid growth of

32 Irish & Qhobosheane "Penetrating State and Business Organised Crime in Southern Africa" 2003 Monograph No 89 127  
34 The Preamble of Act 121 of 1998
organized crime, money laundering and criminal gang activities nationally and internationally and organized crime has internationally been identified as an international security threat. Organized crime, money laundering and criminal gang activity infringe on the rights of the people as enshrined in the Bill of Rights and present a danger to public order and safety and economic stability, and have the potential to inflict social damage. The South African common law and statutory law fail to deal effectively with organized crime, money laundering and criminal gang activities, and also fail to keep pace with international measures aimed at dealing effectively with organized crime, money laundering and criminal gang activities.

Already the confiscatory powers given to state institutions is evident as set out in the Preamble of the Prevention of Organized Crime Act:

It is as follows that, (1) no person convicted of an offence should benefit from the fruits of that offence eg. money laundering, organized crime, whether such offence took place before or after the commencement of this Act, legislation is necessary to provide for a civil remedy for the restraint and seizure, and confiscation of property which forms the benefits derived from such offence; (2) no person should benefit from the fruits of unlawful activities, nor is any person entitled to use property for the commission of an offence, whether such activities or offence took place before or after the commencement of the act, legislation is necessary to provide for a civil remedy for the preservation and seizure and forfeiture of property which is derived from unlawful activities or is concerned in the commission or suspected commission of an offence.

3.5 CONFISCATION AND FORFEITURE PROVISIONS

The Prevention of Crime Act \(^{35}\) contains two separate procedures for
depriving criminals of the proceeds of their activities: The criminal confiscation procedure \textsuperscript{36} and the civil forfeiture procedure. \textsuperscript{37} The criminal confiscation procedure may only be instituted once a person is convicted of an offence. The procedure consists of an enquiry instituted by the trial court at the request of the public prosecutor. The purpose of the enquiry is to determine the benefit which the offender has derived from the offence of which he or she is convicted, as well as from other related unlawful activities. This enables the court to order the confiscation of property to the value of the benefit through issuing a confiscation order. The confiscation order is similar to a judgement for the payment of a sum of money and is made in addition to any other sentence that the court may impose.

Although the criminal confiscation enquiry may only be instituted after conviction, the procedure to be followed at the enquiry is a civil procedure. This means that the rules of evidence applicable in civil proceedings apply at such an enquiry and that the burden of proof is one of a balance of probabilities. For a confiscation order to function effectively, it must be supported by a proactive measure to obtain control over the offender’s realisable property before issuing a confiscation order. This is necessary to prevent a person who may be subjected to a confiscation order from disposing of property that may be used to satisfy the order, or from diminishing its value before the confiscation order is issued. Such an order is referred to as an restraint order. The aim of the restraint order is to freeze the

\textsuperscript{36} Chapter 5 of Act 121 of 1998
financial position of the offender or suspected offender, and may be granted even if the investigation is still pending. 38

3 5 1 CRIMINAL CONFISCATION PROCEDURE IN TERMS OF THE PREVENTION OF ORGANIZED CRIME ACT

Section 18 of the Act governs the procedure that a court follow after convicting an accused.

The provisions of Section 18 is as follows:

When a defendant or an accused is convicted of an offence the court that convicted an accused may, on the application of the prosecutor, enquire into any benefit which the accused may have derived from that offence, any other offence of which the accused has been convicted at the same trial and any criminal activity which the court finds to be sufficiently related to those offences.

If the court finds that the accused has benefitted, the court may, in addition to any sentence which it may impose in respect of the offence, make an order against the accused for the payment to the state of any amount it considers appropriate. The court may also make any further orders as it may deem fit to ensure the effectiveness and fairness of that order. The section reads further that the amount which a court may order the accused to pay to the state shall not exceed the value of the accused’s proceeds of the offences or related criminal activities as determined by the court. The court that convicted an accused may, when passing sentence, indicate that it will hold the confiscation enquiry at a later stage if it is satisfied that the enquiry will unreasonably delay the proceedings in sentencing the accused or the prosecutor applies to the court to first sentence the accused and the court is satisfied that it is reasonable and justified to do so in the circumstances.

3 5 2 CIVIL CONFISCATION PROCEDURE

The civil forfeiture procedure allows for the forfeiture of property without first obtaining a conviction, or indeed instituting a criminal prosecution, against

37 Chapter 6 of Act 121 of 1998

38 Smith "Clean money, suspect source: Turning organised crime against itself" 2001 I55 Monograph No 51 49-50
any person. It is a procedure based on the nature of the affected property itself and it therefore sometimes referred to as an action *in rem*. The property in question must be tainted, either by being the proceeds of unlawful activities or being used in the commission of an offence the procedure is initiated by issuing a Preservation of Property order. That serves to gain control over property that may have to be forfeited to the State, similar to a restraint order in the confiscation procedure.  

A hearing to determine whether the property is indeed tainted follows the Preservation of Property order. This must be proved during the hearing on a balance of probabilities. A person with an interest in the property concerned may participate in the forfeiture hearing in one of two ways. He or she may oppose the application on the basis that the property is not tainted. Alternatively, he or she may apply for the exclusion of his or her interest in the property on the basis that he or she was unaware that the property is tainted. If the court finds that the property is tainted, it issues an order which declares the property forfeit to the State.  

3 6  **PRESERVATION OF PROPERTY ORDERS IN TERMS OF THE ACT**

Prior to making an confiscation order, the court can make an preservation order to prohibit any person from dealing in any manner with the tainted property.

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39 Smith "Clean money, suspect source: Turning organised crime against itself" 2001 I55 Monograph No 51, 50

40 Smith "Clean money, suspect source: Turning organised crime against itself" 2001 I55 Monograph No 51 page 50
Section 38 of the Act empowers the National Director of Public Prosecutions by way of *ex parte* applications to apply to a High Court for an order prohibiting any person, subject to conditions and exceptions as may be specified in the order, from dealing in any manner with any property.

*The High Court shall make an order if there are reasonable grounds to believe that the property concerned is an instrumentality of an offence referred to in Schedule 1 of the Act, is the proceeds of unlawful activities or is property associated with terrorist and related activities. A High Court that makes a preservation of property order shall at the same time make an order authorizing the seizure of the property concerned by a police official, and any other ancillary orders that the court considers appropriate for the proper, fair and effective execution of the order.*

361 THE APPLICATION FOR A FORFEITURE ORDER IN TERMS OF THE ACT

Section 48 of the Act empowers the National Director of Public Prosecutions when a preservation of property order is in force, to apply to a High Court for an order forfeiting to the state all or any of the property that is subject to the preservation of property order. The National Director shall give 14 days notice of an application to every person who entered an appearance in terms of section 39(3) of the Act. Any person who entered an appearance in terms of section 39(3) may appear at the application to oppose the making of the order, or to apply for an order to exclude his or her interest in that property from the operation of the order or varying the operation of the order in respect of that property and may adduce evidence at the hearing of the application.
3 6 2 THE MAKING OF A FORFEITURE ORDER IN TERMS OF THE ACT

In terms of section 50 of the Act the High Court shall make an order that was applied for by the National Director if the court finds on a balance of probabilities that the property is an instrumentality of an offence referred to in Schedule 10 of the Act, is the proceeds of unlawful activities or is property associated with terrorist and related activities. The absence of a person whose interest in property may be affected by a forfeiture order does not prevent the High Court from making the order. The validity of a confiscation order is not affected by the outcome of criminal proceedings, or of an investigation with a view to institute such proceedings, in respect of an offence with which the property concerned is in some way associated.

3 7 THE ASSET FORFEITURE UNIT

An Asset Forfeiture Unit was created in terms of the National Prosecuting Authority Act 32 of 1998. The Unit is headed by a Special Director and is located in the office of the National Director of Public Prosecutions. The Special Director, Mr William Hofmeyer, was given the mandate to manage and operate the Unit, including the mandate (Proclamation 57, 1999):
- to develop detailed policy guidelines for forfeiture proceedings;
- to institute forfeiture proceedings; and
- to co-ordinate the management of assets subject to restraint orders. 41

41 De Koker KPMG Money Laundering Control Service (1999) COM 5.4 to 5.5
CONCLUSION

Since organized crime is such a world wide threat, South Africa’s forfeiture laws are more in line with international practice to fight organized crime world wide. Confiscation powers are now not only limited to a convicted accused but extended to any other person who may not necessarily be a suspect. Before a person can get rid or destroy property, the authorities are now empowered to apply for a preservation order to prevent any person from disposing of the effected property. The test is now to see how the courts interpret the Prevention of Organized Crime Act and to see how successful is our confiscation in the application of the Prevention of Organized Crime Act. In the next chapter the term instrumentality of an offence and the proceeds of unlawful activity will be scrutinized.
CHAPTER FOUR
INSTRUMENTALITY OF AN OFFENCE IN RELATION TO THE PROCEEDS OF UNLAWFUL ACTIVITIES AS A MEASURE TO COUNTER ORGANISED CRIME

4.1 INTRODUCTION

Proceedings for forfeiture are argued to be in rem (ie against the thing) rather than in personam (against the person). Neither a criminal conviction nor even a pending charge are conditions precedent to forfeiture. Ackermann J stated in *Mohammed NO* 45 that Chapter 6 of the Prevention of Organised Crime Act (dealing with civil forfeiture) is focused, not on wrongdoers, but on property that has been used to commit an offence or which constitutes the proceeds of crime. The guilt or wrongdoing of the owners or possessions or property is, therefore, not primarily relevant to proceedings. 46 Ackerman J did add that the chapter makes provision for an innocent owner defence. 47 The Act does make provision for the exclusion of interest in property in terms of Section 50 of the Act when a court makes a confiscation order.

4.2 DEFINITION OF INSTRUMENTALITY OF AN OFFENCE AND PROCEEDS OF UNLAWFUL ACTIVITIES

The Prevention of Organised Crime Act 48 describes an instrumentality of an offence as follows:

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45 *National Director of Public Prosecution v Mohammed* 2002 SA 843 (CC) 2002 (2) SACR

46 Burchell Principles of Criminal (2005) 1001-1002

47 Burchell Principles of Criminal Law (2005) 1001-1002

48 121 of 1998

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An instrumentality means any property which is concerned in the commission or suspected commission of an offence at any time before or after the commencement of this Act, whether committed within the Republic or elsewhere.

Proceeds of unlawful activities is described as follows:

Proceeds of unlawful activities is any property or any service, advantage, benefit or reward which was derived, received or retained, directly or indirectly, in the Republic or elsewhere, at any time before or after the commencement of this Act, in connection with or as a result of any unlawful activity carried on by any person, and includes any property representing property so derived.

Unlawful activity means any conduct which constitutes a crime or which contravenes any law whether such conduct occurred before or after the commencement of this Act and whether such conduct occurred in the Republic or elsewhere. There must be reasonable grounds to believe that the property concerned is (i) the instrumentality of an offence or (ii) the proceeds of unlawful activities. To establish instrumentality a scheduled offence must be involved. Schedule 1 of the Act contains a list of the more serious offences, including reference to any offence the punishment wherefor may be a period of imprisonment exceeding one year without the option of a fine.

4.3 THE INSTRUMENTALITY OF AN OFFENCE AND THE PROCEEDS OF UNLAWFUL ACTIVITIES THROUGH CASE LAW

The meaning of instrumentality and the proceeds of unlawful activities was considered by the Cape High Court in National Director of Public Prosecutions v Carolus, National Director of Public Prosecutions v Patterson and National Director of Public Prosecutions v Seevnarayan.

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49 Chapter 1 Definitions and interpretation of Act 121 of 1998
50 Chapter 4 Definitions and interpretations of Act 121 of 1998
51 Burchell Principles of Criminal Law Third Edition 1004
52 National Director of Public Prosecutions v Carolus 1997 (2) SACR 27
53 National Director of Public Prosecutions v Paterson 2001 (2) SACR 665
54 National Director of Public Prosecutions v Seevnarayan 2003 (1) SACR 260 (C)
The issue on the instrumentality of an offence was also considered by the courts in National Director of Public Prosecutions v RO Cook Properties, 55 National Director of Public Prosecutions v Prophet 56 and National Director of Public Prosecutions v Van Staden. 57

In National Director of Public Prosecutions v Carolus and Others 58 the Director (Applicant) brought an urgent ex parte application in the High Court. He sought an order under section 38 of the Act against the Respondent prohibiting him from dealing with certain property as was specified in the application. The property consisted of moveable and immovable assets belonging to the Respondent, members of his family and certain close corporations controlled by the Respondent. Two witnesses asserted that the Respondent was extensively engaged in dealing in drugs, and in which they sought to demonstrate that the property fell within the definition of "instrumentality of an offence" or "proceeds of unlawful activity". The court granted a preservation of property order. The Respondent applied for leave to rescind the preservation of property order. The Respondent disputed that he dealt in drugs and stated that during the period he had engaged in lawful activities, from which he had derived a legitimate income. The Director of Public Prosecutions was unable to deny the contention of the Respondent. 59

55 Director of Public Prosecutions v RO Cook Properties 2002 4 ALL SA 692
56 National Director of Public Prosecutions v Prophet 2003 (8) BCLR 906 (C)
57 National Director of Public Prosecutions v Van Staden (2006) SCA 135 (RSA)
58 National Director of Public Prosecutions v Carolus 1999 (2) SACR 27
59 Supra
The court held that in order to establish that property constituted the "proceeds of unlawful activity", the Director of Public Prosecutions had to establish a connection or link between the alleged unlawful activity and the property concerned. In terms of the definition there had to be evidence that the property was derived, received or retained, directly or indirectly, in connection with or as a result of the unlawful activity.

Even upon the assumption that the Respondent derived some income from dealing in drugs, the fact that the Director of Public Prosecutions was not able to dispute the Respondents averments about his lawful activities and the other legitimate ways in which he earned an income over the relevant period, made it impossible to conclude that any of the properties were derived, received or obtained from the alleged unlawful activities. There was no reasonable ground from which the inference could be drawn that any of the properties fell within the definition of 'proceeds of unlawful activity'. The court further held that the words "which is concerned" in the definition of "instrumentality of an offence" were not very clear. The court called for a restrictive interpretation of this definition in view of the far reaching effect of the provisions of Chapter 6. Such a restrictive interpretation was that property would only qualify as an instrumentality where it had been used as a means or instrument in the commission of the offence, or where it was otherwise involved in the commission of the offence. It was accordingly held on the facts, and upon application if the definition thus construed, that the
property did not constitute an "instrumentality of an offence".  

In National Director of Public Prosecutions v Patterson and Another the Applicant applied for an order in terms of Section 48(1) of the Prevention of Organised Crime Act for the forfeiture of certain immovable property to the State. The Applicant alleged that the premises were used for the purposes of selling drugs. In his judgement Foxcroft J referred to foreign case law. In United States v Chandler 36 F 3d 358, 365 (4th Circuit, 1994) the court developed the so-called "instrumentality test" which requires a balancing of three factors, namely:

1. The nexus between the offence and the property and the extent of the property's role in the offence.
2. The role and culpability of the owner.
3. The possibility of separating the offending property from the remainder.

Factors which the Chandler court took into account were:

1. Whether the use of the property was deliberate and planned or merely incidental and fortuitous.
2. Whether the property was important to the success of the illegal activity.

60 National Director of Public Prosecutions v Patterson and Another 2001 (2) SACR 665 (C)
3. The time during which the property was illegally used and the spatial extent of its use.

4. Whether its illegal use was an isolated event or had been repeated.

5. Whether the purpose of acquiring, maintaining or using, the property was to carry out the offence.

At the other end of the spectrum, one circuit has concluded that:

\[ \text{The appropriate inquiry with respect to the excessive fines clauses is, and is only, a proportionality test that compares the value of the property forfeited with the severity of the crime committed. United States v 427 and 429 Hall Street 74 F3rd 1165, 1170 (11th Circuit 1996)} \]

In rejecting the Chandler Court's analysis and instrumentality test, Foxcroft J's only point of passing reference to these cases is that there is by no means any settled law in America as to the method to be adopted to ascertain whether a property has indeed been an instrumentality or instrument of an offence, and he is satisfied that he must apply ordinary South African law to the question whether the property in this matter has on a balance of probabilities been instrumental in the offences which are alleged to have occurred on that property.

In its judgement the court held, as to the nature of proof required, that the mere fact that a particular offence was committed on a particular property

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\[ \text{National Director of Public Prosecutions v Patterson and Another 2001 (2) SACR 665-669} \]
would not necessarily entail the consequence that the property was "concerned in the commission" of the offence, or that the property had become an "instrumentality of an offence"; evidence of some closer connection than were present on the property would ordinarily be required. It was further held that ordinary South African law had to be applied to determine whether the property in this case had on a balance of probabilities been instrumental in the offences which were alleged to have occurred on that property. It was further held by the court that there was a good deal of evidence during the trial to suggest that the entire neighbourhood was riddled with drug dealers: the mere fact that one smoked a prohibited substance on a property did not make the property instrumental in the smoking. Selling drugs from the property or on the property would be a different matter. The applicant was unable to provide evidence from any person who had actually bought or sold any drugs on the property. The application was accordingly dismissed. 62

In Director of Public Prosecutions v RO Cook Properties 63 the applicant applied for a forfeiture order in respect of certain immovable property that was owned by the respondent. The police had raided the property and it lead to suspicions that it was being used to run a brothel. The property, a guesthouse, was leased to two third parties by the respondent. The Director of Public Properties alleged that the property was used by persons who lived wholly or in part on earnings of prostitution as contemplated by Section

62 Director of Public Prosecutions v Patterson 2001 (2) SACR 665-669
20(1) of the Sexual Offences Act. The statutory provision formed part of the first schedule to the Prevention of Organised Crime Act on which the application was based. The respondent contend that he worked in the Cape while the property in question was based in Johannesburg. On his visits to the property to collect rentals, he claimed not to have noticed any signs of illicit activity. He became aware thereof when he was informed by the police.

The question that arose from the Applicant's argument was whether such an applicant had to be the owner of the property, or someone with a lesser interest therein. This required the court to interpret the statutory provisions in question. In its judgement the court regarded it as arbitrary for property to be confiscated from persons when they had not been guilty of a serious offence in connection therewith. The court interpreted the provisions of section 48 read together with section 50 and 52 and the definition of "instrumentality of an offence" as requiring that a person may not be deprived of property unless the person owning that property had a guilty state of mind in connection with the particular offence. The respondent had not been shown to be such a person and therefore the application was dismissed.

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63 Director of Public Prosecutions v RO Cook Properties (2002) 4 ALL SA 692

64 3 of 1957

65 Director of Public Prosecutions v RO Cook Properties (2002) 4 ALL SA 693-694
In National Director of Public Prosecutions v Seevnarayan the respondent had made a long series of rolling investments in Sanlam products under a variety of different names, mostly fictitious. The investments under fictitious names were allegedly in order to evade tax. A preservation order in terms of section 38(2) of the Act was granted in the High Court preserving certain investments with Sanlam in the amount of about R4,1 million. The National Director of Public Prosecutions applied for an order in terms of section 48(1) of the Act declaring forfeited to the state the property preserved under the preservation order. The applicant had to prove on a balance of probabilities that the property concerned was "an instrumentality of an offence" or that the property concerned was the "proceeds of unlawful activities". The unlawful activities the applicant relied upon amount to (1) fraud on the South African Revenue Service (SARS); (2) contravention of s104(1) of the Income Tax Act 58 of 1962 and (3) fraud on Sanlam. The court held that it would be contrary to the purpose of the Act if one were to describe the property in question as the means by which the alleged offences of fraud and contravention of s104 of the Income Tax Act were committed. Fraud was not committed by means of money or other property, but by means of intentional misrepresentation. Tax evasion was not committed by means of undeclared income - the undeclared income formed the subject matter of the offence. The court held further that the applicant had failed to establish a connection between the alleged unlawful activity and the derivation or receipt of the property concerned. Property retained as a result of unlawful activity could refer only

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66 National Director of Public Prosecutions v Seevnarayan 2003 (1) SACR 260 (C)
to that portion of the property that would otherwise (ie had no unlawful activity taken place) have been subject to income tax. It was further held that, having regard to the very wide definition of 'proceeds of unlawful activities' it could lead to absurd and grossly inequitable consequences unless a restrictive interpretation was applied to the provision in question.

It was further the finding of the court that even applying the 'traditional' approach to statutory interpretation, the court was entitled to have regard to the preamble to the Act, which led to the same conclusion, namely that the Act as not intended to be applied in a situation such as the present case. Upon a proper construction of the Act, the property concerned did not constitute the proceeds of unlawful activities and the application had to be dismissed. 67

In National Director of Public Prosecutions v Prophet 68 the applicant sought a forfeiture order against the respondent owner of a property, which the Applicant contended had been used in several drug related offences. The applicant alleged that the respondent was using the property in an attempt to manufacture a schedule 2 drug under the Drugs and Drug Trafficking Act, as well as for the possession of and dealing in prohibited substances.

67 National Director of Public Prosecutions v Seevnarayan 2003 (1) SACR 262-263
The applicant argued that the property was instrumental in the commission of the following offences:

- contravening of section 3 of the Drugs Act, manufacture and supply of scheduled substances
- contravening of section 4(b) of the Act read with section 1(1)(xxvii) in that respondent was found in possession of phynyl acetic acid, substances useful for the manufacture of drugs
- contravention of section 5(b), read with sections 1(1)(iii), 1(1)(xiii) and 1(1)(xxvii) of the said Act, in that respondent dealt in an undesirable dependence producing substance.

In his judgement Erasmus J was of the view that a number of recent judgements have examined the term instrumentality of an offence, for instance as in National Director of Public Prosecutions v Carolus and Others. 69 The dictionary meaning of instrumentality is "a thing, employed for a purpose or end, a means". In the unreported case of 2000/12886 National Director of Public Prosecutions re Application for Forfeiture of property in terms of section 48 and 53 of the Prevention of Organized Crime Act, Stegmann J remarked at paragraph 12 that:

68 National Director of Public Prosecutions v Prophet 2003 (8) BCLR 906 (C)
Evidence of some closer connection than mere presence on the property would ordinarily be required in order to establish that the property had been concerned in the commission of the offence.

The Oxford English Dictionary defines the word "concerned" as "involved, interested" suggesting the need for a direct connection to the offence. Generally the United States courts have adopted either the "instrumentality test" or the proportionality test or one that combines both of these. In terms of the instrumentality test the forfeited property must have a sufficiently close relationship to the illegal activity. The test was already referred to as outlined in United States v Chandler 36 F3d (4th circuit 1994). The test was also referred to in National Director of Public Prosecutions v Patterson.

The American and Australian approach do provide some guidance in the process of determining the type of relationship that needs to exist, between the property to be forfeited, and the crime in question. The essential element that emerges is the idea of a `nexus' connecting the property to the unlawful use and consequently "tainting" it. The determining question is whether the confiscated property has a close enough relationship to the offence to render if an "instrumentality".

The court concluded that in the light of the evidence and on a balance of probabilities the property was "concerned in" the commission of the offences.

It was a place to store the chemicals, rooms on the property were being used

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69 National Director of Public Prosecutions v Carolus and Others 1999 (2) SACR 27

70 National Director of Public Prosecutions v Patterson 2001 (2) SACR 665
to process, refrigerate and "synthesise" these chemicals, into what on a balance of probabilities was Inethawnphtamine. The property can not be divorced from these acts, it was an integral part, an instrumentality. In terms of section 50 of the Prevention of Organised Crime Act, the property which was subjected to a preservation of property order was forfeited to the State.

The cases outlined so far are a clear indication that the courts considered the definition of "instrumentality of an offence" and the "proceeds of unlawful activities" to reach its decisions. The courts not only look at provisions of the Prevention of Organized Crime Act but also interpret the act. The courts also considered American case law as in National Director of Public Prosecutions v Prophet. It is clear that the courts considered American case law as far as the instrumentality test is concerned because the issue is so new to South Africa. So far it is only immovable property that the Director of Public Prosecutions applied confiscation orders for that is connected to drug dealing.

In National Director of Public Prosecutions v (1) RO Cook Properties (Pty) Ltd, (2) 37 Gillespie Street Durban (Pty) Ltd and Another, (3) Seevnarayan, the National Director of Public Prosecutions alleged in each case that the property should be forfeited, and applied ex parte for and obtained, an

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71 National Director of Public Prosecutions v Prophet 2003 (8) BCLR 911-915

72 National Director of Public Prosecutions v (1) Cook Properties (Pty) Ltd (2) 37 Gillespiestreet Durban (Pty) Ltd and Another (3) Seevnarayan 2004 (8) BCLR 844 (SCA)
interim preservation order in respect of it. In each case the High Court dismissed the application for forfeiture. The National Director appealed against the courts findings. Before continuing with the courts finding, the facts of the case is being referred to in National Director of Public Prosecutions v 37 Gillespie Street, Durban (Pty) Ltd. The National Director of Public Prosecutions alleged that drug and prostitution offences were committed on the property, which was operated as a hotel. The court found that the National Director of Public Prosecutions had not discharged the onus of proving that the hotel was an instrumentality of an offence. The court set aside the preservation order and dismissed the forfeiture application.

In Cook Properties and 37 Gillespie Street appeals turn on the meaning of "instrumentality of an offence" in the Act; Seevnarayan in addition concerns the meaning of "proceeds of unlawful activities". The court referred to National Director of Public Prosecutions v Mohamed NO and Others that in Mohammed’s case it was pointed out that Chapter 6 of the Acts primary focus is not on wrongdoers, but on property that has been used to commit an offence of which constitutes the proceeds of crime. A criminal conviction is not a condition precedent to forfeiture, and property may be forfeited even where no charge is pending. The approach to Chapter 6 has the interpretative consequence that in giving meaning to "instrumentality of an offence" the focus is not on the state of mind of the owner, but on the role the property plays in the commission of crime. The phrase must be interpreted independently of the guilt or innocence of the property owner. Where a
forfeiture order is sought the court undertakes a two stage enquiry. In the first, it ascertains whether the property in issue was an "instrumentality of an offence". At this stage the owners guilt or wrongdoing, knowledge or lack of it, are not the focus. The question is whether a functional relation between property and crime has been established. Only at the second stage, when (after finding that the property was an instrumentality), the court considers whether certain interest should be excluded from forfeiture, does the owner's state of mind come into play. The extent of the burden the statute places on owners and other interest holders at the second stage suggest a more narrowly defined, rather than a wider, understanding of "instrumentality of an offence". The present relevance of the second stage is to emphasize that, even on any likely constitutional interpretation, the forfeiture provisions place substantial burdens on owners and that these likewise point to a narrow reading of "instrumentality of an offence".

The court was of the view that it is not enough to say that the words "concerned in the commission of an offence" must be interpreted so that the link between the crime committed and the property is reasonably direct, and that the employment of the property must be functional to the commission of the crime. By this the court meant that the property must play a reasonably direct role in the commission of the offence. In a real or substantial sense the property must facilitate or make possible the commission of the offence. As the term "instrumentality" itself suggests, the property must be instrumental in, and not merely incidental to, the commission of the offence. The court
endorsed broadly the conclusion cases, following the first instance decision in *National Director of Public Prosecutions v Carolus and Others*, where a narrow rather than a wide interpretation of the definition of instrumentality was held appropriate. The court found practical assistance in *The State v Bissessue*, where a Magistrate declared forfeit a motor vehicle and fishing rods used in fishing without a licence under an ordinance that, in addition to a criminal penalty, required the court to declare any article used in, for the purpose of, or in connection with the commissions of the offence forfeit. On appeal the forfeiture of the fishing rods was upheld, but that of the vehicle was set aside. The court held that "to qualify for forfeiture the thing must play a part, in a reasonably direct sense, in those acts which constitute the actual commission of the offence in question." In *Cook Properties* it was the court's view that the National Director of Public Prosecutions failed to prove that the property was an instrumentality of any of the offences on which he relied. In *37 Gillespie Street* it was the court's view that the National Director of Public Prosecutions failed to prove that the hotel was an instrumentality of an offence. In *Seevnarayan* it was the court's view that to constitute an "instrumentality", the money must stand in a close relationship to the actual offence. The Sanlam investments were not themselves prohibited, and the offence did not consist in making them. They were perfectly lawful. The crime consisted in falsifying the identity of the person making the investment. In the present case making the investments did not by itself constitute fraud, nor did making the investments in itself constitute tax evasion. The court

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73 *National Director of Public Prosecutions v Carolus and Others* 1999 (2) SACR 27
concluded that the cash involved was not an instrumentality of offence.

As far as the "proceeds of unlawful activities" is concerned, it was the courts view, even viewing the definition broadly, there is no connection between the interest earned and any of the offences Seevnarayan committed. The interest did not accrue to him in consequence of his conduct in proffering false information to Sanlam, but from his conduct in making the investments. Nor did the interest accrue to him in consequence of his conduct in proffering false income tax returns. 75

In Prophet v National Director of Public Prosecutions 76 the issue of the appeal was whether the appellant's immovable property consisting of a dwelling house should be forfeited to the State. The court considered the approach followed in National Director of Public Prosecutions v RO Cook Properties. 77 On the evidence the court found that although the property was used by the appellant as his home, it was clear that the property was adapted and equipped to unlawfully manufacture drugs. Its use was deliberate and planned and important to the success of the illegal activity. The respondent had proven that the appellant's property was indeed an instrumentality of the offence of illegal manufacture of drugs in contravention

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74 State v Bissessue 1980 (1) SA 228 (H)

75 National Director of Public Prosecutions v (1) Cook Properties (Pty) Ltd; (2) 37 Gilliespiestreet Durban (Pty) Ltd and Another; (3) Seevnarayan 2004 (8) BCLR 847-868 (SCR)

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

77 National Director of Public Prosecutions v RO Cook Properties 2004 (8) BCLR 844 (SCA)
of sections 3 and 5 of the Drugs Act. The appeal was therefore dismissed.

The appellant, also appealed to the constitutional court in Prophet v National Director of Public Prosecutions.\(^7^8\) One of the issues raised by the application for leave to appeal related to the constitutionality of the forfeiture and the proper constitutional approach to that question. The applicant contended that the forfeiture order amounted to a verdict of guilty despite the fact that he had been acquitted at the criminal trial. The court observed the fact that the applicant had been acquitted in the criminal trial did not mean that the forfeiture under the Prevention of Organized Crime Act could not be effected if the evidence established on a balance of probabilities that the property in question had been used as an instrument of crime. The Supreme Court of Appeal had correctly found that the applicant's property had been adapted in almost every single room to facilitate the manufacture of drugs. The court concluded that the forfeiture of the applicant's property did not constitute arbitrary deprivation of property and the court therefore dismissed the appeal.

4.4 CONCLUSION

Asset forfeiture is a valued tool to deal with organised crime. There is a duty on property owners not to allow their premises to be used as prostitution houses or places to produce drugs or sell drugs from. If an offence is committed on the premises and if proved that the property is an

\(^{78}\) Prophet v National Director of Public Prosecutions 2007 (2) BCLR 142 (CC)
instrumentality of an offence, the property owners is faced with the prospect of having his property forfeited to the State. Not only does the act target organised crime groups, but is is also extended to acts of individual wrongdoing. Motor vehicle owners who drive their vehicles while under the influence of alcohol are now in danger of not only being convicted but also have their motor vehicles forfeited to the State if a court finds on a balance of probabilities that the vehicle is an instrumentality of the offence. In National Director of Public Prosecutions v Van Staden it was decided that the motor vehicle concerned is indeed an "instrumentality of the offence" of driving under the influence of intoxicating liquor, or with excessive alcohol in the driver's blood, in contravention, respectively, of section 65(1) and section 65(2) of the National Road Traffic Act, and thus liable to be forfeited under the provisions of Chapter 6 of the Act.

\footnote{National Director of Public Prosecutions v Van Staden (2004) SCA 135 (RSA)}
CHAPTER FIVE

THE EFFECTIVENESS OF CRIMINAL AND CIVIL CONFISCATION

PROCEDURE

5.1  INTRODUCTION

Asset forfeiture involves procedures, invoked by the State, for the compulsory deprivation of the private property belonging to individuals (or corporations) that is derived from or link to unlawful activities. The objectives of the forfeiture is to remove the profit from crime. The Prevention of Organised Crime Act \(^{81}\) in South Africa provides for two types of asset forfeiture criminal confiscation (Chapter 5) and civil forfeiture (Chapter 6). \(^{82}\)

5.2  THE NATURE OF CIVIL FORFEITURE - A MUCH MORE POWERFUL WEAPON

Civil (in rem) forfeiture is distinguished from criminal (in personam) forfeiture by three considerations:

(a) criminal forfeiture requires a prior criminal conviction of the property owner, whereas civil forfeiture merely requires the State to prove that the property probably constitutes illegal contraband or that it was probably used for illegal purpose;

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\(^{80}\) 93 of 1996

\(^{81}\) Act 121 of 1998

\(^{82}\) Burchell “Principles of Criminal Law” (2005) 998
(b) the State bears a lower burden of proof in a civil forfeiture action than in a criminal action; and

(c) criminal forfeiture covers only property held by the criminal at the time of conviction, but civil forfeiture relates back to the date of illegal use of property, regardless of whether it is still owned or possessed by the criminal.

These differences are explained by the saying that the civil procedure is aimed by the property itself (in rem) and not at any person, with the result that civil forfeiture does not depend on a criminal procedure ever being instituted or a criminal conviction being obtained against any person. Consequently, civil forfeiture is enforced against whoever holds or owns the effected property, regardless of his or her involvement in or knowledge of any crime.⁸³

5.3 THE NATURE OF CRIMINAL CONFISCATION

In terms of Section 25 of the Prevention of Organised Crime a restraint order may be granted if a court is:

(i) satisfied that a prosecution has been instituted (but not concluded) against the defendant and a confiscation order has been made or

⁸³ Van der Walt: "Civil Forfeiture of Instrumentalities and Proceeds of Crime and the Constitutional Property Clause" (2000) 16 SAJHR 4-5
there are reasonable grounds for believing such an order may be made, or

(ii) the defendant is to be charged and reasonable grounds exist for believing a confiscation order may be made. The National Director of Public Prosecutions must show at least a reasonable prospect of obtaining confiscation. A restraint order does not have to be made ie, the court has discretion. A provisional restraint order with immediate effect can be made and can include a rule nisi. The order may include provision for the defendant's reasonable living expenses and legal expenses. A restraint order can be issued in respect of assets outside South Africa. A restraint order may precede a confiscation order, but does not have to do so. 84

Neither restraint orders nor confiscation orders operate retrospectively. Criminal confiscation applies only to proceeds of crime and not to the instrumentalities of crime. Criminal confiscation is in personam and so only capable of being executed against the property of the accused, not against that of third parties. 85

A court may, after convicting an accused of an offence, on application of the public prosecutor, enquire into any benefit which the defendant may have derived from that offence, any other offence of which the defendant has been

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84 Burchell "Principles of Criminal Law (2005) 999
convicted of at the same trial and any criminal activity which the court finds to be sufficiently related to those offences. 86 If the court finds that the defendant has so benefited, the court may, in addition to any punishment which it may impose in respect of the offence, make an order against the defendant for the payment to the State of any amount it considers appropriate. That amount may not exceed the value of the defendant's proceeds of the offences or related criminal activities or, if the value which might be realised at the time of the making of the order is lower than the value of the illicit proceeds, should not exceed the lower value. 87

The courts must assess the evidence relating to the proceeds of unlawful activities in the following manner:

First, if it is found that a defendant did not, at the fixed date, have legitimate sources of income sufficient to justify the interest in any property that he or she holds, the court shall accept this as prima facie evidence that such interest forms part of such benefit. 88

Secondly, if, pursuant to a restraint order, the court ordered a defendant to disclose information and he or she had without sufficient cause failed to disclose such facts, or had, after being so ordered, knowingly furnished false

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85 Burchell "Principles of Criminal Law (2005) 999
86 Section 18(1) of Act 121 of 1998
87 Jordaan "Confiscation of the proceeds of crime and the fair trial rights of an accused person" 2002 SACJ 40-43
88 Section 22(1) of Act 121 of 1998
information, the court shall accept this as prima facie evidence that any property to which the information relates, forms part of the defendant's benefit or is held by the defendant as an advantage, payment service or reward in connection with the offences or related criminal activities. 89

The confiscation of the proceeds of crime as provided for in the Prevention of Organised Crime Act were attacked directly in National Director of Public Prosecutions v Phillips. 90 The respondents in this case raised, inter alia, the following argument:

Confiscation of the proceeds of crime is a criminal penalty. The proceedings leading to a confiscation order are inherently criminal proceedings and incorrectly classified as civil proceedings in terms of the Prevention of Organised Crime Act. Therefore, a person against whom confiscation enquiries are made, is entitled to the rights of an accused person set out in Section 35(3) of the Constitution. The court rejected this argument, advancing a number of reasons why confiscation of the proceeds of crime should be viewed as a civil, rather than a criminal remedy.

In rejecting the argument, the court contended that there is a great deal of foreign case law on the question of whether the confiscation and forfeiture of the proceeds of crime constitute civil or criminal remedies. In Her Majesty's Advocate and Another v McIntosh, delivered on 5 February 2001, one of the

89 Section 22(1) of Act 121 of 1998
issues before the council was whether S3(2) of the Proceeds of Crime (Scotland) Act 1995 was incompatible with Art 6(2) of the European Convention of Human Rights. Section 3(2) created a number of presumptions to assist the State in an application for a confiscation in proceedings similar to those under Chapter 5 of the Prevention of Organised Crime Act. 91

The question was whether those presumptions violated the guarantee in Art 6(2) of the European Convention which provides that: "Everyone charged with a criminal offence shall be presumed innocent until proven guilty according to law." The Privy Council had to decide whether a defendant against whom a confiscation order was sought was someone charged with a criminal offence within the meaning of Art 6(2) of the European Convention. It held that he was not. Lord Bingham expressed the conclusion of the Judicial Committee as follows:

None of these authorities, in my opinion, provides substantial support for the respondent's contention. He cannot overcome the problem of showing either that he is "charged" or that he is accused of any criminal offence. He faces a financial penalty (with a custodial penalty in default of payment) but it is a penalty imposed for the offence of which he has been convicted and involves no accusation of any other defence.

In coming to the conclusion, his Lordship listed nine 'compelling reasons'
upon which it was based.

(1) The application is not initiated by complaint or indictment and is not governed by ordinary rules of criminal procedure;

(2) The application may only be made if the accused is convicted and cannot be pursued if he is acquitted;

(3) The application forms part of the sentencing procedure;

(4) The accused is at no time accused of committing any crime other than that which permits the application to be made;

(5) When as a standard procedure in anything other than the simplest case, the prosecutor lodges an application under s9, that application (usually supported by detailed schedules) is an accounting record and not an accusation;

(6) The sum ordered to be confiscated need not to be the profit made from the drug trafficking offence of which the accused has been convicted, or any other drug trafficking offence;

(7) If the accused fails to pay the sum he is ordered to pay under the order, the term of imprisonment which he will be ordered to serve in default, is imposed not for the commission of any drug trafficking offence but on his failure to pay the sum ordered and to procure

91 National Director of Public Prosecutions v Phillips 2001 (2) SACR 542 (W)
compliance;

(8) The transactions of which account is taken in the confiscation proceedings may be the subject of a later prosecution, which would be repugnant to the rule against double-jeopardy if the accused were charged with a criminal offence in the confiscation proceedings;

(9) The proceedings do not culminate in a verdict, which would (in proceedings on indictment) be a matter for the jury if the accused were charged with a criminal offence.

All but consideration number (7) are equally applicable to an application for a confiscation order under chapter 5 of the Prevention of Organised Crime Act. (Our Act does not provide for the imprisonment of the defendant or for any other penalty upon default of payment of the confiscation order, but that only means that there is even less reason to characterise a confiscation order under the Prevention of Organised Crime Act as a criminal penalty and the application for it as criminal proceedings.) The court went on further that in the leading English text on proceedings for the confiscation and forfeiture of the proceeds of crime, the authors characterise those proceedings as follows:

(“confiscation should not be seen as a form of extra punishment for the convicted defendant but rather as a way of taking away the unjust profits and ensuring that there will be no pot of gold waiting after any punishment has been served. It is the civil consequences of the criminal wrong doing, taking away the raison d’etre for the criminal”).

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92 National Director of Public Prosecutions v Phillips 2001 (2) SACR 542 (W)
For all these reasons an application for a confiscation order is properly characterised as civil proceedings. A defendant against whom such an order is made is not an accused person within the meaning of s35(3) of the Constitution and a confiscation order does not punish him for his crimes.  

5.4 CIVIL FORFEITURE IN GENERAL

The origin of civil forfeiture lies in the ancient concept of the `deodand' (to be given to God) that found expression in the biblical injunction that "if an ox gore a man or woman, and they shall die, he shall be stoned and his flesh shall not be eaten." Although the deodand was abolished in England in 1846, prior to 1870 forfeiture resulted at common law from conviction for felonies and treason. There also existed statutory forfeiture of offending objects used in violation of customs and revenue laws.

In *National Director of Public Prosecutions v Mcasa*  the court remarked that the confiscation provisions in the Prevention of Organised Crime Act presents an interesting convergence of civil and criminal law. The court observed that, apart from the fact that restraint and confiscation proceedings are denoted as civil, and that civil law rules of evidence are made applicable and questions of fact are to be decided on a balance of probabilities, there is

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93 Supra

94 Exodus 21 v28

95 Burchell "Principles of Criminal Law" (2005) 1001

96 *National Director of Public Prosecutions v Mcasa* 2000 (1) SACR 263 TD
also the choice of language. Instead of referring to an `accused' as found elsewhere in Chapter Five, dealing with restraint and confiscation proceedings refers to a defendant. The court remarked that reference to a defendant in the context of criminal proceedings is very unusual nomenclature in the South African criminal justice system. In the court's view, it appears to flow from the deliberate insistence by the Act that proceedings for a confiscation order are civil and not criminal.  

As we have seen, criminal confiscations in personam are capable of being executed only against the property of the accused, not third parties, and the property confiscated must be linked in some way to the offence for which the accused is convicted. In contrast, the advocates of civil forfeiture argue that such forfeiture can be used against property belonging to third parties and even against the proceeds of criminal conduct other than that for which the accused may have been convicted. The very breadth of the possible use of civil forfeiture proceedings to cover conduct not the subject of any initial criminal trial and to involve proceedings potentially prejudicial to the party whose property is forfeited leads to the conclusion that due process rights must be adhered to in the process.

One way that South African courts have at their disposal to ensure that these wide powers (to effect the property rights of persons adversely) are exercised reasonably is to give a restrictive interpretation to the concept of

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97 National Director of Public Prosecutions v Mcasa 2000 (1) SACR 263 TD
the link between the individual to be dispossessed of his or her property and
the offence committed (albeit by another). This is exactly what the courts
have done. 98

5 5  CONCLUSION

Since the Prevention of Organized Crime Act was passed the authorities, for
example the Asset Forfeiture Unit had some successful forfeiture
applications. The Act is still in test phase and much needs to be done for the
Prevention of Organised Crime Act to be used to the fullest. The legislation is
still new to South Africa but already through cases before the courts the Act
seems to have made an impact to counter organised crime for example
abalone poaching. In an Eastern Cape case of National Director of Public
Prosecutions v Jason Dean Ross, 99 the accused was convicted on five
counts of unlawful operation of fish processing establishments in
contravention of section 58(1)(b) of the Marine Living Resources Act. 100 The
accused gained significant benefits from the operation he was orchestrating.
The operational records clearly reflect that the accused processed in excess
of 76 tons of abalone. The benefit the accused had derived was in the
amount of R23 000 436. The court found that the applicant is entitled to a
confiscation order in the amount of his illgotten benefits. Civil forfeiture that is
dealt with mostly in the High Courts is the most widely used procedure in
forfeiture applications that is evident from decided cases. Criminal forfeiture

98 Burchell "Principles of Criminal Law" (2005) 1002
99 National Director of Public Prosecutions v Jason Ross Case No 5/193/02 Eastern Cape
100 18 of 1998

54
must be effectively used especially where repeated drunken driving offences are concerned for example where an accused is convicted with previous convictions for drunken driving. The confiscation of motor vehicles is already seen as a deterrent. Not only will a repeated drunken driver face a severe sentence, but he also faced with having his motor vehicle confiscated. Criminal and civil confiscation are effective procedures in the fight against organised crime.
CHAPTER SIX

CONCLUSION

In 1994 South Africa entered the international arena after decades of isolation. There was a need for South Africa to change its forfeiture laws that was mainly confined to the Drugs and Drug Trafficking Act. The Prevention of Organised Crime Act extended to the confiscation powers not only to after conviction, but also to before conviction and not necessarily to an accused person but also to any other person who is not necessarily a suspect. After the enactment of the Prevention of Organised Crime Act, South Africa’s forfeiture laws are now more in line with international practise to fight organised crime. Before a person gets rid of or destroy property before confiscation, the authorities are empowered to apply for a preservation order to prevent any person from disposing of the affected property.

Asset forfeiture as a valued tool to deal with organised crime, not only target organised crime groups, but also stretches out to acts of individual wrongdoing. Motor vehicle owners who drive their vehicles while under the influence of alcohol are now in danger of not only being convicted, but also to have their motor vehicles confiscated by the State, if a court finds on a balance of probabilities that the vehicle is an instrumentality of the offence. Since the Prevention of Organised Crime Act was passed, the Asset Forfeiture Unit had some success in their forfeiture applications. The legislation is still new to South Africa but already through cases before the
courts the Act seems to have made an impact to counter organised crime.

Civil forfeiture, that is dealt with in the High Courts is, so far the widely used procedure in forfeiture applications that is evident from decided cases. Criminal forfeiture must be effectively used especially where repeated drunken driving offenders are concerned. Criminal and civil confiscation are effective procedures in the fight against organised crime.

Criminal forfeiture of contraband and the proceeds of crime is fairly easily justified, even when the loss appears disproportionate to the seriousness of the crime, by the argument that the criminal should not be allowed to enjoy the benefits of the crime, and that forfeiture of the proceeds of crime does not actually constitute a deprivation of property or an additional crime of the criminal at all. Criminal forfeiture of contraband and of the proceeds of crime is justified whenever it serves legitimate regulatory and compensatory purposes. ¹⁰¹

Civil forfeiture is in fact nowadays more often justified on pragmatic grounds, such as the importance of preventing crime or the difficulty of identifying the owner of the property or the person who should be prosecuted for the crime, and the guilty-property fiction is not generally regarded as a good justification for the legitimacy of civil forfeiture in modern law. The advantage of civil forfeiture is that it allows the State to restrict the financial mobility of crime

¹⁰¹ Van der Walt "Civil forfeiture of instrumentalities and proceeds of crime and the constitutional property clause" 2000 16 SAJHR 6-10
syndicates by the forfeiting of property especially money, derived from and used in criminal activities, without having to go through the more demanding criminal prosecution and criminal forfeiture process, the argument being that the public interest in fighting organised crime justifies the enforcement of harsh and unusual measures that detract from the 'normal' protection of individual rights in terms of international and constitutional law. 102

RECOMMENDATION

The Jurisdiction of Regional Courts Amendment Bill (B48-2007) envisages extending civil jurisdiction to the Regional Courts. It is recommend that civil confiscation be dealt with in the Regional Courts where the `instrumentality of the offence' and the `proceeds of unlawful activities' are concerned.

102 Van der Walt "Civil forfeiture of instrumentality and proceeds of crime and the constitutional property clause 2000 16 SAJHR 6-10
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