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TITLE: The war against organised crime: A critical assessment of South African Asset Forfeiture Law and its impact on redress for victims of crime

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DECLARATION BY STUDENT

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QUALIFICATION: Master of Laws

TITLE: "The war against organised crime: A critical assessment of South African Asset Forfeiture Law and its impact on redress for victims of crime".

DECLARATION:

In accordance with Rule G4.6.3, I hereby declare that the above-mentioned treatise/dissertation/thesis is my own work and that it has not previously been submitted for assessment to another University or for another qualification.

SIGNATURE:

DATE: 3 April 2009
LIST OF ABBREVIATIONS

AFU/the unit - Asset Forfeiture Unit
AJ - Acting Judge/Justice
AJA - Acting Judge of Appeal
ATM - Automated Transmission Machine
CARA - Criminal Assets Recovery Account
DP - Deputy President
FICA - Financial Intelligence Centre Act, No. 38 of 2001
FIC/the Centre - Financial Intelligence Centre
FATF - Financial Action Task Force on money laundering
JP - Judge President
NDPP - National Director of Public Prosecutions/the State
P - President of the Supreme Court of Appeal
SARS - South African Reserve Services
SCA - Supreme Court of Appeal
The criminal code - The Criminal Procedure Act, No. 51 of 1977
UNCAC - 2003 UN Convention against Corruption
US - United States of America
Vienna Convention - 1988 UN Convention against Illicit Traffic in Narcotic Drug and Psychotropic Substances
Chapter 1

Organised Crime

1.1 Introduction

For many centuries and all over the world criminals have been taking steps to disguise the true nature of their crimes and to hide proceeds thereof.\(^1\) It requires of them to be well organised and disciplined to be successful in this regard. Being organised, in general, means the formation into a whole with interdependent parts to give an orderly and systematic structure to something.\(^2\)

The main motive of criminals in being organised is to avoid their ill-gotten gains being used to incriminate them and to protect the proceeds thereof against possible forfeiture.\(^3\) These ongoing organised criminal acts manifest themselves in offences such as, to name just few, fraud, theft, drug trafficking, prostitution, human trafficking, extortion, murder for hire, hijacking, violence, abduction, corruption and, recently, money laundering,\(^4\) racketeering, terrorism, online extortion and identity theft.\(^5\) The notion of organised crime,\(^6\) it is submitted, connotes these and other illicit acts.

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\(^1\) See *Shaik and Others v The State*, a reportable judgment of the Constitutional Court, case no CCT 86/2006 delivered on 29/05/2008 at 16.


\(^3\) De Koker “KPMG Money Laundering Control Service - South African money laundering and terror financing law” (1999) at Comm 1 – 3.

\(^4\) Rieder “Taking the profit out of crime” Money laundering control (1996) at 1.

\(^5\) According to the UNODC, organised crime is one of the major threats to human security. It’s a multifaceted phenomenon and has manifested itself in different activities, amongst others drug trafficking, trafficking in human beings, trafficking in firearms, smuggling of migrants, drug trafficking and money laundering; See also Whitfield - ‘Crime Pays - A global growth Industry’ Finweek 17/07/2008 at 17.

This research will be undertaken in the field of both criminal and civil law with particular focus on international interventions\textsuperscript{7} in the fight against organised criminal activities, asset forfeiture in South Africa in general and its treatment of the victims of the underlying forfeiture crimes\textsuperscript{8} ("the victims") in asset forfeiture, more specifically. In August 2001 the Department of Justice and Constitutional Development presented a consultative draft\textsuperscript{9} on the Victim’s Charter ("the Charter") which sets out comprehensive victims’ rights. Clauses 168 – 179 of the Charter deal with the victim’s rights to compensation and restitution. In his work Von Bonde\textsuperscript{10} drew an extensive comparison between the South African, Indian and the United Kingdom’s treatment of victims of crime in general. What has been covered in these two works will not be repeated in this paper. It suffices to state that Von Bonde\textsuperscript{11} summarises the status of the South African victims of crime as follows:

- Sections 297 and 300 of the Criminal Procedure Act, No. 51 of 1977 provide for restitution;
- The proposed Charter places the obligation on police, prosecutors and Courts to inform the victims of their rights;
- There are examples of legislation where victims of crime may be compensated by the State, but no victim compensation scheme exists; and he concludes that there is

\textsuperscript{7} South Africa has an advanced banking framework. Isolating the problem of organised crime to South Africa will not do justice to this research on the problem, which knows no national boundaries. The international interventions resulted in promulgation by South Africa of various statutory frameworks targeting the problem: Hoyle & Young — "Restorative Justice: Assessing the Prospects and Pitfalls" in McConvillie & Wilson (eds) The Handbook of the Criminal Justice Process (2002) Oxford 525 at 547 – 548.
\textsuperscript{8} As set out in Schedule 1 of Prevention of Organised Crime Act, No. 121 of 1998 ("POCA").
\textsuperscript{9} An electronic version of this draft is available at www.dej.gov.za.
\textsuperscript{11} At 275 – 278.
a growing perception that victims\textsuperscript{12} of crime in South Africa do not receive adequate support from the State.

Some of the features\textsuperscript{13} of organised crime are:

\begin{itemize}
  \item Illegality of its purpose;
  \item Secrecy in its operation;
  \item Legal fronts as a disguise;
  \item Some degree of support from the society;
  \item Ability to evolve and reorganise much more quickly; and
  \item Crossing boundaries of countries with ease.
\end{itemize}

All these features make combating organised crime a complex exercise. Once firmly established, organised crime operations are immensely difficult to eradicate.\textsuperscript{14} Writing in 1998 Shaw\textsuperscript{15} indicated that the growth of organised crime caught South African law enforcement agencies unprepared. The reasons\textsuperscript{16} for this were that:

South Africa has emerged as a major transhipment point for narcotics trafficking after the transition to democracy ended the country’s international isolation. Contributing factors include its geographic position on major trafficking routes between the Far and the Middle East, the Americas and Europe, the rapid expansion of international air links, a well developed transportation infrastructure, and modern international telecommunication and banking systems. Long porous borders and weak border control, including undermanned ports and numerous secondary airports, give traffickers nearly unlimited access to South Africa.

Something had to be done about this climate conducive to international organised crime groups which enabled them to operate actively. De Kok\textsuperscript{17} summarises the response as follows: Law enforcement began to pay attention to the flow of criminal funds. Money

\textsuperscript{12}~More on this aspect in later chapters.
\textsuperscript{13}~Organized crime – Wikipedia, the free encyclopedia – \url{http://en.wikipedia.org/wiki/Organised\_Crime} – accessed on 07/02/2008; this list is not exhaustive but it gives a clear guide of what this phenomenon encompasses.
\textsuperscript{15}~Shaw at 1.
\textsuperscript{16}~At 4. It is submitted that some of these factors still prevail today.
laundering control became a major strategy for combating crime and terrorism. A new regulatory system was developed which forged a crime combating relationship between law enforcement and financial systems. These changes were radical. They required law enforcement to consider the way in which economic crimes and organised crimes were investigated and prosecuted. They also required the business community to review age-old practices and principles regarding client services and client confidentiality.\textsuperscript{17}

Thus a multifaceted effort, it is submitted, had to be devised and embarked upon, both on international and national fronts to combat this social phenomenon.

1.2 Should ‘Organised Crime’ as a concept be defined?

It is important first to briefly consider whether this concept needs a universally accepted definition and whether its definition in POCA is necessary. Von Lampe\textsuperscript{18} has compiled a collection of definitions of this concept. He mentions for example that the Federal Bureau of Investigation defines the concept as any group having some manner of a formalised structure and whose primary objective is to obtain money through illegal activities. This definition excludes individual wrongdoing.

An assessment of these definitions leaves an impression that they are arbitrary and that there is no consensus on an appropriate international definition to be used. Furthermore

\textsuperscript{17} See footnote 3 supra.
there is in it an emphasis on group and structure formations. Von Lampe, however, comes to the following conclusion:\(^\text{19}\)

From an organization-oriented point of view, organized crime would refer to all criminals who do not operate in complete isolation. Consequently, the term organised crime could even be applied to an individual criminal as long as someone else knowingly contributes to his criminal conduct, for example by providing useful information or by merely showing respect for his behaviour.

There is one trend in particular that gradually seems to become prevalent in organised crime research today. This trend involves the shift from a focus on criminal collectivities, initially on organizations and later primarily on criminal networks, to the individual "organised criminal". This trend, to the extend it is real, marks a departure from the notion of relatively static structures to the notion that in a chaotic and ever changing criminal world the least common denominator is the individual offender who may or may not link up with other offenders. It should be noted that efforts in this direction would find support in current social psychology.

The United Nations ("UN") says\(^\text{20}\) global business models of criminal organisations have changed from strictly hierarchical groups to loose networks, which co-operate internationally to exploit mutually beneficial market opportunities. In the result, it appears that there is no need to formulate an internationally acceptable definition of the concept. Individual States should be free to have definitions unique to them in order to cover peculiar circumstances in their jurisdictions. The likelihood of having a uniform internationally acceptable definition is remote. Certainly a definition will not help as long as there is no understanding of the intrinsic links that supposedly connect the various


\(^{20}\) Whitfield at 18.
aspects\textsuperscript{21} of the social universe that fall under the organised crime label. Until then all attempts to define organised crime would have to be arbitrary and would in some way or other contradict existing perceptions on organised crime.\textsuperscript{22}

The short title of POCA\textsuperscript{23} leaves an impression that POCA only deals with organised crime and an expectation is thereby created that a definition might be found. In fact POCA does not define organised crime.\textsuperscript{24} Its purpose as reflected in the short and long titles and preamble is to prevent organised crime. It introduces new offences of racketeering,\textsuperscript{25} money laundering\textsuperscript{26} and criminal gang activities\textsuperscript{27} which are known organised crime offences but it has a list of 33 pre-existing common law and statutory offences referred to in Schedule 1 which may be committed by individuals. The organised crime \textit{leitmotif} forms a recurrent theme throughout POCA.\textsuperscript{28} Van Heerden AJ\textsuperscript{29} commented, in the minority judgment, as follows on this aspect:

\begin{itemize}
  \item [21] These aspects, according to von Lampe, are the individual characteristics of organised criminals: the structures/networks/groups which connect these individuals; the over-arching power structures that subordinant these structural entities; and the relation between these illegal structures and the legal structures of society.
  \item [23] Which does not define the concept; NDPP v Vermaak 2008 1 SACR 157 (SCA) at par 4, where Nugent JA used the concept to describe offences that have organisational features of some kind that distinguish them from individual criminal wrongdoing.
  \item [24] De Koker – unpublished paper entitled – "Organised crime, racketeering, money laundering and criminal gang activities – Reflections on the terminology"; See also Abadansky at 405 where he indicates that the Organised Crime Act of 1970 (of which the Racketeer Influenced and Corrupt Organizations 18 U.S.C. Sections 1961 – 68 ("RICO") is a part) also fails to define the concept. The rational behind this failure, he argues, is to use the statute against persons who are not connected to organised crime.
  \item [25] Under Ch 2 of POCA.
  \item [26] Under Ch 3 of POCA.
  \item [27] Under Ch 4 of POCA.
  \item [28] NDPP v Seenarayen 2003 2 SA 178 C; 2003 1 All SA 240 C at par 60.
  \item [29] Mohunraj v NDPP (Law Review Project as Amicus Curiae) 2007 6 BCLR 575 (CC); 2007 4 SA 222 (CC) at paras 25 – 27; This view found support in NDPP v (1) RO Cook Properties (Pty) Ltd (2) 37 Gillespie Street Durban (Pty) Ltd and Another (3) Seenarayen 2004 8 BCLR 844 SCA; 2004 2 SACR 208 SCA; 2004 2 All SA 491 SCA at par 19; NDPP v Van Staden and Others 2007 1 SACR 338 (SCA); 2007 2 All SA 1 at paras 1 and 10 where it was reiterated that the provisions of POCA are designed to reach far
\end{itemize}
Notwithstanding this recurrent theme, the wording of POCA as a whole makes it clear that its ambit is not in fact limited to so-called “organised crime offences”, so that the initial impression created by the short and long titles, as well as by most of the paragraphs of the preamble, is incorrect. This is misleading and more than a little unfortunate.

It will thus be suggested later on that the misleading title be changed. Now that it is settled law that POCA applies to both organised crime and individual wrongdoing, it is accordingly submitted that a definition of the concept is not necessary. An organised criminal group is defined in the 2000 UN Convention against Trans-National Organized Crime as:

A structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established in accordance with the Convention, in order to obtain, directly or indirectly, a financial or other material benefit.

POCA defines a criminal gang as including:

Any formal or informal ongoing organisation, association, or group of three or more persons, which has as one of its activities the commission of one or more criminal offences, which has an identifiable name or identifiable sign or symbol, and whose members individually or collectively engage in or have engaged in a pattern of criminal gang activities.

30 NDPP v Vermaak 2008 1 SACR 157 (SCA) at par 4 – 8.
31 As opposed to ‘organised crime’.
32 See article 2 of the Convention; suitably refined, this definition may perhaps assist in defining organised crime.
These two guiding definitions should suffice. For the purpose of this paper Von Lampe’s and Mohunram’s33 respective approaches to the concept and that of POCA, as interpreted by our Courts would be preferred because they do not leave out individual wrongdoing.

1.3 International’s endeavours against organised crime

One of the mechanisms the world uses to combat organised crime is Conventions or Treaties or other international instruments. A member state would initially sign34 a Convention which would be followed by ratification thus making the Convention legally binding on it. To facilitate member states’ compliance with the principles of a Convention on some level, states are afforded some room to allow circumstances applicable to their own countries.

Implementation and compliance by states is monitored through the use of Special Rapporteurs who conduct on-site investigations. They meet annually to discuss their reports and provide recommendations for action against a non-complying state. The effect of non-compliance with a ratified Convention may be more felt in the non-complying state’s diplomatic relations with other member states.35 A comprehensive assessment of the Conventions is beyond the scope of this paper. The following36 are international Conventions37 in place dealing with organised criminal acts:

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33 Mohunram v NDPP (Law Review Project as Amicus Curiae) 2007 4 SA 222; 2007 6 BCLR 575 (CC).
34 This indicates a commitment to providing the means by which a convention’s principle may be implemented by passing laws and initiating government programming.
36 Where South Africa has signed or ratified a Convention this is indicated.
37 De Koker at Cor 11 - 12.
13.1 1988 Basel Statement on the Prevention of Criminal Use of the Banking System for the Purpose of Money Laundering\textsuperscript{38}

One of the biggest obstacles to maintaining an effective operating international financial system is the commission of the offence of money laundering. A global phenomenon and an international challenge, money laundering is a financial crime that often involves a complex series of transactions and in numerous financial institutions across many foreign jurisdictions. This makes it extremely difficult to investigate and prosecute.\textsuperscript{39}

The Committee of Ministers of the Council of Europe acknowledged this problem and issued this Statement of Principles on the so called ‘Know Your Customer’ principle.\textsuperscript{40} It outlines some basic policies and procedures that banks’ management should ensure are in place within their institutions with a view to assisting in the suppression of this crime through banking system, national and international.\textsuperscript{41}

13.2 1988 UN Convention against Illicit Traffic in Narcotic Drug and Psychotropic Substances\textsuperscript{42} ("the Vienna Convention")

This is the first Convention to have laid the foundations of the new strategy to combat drug trafficking organisations by attacking the goal of all organised crime, and also its

\textsuperscript{38} Adopted in December 1998.
\textsuperscript{39} Jean-François Thony – "Money Laundering and Terrorism Financing: An Overview" – a paper delivered on 10/05/2000 at 1.
\textsuperscript{40} Article II.
\textsuperscript{41} Article I.
\textsuperscript{42} Adopted by the UN Conference held at Vienna from 25/11 – 20/12/1988, no 27627, E/CONF.82/15, took effect on 11/11/1990 and as at November 2002 166 countries had ratified it. South Africa has both signed and ratified this Convention.
weakest point namely money itself.\textsuperscript{43} It defines money laundering. It instituted a
mechanism for mutual international assistance in the area of confiscation.

\textbf{133 1990 Council of Europe Convention on Laundering, Search, Seizure and
Confiscation of Proceeds from Crime}\textsuperscript{44}

In the preamble of this Convention it is acknowledged that serious crime has become an
increasingly international problem and that modern and effective methods should be used
on an international scale. Laundering offences are targeted in Article 6. The deprivation
of criminals' proceeds of crime\textsuperscript{45} is recognised as one of those effective methods. This
Convention has been updated and expanded to include measures to prevent financing of
terrorism and has been replaced by the 2005 Council of Europe Convention on
Laundering, Search, Seizure and Confiscation of Proceeds from Crime and on the
Financing of Terrorism.\textsuperscript{46} This new Convention is a very significant step against
terrorism, by attacking its financing on a broad front and ensuring that logistical cells
cannot find financial safe havens anywhere in Europe.\textsuperscript{47}

\textbf{134 1991 Council of the European Communities Directive on Prevention of the
Use of the Financial System for the Purpose of Money Laundering}\textsuperscript{48}

This Directive represents the first stage in combating money laundering at community
level.\textsuperscript{49} It defines the concepts of credit, financial institutions\textsuperscript{50} and money laundering.

\textsuperscript{43} Thony at 8.
\textsuperscript{44} Approved in September 1990.
\textsuperscript{45} By way of confiscation and mutual legal assistance as set out in Articles 13 to 16.
\textsuperscript{46} Adopted by the Committee of Ministers of the Parliamentary Assembly of the Council of Europe at its
925 meeting on the 03/05/2005.
\textsuperscript{47} europa.eu/.../05/331\&format=HTML\&aged=1\&language=EN\&guiLanguage=en – accessed on
12/02/2008.
The institutions are required to identify their customers, keep a copy or references of the evidence required and records of transactions for a period of five years following the execution of the transactions. They should co-operate fully with authorities and put internal controls in place to prevent money laundering.

13.5 **1999 UN International Convention for the Suppression of Financing of Terrorism**

The main concern that preceded the adoption of this Convention was the world wide escalation of acts of terrorism in all its forms and manifestations. The Convention requires state parties to make certain acts criminal offences in national law, establish jurisdiction over such offences, prosecute or extradite persons alleged to have committed the offence of terrorism, and engage in co-operation and mutual legal assistance with regard to its objectives. Article 2 criminalises the act of providing or collecting funds with the intention or knowledge that such funds will be used to carry out a terrorist attack. The speed with which this Convention was ratified by member states illustrates the heightened commitment of the international community to combat terrorism, especially in the aftermath of the events of 11th September 2001. Increasingly, international terrorist activity has become interlinked with other modern scourges, such as drug trafficking and the proliferation of small arms. The Convention recognises that

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50 Article 1.
51 This Convention was adopted on 09/12/1999, no 38349, GA Resolution no. A/RES/54/109 and has been followed by the 2005 International Convention for the Suppression of Acts of Nuclear Terrorism which came into force in July 2007; As at 02/04/2002, 132 countries has signed it and 26 countries had completed the ratification process and become state parties.
financing is at the heart of terrorist activity, and it paves the way for concerted action and close co-operation among law enforcement agencies, financial authorities and states.

136 **2000 UN Convention Against Trans - National Organized Crime ("the Palermo Convention")**

It is a multi-purpose instrument as its title indicates to combat the phenomenon of trans-national organised crime like criminal association, money laundering, corruption and obstruction of justice.

137 **2001 UN Security Council Resolution 1368**

This Resolution came after the horrifying terrorist attacks on the 11th September 2001 in New York, Washington, D.C. and Pennsylvania. In Article 4 it called on the international community to redouble its efforts to prevent and suppress terrorist acts by increased co-operation and full implementation of the relevant international anti-terrorist Conventions and Resolutions.

138 **2003 UN Convention against Corruption** ("the UNCAC")

An international consensus on anti-corruption emerged due to the awareness of the effects of corruption on development. Corruption consumes public wealth. It impedes

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56 Adopted by the General Assembly on 31/10/2003 per Resolution 58/4 and entered into force on 14/12/2005. South Africa has also signed and ratified this Convention.
investment and reduces the quality of public services, such as health and education. It undermines democracy, weakens the rule of law, and threatens the stability and security of societies\textsuperscript{57}. It is with this background that the UNCAC was developed as an international anti-corruption instrument. It establishes a comprehensive framework that allows the development of a global, comprehensive and unified approach against corruption\textsuperscript{58} and sets out a number of strategies to prevent and combat its numerous manifestations.

13.9 African Union Convention on Preventing and Combating Corruption\textsuperscript{59}

This Convention is an example that the African continent has also followed the world’s initiatives against corruption. Forty one countries have signed it among which twenty four have ratified it. It resembles the UNCAC, with some substantive differences. It is characterised by its mechanism to monitor implementation, noting that the lack of resources holds back its implementation.

13.10 Financial Action Task Force and its recommendations

In July 1989 and in an attempt to combat organised criminal activities, the Paris G-7 Summit\textsuperscript{60} established the Financial Action Task Force ("the FATF")\textsuperscript{61} to examine

\textsuperscript{57} Preamble to the UNCAC.
\textsuperscript{58} See Article 1; The purposes of UNCAC include asset recovery as set out in Article 31.
\textsuperscript{59} Adopted on 11July 2003. South Africa has also signed and ratified this Convention. The most insidious, dangerous, corroding part of organised crime is its ability to penetrate government, business and public structures — Whitfield at 14.
\textsuperscript{60} Canada, France, Germany, Italy, Japan, United Kingdom and the United States, The European Commission, Australia, Austria, Belgium, Luxemburg, the Kingdom of the Netherlands, Spain, Sweden and Switzerland were invited to join the FATF.
\textsuperscript{61} De Koker explains the FATF as essentially a policy – making and standard – setting body promoting policies to combat money laundering.
measures taken by countries in combating money laundering. In 1990 the FATF formulated the 40 Recommendations to address the problem and these include legislative measures for confiscation of proceeds of unlawful activities and instrumentalities used or intended to be used in the commission of crime and their forfeiture. An additional 9 Special Recommendations have to date been issued to deal with terrorism. The FATF is also exploring ways to address links between corruption and money laundering or terrorist financing. Member countries are encouraged to implement the recommendations in their jurisdictions and the consequences of failure to do so are explained by De Koker as follows:

The FATF has a policy for dealing with non-compliant members. The measures contained in this policy represent a graduated approach at increasing peer pressure on member government to take corrective steps. A country which is not fully compliant will first be required to deliver a progress report at plenary meetings. Peer pressure will then be gradually increased and, if these strategies fail to deliver results, the FATF membership of the country in question can be suspended.

It is clear that worldwide there is a firm commitment to combat organised crime in all its manifestations. This, however, is not enough. Individual countries have a responsibility to effectively carry out this commitment in their respective jurisdictions and on an ongoing basis. The form this would take varies from country to country but mainly it will manifest itself in statutory frameworks. In doing so, individual countries should bear in mind that the criminal world is not only aware of such interventions but will always

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62 Recommendation 3.
63 See footnote 3 supra at Com 1 – 13.
64 Summary address by FATF chairperson, Prof Kader Asmal, Cape Town Plenary held on 15 – 17 February 2006.
65 See footnote 3 supra at Com 1 – 14.
devise new ways of advancing the goals of organised crime. South Africa has so far, as it will be apparent below, played its part in this regard.
Chapter 2
Asset Forfeiture

2.1 Introduction

Both criminal\(^{66}\) and civil\(^{67}\) forfeiture, especially on the scale\(^{68}\) presented in POCA are relatively new concepts in the South African jurisprudence. The dawn of the human rights era in the 1990's in South Africa brought with it violent and serious crimes on a scale and distribution not seen before, as well as crimes associated with international organised drug trafficking groups.\(^{69}\) Imprisonment and the imposition of suspended sentences and fines were used to fight crime but proved to be ineffective. Imposing a prison sanction is costly\(^{70}\) and criminals view it as a temporary inconvenience.

Asset forfeiture has thus been brought about in response to international calls to put systems in place in the fight against organised crime and by an urgent need to counter the complex and sophisticated nature of the mechanisms used by the criminals,\(^{71}\) which enable them to live comfortably from proceeds of crime. Such peaceful enjoyment of the proceeds of crime by criminals damages public confidence in the rule of law and provides

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\(^{66}\) Refers to Ch 5 provisions of POCA which are targeted at the recovery of proceeds of unlawful activities and invoked when a suspect is to be charged or has been charged or prosecuted, there are reasonable grounds to believe that a conviction may follow and that a confiscation order may be made. It is thus conviction-based forfeiture. It is not really different from the UK asset forfeiture law.

\(^{67}\) Refers to Ch 6 provisions of POCA targeted at both the recovery of proceeds of unlawful activities and removal from public circulation of instruments or assets used in the commission of crime where the guilt of the wrongdoer is not relevant.

\(^{68}\) POCA introduces new offences of racketeering and money laundering and combines both forfeitures in one piece of legislation something which has never been done anywhere else in the world.


\(^{71}\) S A Law Commission Project 82 Working Paper 97 (2001) 8 – 12; Snyman Criminal Law 24 – 31; Preamble to the Act; Van Der Walt - "Civil Forfeiture of Instrumentalities and Proceeds of Crime and the Constitutional Property Clause (2000) 16 SAJHR 6; Gilligan v Criminal Assets Bureau and Others, unreported judgment of the High Court of Ireland dated 26 June 1997; NDPP v Mcasla and Another 2000 1 SACR 263 (Tk); Mohunram and Another v NDPP and Others 2007 6 BCLR 575 (C) at par 144.
harmful role models. It is therefore essential that mechanisms are put in place to ensure greater public confidence in the justice system.

The objectives of POCA were carefully considered and summarised in a unanimous judgment of the Constitutional Court in Mohamed as follows:

The Act’s overall purpose can be gathered from its long title and preamble and summarised as follows: The rapid growth of organised crime, money laundering, criminal gang activities and racketeering threatens the rights of all in the Republic, presents a danger to public order, safety and stability, and threatens economic stability. This is also a serious international problem and has been identified as an international security threat. South African common and statutory law fail to deal adequately with this problem, because of its rapid escalation and because it is often impossible to bring the leaders of organised crime to book, in view of the fact that they invariably ensure that they are far removed from the overt criminal activity involved. The law has also failed to keep pace with international measures aimed at dealing effectively with organised crime, money laundering and criminal gang activities. Hence the need for the measures embodied in the Act.

It is common cause that conventional criminal penalties are inadequate as measures of deterrence when organised crime leaders are able to retain the considerable gains derived from organised crime, even on those occasions when they are brought to justice. The above problems make a severe impact on the young South African democracy, where resources are strained to meet urgent and extensive human needs. Various international instruments deal with the problem of international crime in this regard and it is now widely accepted in the international community that criminals should be stripped of the proceeds of their crimes, the purpose being to remove the incentive for crime, not to punish them. This approach has similarly been adopted by our legislature.

73 NDPP v Mohamed NO 2002 4 SA 834 (CC) at 850 para 14 – 15.
Asset forfeiture is traditionally viewed\textsuperscript{74} as a form of deterrence and restitution (or civil recovery) of proceeds of crime which are returned to the persons they belonged to in the first place and taking away from public circulation of assets used in the perpetration of crime, giving them to the State. This makes its most striking feature as being acquisitive: to vest the State with ownership in the property for the public benefit.\textsuperscript{75} This is a laudable exercise.

The State lodges application proceedings in Court against assets belonging to the criminals on the basis that they are either proceeds of unlawful activities or instrumentalities of crime. A curator bonis ("the curator") is appointed by Court to take control, maintain and look after the safety of the seized property. The objective in this regard is to receive good value at the time of sale. The Orders granted by Court are served on those with interest in the affected property and published, in civil forfeiture, in the Government Gazette ("the Gazette"). Assets are, after prescribed periods, sold in private or public auction the proceeds of which are then deposited into the Criminal Assets Recovery Account ("CARA") which in turn is used to bolster law enforcement.\textsuperscript{76} In this way asset forfeiture is meant to be used to regain public confidence in the justice system and to send a strong message to criminals that crime does not pay.

2.2 Origins of asset forfeiture

The origins of asset forfeiture are rooted in ancient English common law which provided for the forfeiture of the value of the object causing the accidental death of a King's

\textsuperscript{74} NPA Website address: http://www.ithala/about_npa/units/afahome.asp accessed on 27/03/2006.
\textsuperscript{75} Van Der Walt at 3.
\textsuperscript{76} S 69A of POCA.
subject known as *deodand*. The latter was transformed through years from a religious expiation of guilt to a useful revenue – generating device\(^\text{77}\) for the State. Many modern and democratic legal systems have adopted asset forfeiture, not as a substitute but as a law enforcement mechanism operating parallel to the criminal and civil justice systems to deal with unlawful activities. Mention may be made here of the United States, Canada, the UK, Australia, France, Belgium, the Republic of Ireland\(^\text{78}\), Nigeria\(^\text{79}\), Namibia\(^\text{80}\) and Botswana.\(^\text{81}\)

2.3 Critics of asset forfeiture

Except that criminal forfeiture is often incorrectly\(^\text{82}\) viewed as an additional punishment to a conviction and sentence, so far no criticism can be found levelled against it because there appears to be much contentment due to the fact that a conviction is prerequisite. It also follows that the benefit to the convicted criminal should be dislodged from his/her possession as it is never due to such an offender.

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\(^{78}\) Kennedy at 9.

\(^{79}\) The National Drug Law Enforcement Agency Decree 48 of 1989 contained in Chapter 253 of the Laws of the Federation of Nigeria provides for the forfeiture of the properties of any person convicted under the decree; See also the discussion on Decree 48 by Redpath "Forfeited Rights? Assessing South Africa's asset forfeiture laws" at 7 [http://www.isa.co.za](http://www.isa.co.za) accessed on 16/02/2007.


\(^{81}\) The Proceeds of Serious Crime Act, No 8 of 2003 (as amended).

\(^{82}\) Van der Walt 4, In *Shalk*, O’ Regan ADCJ at paras 57 said that upon a proper construction of the Act, she was not persuaded that the primary purpose of chapter 5 is punishment of offenders but was to ensure that that criminals cannot enjoy the fruits of their crimes. The achievement of this purpose might very well have a punitive effect.
Civil forfeiture has, however, been viewed by many as controversial and more so in constitutional democracies. Critics agree that there is a need to declare war on crime but do not agree with the approach followed in civil forfeiture. They are against the use of a 'legal fiction' which provides for a motion application against a 'guilty' property rather than its owner. They argue that civil forfeiture violates the constitutional rights or 'safeguards' to property; the presumption of innocence and due process of law do not apply - thus an asset may be forfeited without a conviction and a criminal trial 'is avoided'; and the seizing order is obtained 'secretly' based exclusively on affidavits that may contain 'lies'.

They contend further that 'Courts simply rubber - stamp the process and no evidence at all is presented', 'the case is resolved based solely on affidavits'; the 'double jeopardy' rule does not apply'; and when those whose property has been preserved want to oppose they 'must give up their right to silence' and that innocent owners even if they oppose simply 'have no rights'. The forfeiture of assets, it is further argued, 'is an unconstitutional attempt to grab property'. By far the most innocent victims of forfeiture are the children of the offenders.

83 Meeker-Lowry at 2; Barnet; Vivian - “SA’s Constitutional Safeguards are in Shreds” 2; Vivian “Breaking Every Safeguard in the Book” http://www.businessday.co.za accessed on 14/03/2007; Van Der Walt 4 – 7.
84 Vivian – “SA’s Constitutional Safeguards are in Shreds” at 2.
85 Meeker-Lowry at 7.
2.4 Asset forfeiture in the South African context justified

Both the Supreme Court of Appeal ("the SCA") and the Constitutional Court have held that there is nothing unconstitutional in civil forfeiture as set out in POCA. Motion proceedings used when invoking civil forfeiture are well known in civil law and have been part of our law for very many years. Such proceedings have been and remain the same before POCA was promulgated and currently. Once a Court is satisfied with the evidence as set out in affidavits, it applies the law to the facts to arrive at a decision. It is therefore wrong to state that the Courts simply rubber-stamp the process. The Courts have certain requirements or procedures which must be followed before relief is granted. This position applies equally to all litigants who seek relief from Courts.

POCA provides that its provisions shall only be invoked when certain more serious crimes are committed and schedule 1 to POCA lists such crimes. The focus in civil forfeiture is on these crimes (and not on the individual) without which there can be no forfeiture. These crimes do not receive a special "civil" character in civil forfeiture. Prosecution is but one commonly known way of proving that a criminal offence has been committed; stating in an affidavit that a crime has been committed is another equally acceptable one and there are times when even hearsay evidence would be admitted. Section 50(4) of POCA provides that civil procedure is not conviction based therefore there is no need for an individual to be arrested, charged, prosecuted or even convicted for a preservation or forfeiture order to be valid. It is not that the criminal trial is "avoided"; there is simply no need for it to be held.

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86 On justifying forfeiture see Cassella "Forfeiture is reasonable, and it works" http://www.mmg.org accessed on 14/03/2007.
87 In terms of section 3 of the Law of Evidence Amendment Act, No. 45 of 1988.
Section 38 of POCA provides that a preservation application may be brought *ex parte* and this is the norm in South African legal practice. Where a case has been made out for the hearing of the matter in the judge's chambers or *in camera*, that may also be allowed just as where interdicts are involved and especially where dissipation of assets is likely to occur.

POCA does not require the State to show an actual threat from the wrongdoer to dispose of any property with the intention of defeating the State's claim. The public policy behind the legislation therefore demonstrates that the Legislature did not, as a jurisdictional prerequisite, require the Courts to examine the likely intention of a respondent in regard to the retention or disposal of the property nor did it expect the State to adduce evidence of a state of mind about which it would often possess no knowledge.\(^{88}\) This, however, certainly does not make asset forfeiture a process by the State to simply 'grab property' at will. The process is governed by the same rules that govern seizure of property in any civil action.

In accordance with all similar international laws asset forfeiture proceedings must be fair; comply with constitutional and international requirements and where constitutional rights are infringed or threatened, the Courts should intervene at the request of those whose rights have been infringed.\(^ {89}\) In *Prophet*\(^ {90}\), Nkabinde J, writing for a unanimous Court,

\(^ {88}\) *NDPP v Phillips* 2001 2 SACR (W) 542 at 552H, Heber J held that the legislature has in effect accepted that a person who faces restraint proceedings is not one in whom any confidence can be reposed: succinctly, a defendant is assumed to be not simply a debtor but also a rogue.

\(^ {89}\) See footnote 19 *supra* on the discussion of due process.
held that asset forfeiture orders as envisaged under Chapter 6 of POCA are inherently intrusive in that they may carry dire consequences for the owners or possessors of properties, particularly residential properties. Courts are therefore enjoined by section 39(2) of the Constitution of South Africa, 1996 ("the Constitution") to interpret legislation such as POCA in a manner that promotes the spirit, purport and objects of the Bill of Rights to ensure that its provisions are constitutionally justifiable, particularly in the light of the property clause enshrined in terms of section 25 of the Constitution. Should our Courts fail in this noble duty asset forfeiture would amount to an unlawful and arbitrary deprivation of property and thus an infringement of section 25 of the Constitution; and/or a penal deprivation of property that is grossly disproportionate, arbitrary and irrational and thus infringe the cruel and unusual punishment clause in the Constitution. 91

All property owners (excluding 92 fugitives from justice) whether they be criminals or innocent third parties are entitled to the due process of law. Their rights in this regard are, however, limited, justifiably so, when it comes to a hearing in camera of a preservation application. This is remedied by a reconsideration 93 clause in a Preservation Order allowing a respondent to apply for a rescission or variation and also being given a right to oppose a forfeiture application.

90 Prophet v NDP 2006 2 SACR CC 525 at 544 par 45.
91 See discussions on proportionality in NDP v Mohunram Kumarnath, reportable judgment of the SCA Case no 173/2005 delivered on 2006/03/07; 2006 JOL 16879 (SCA).  
92 See Botter v Goslin 1987 2 716 at 721D – G; Mulligan v Mulligan 1925 WLD 164
93 NDP v Tam and Others 2004 1 SACR 126 (W) at 128; NDP v Naidoo and Others 2006 2 SACR 406 (T) at 410.
Litigants have all the rights attendant on normal civil litigation. Section 52 of POCA deals with remedies innocent property owners may use in securing their properties. The Constitutional Court\(^94\) has added the caveat of proportionality analysis as a further consideration before property is forfeited to the State, making forfeiture even more difficult to achieve. The situation of children of criminals whose property is liable to forfeiture is given consideration at this stage of the proceedings. It is therefore ill-informed to say that due process of law does not apply.

The contention that it is unfair to expect property owners to exercise their constitutional right to remain silent in the criminal trial and yet require them to depose to affidavits opposing civil forfeiture sounds more compelling but is misleading. Our Courts have dealt with this issue and simply said tough choices sometimes have to be made in life and this is one of them. What is significant, according to the Courts is the purpose for which the disclosure is sought and whether such disclosure is constitutional.\(^95\) There is accordingly nothing unfair in this regard. POCA does not compel any litigant to depose to affidavits against his/her will. Any person who intends opposing the granting of a Forfeiture Order may, without deposing to any affidavit simply appear at the hearing of a forfeiture application, oppose the making of such an Order or apply for the exclusion of his/her interests in the preserved property from forfeiture by adducing oral evidence.\(^96\)

What have to be balanced are the rights of an individual property owner (and his/her

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\(^{94}\) NDPP v R O Cook Properties Ltd; NDPP v 37 Gillespie Street Durban and Another; NDPP v Scemarayun 2004 2 SACR 208 SCA.

\(^{95}\) NDPP v Mohamed 2003 2 All SA 548 C at 567 – 572. The Court reasoned at par 76 that the disclosure at restraint stage is aimed at securing sufficient property against which an ultimate confiscation order may operate. It is not aimed at obtaining self-incriminating testimony for the objective of securing a conviction against an arrested or accused person.

\(^{96}\) S 48(4); It will, however, be contended later on that this provision should be amended.
family) as against those of the public good and our Courts are capable of discharging this duty. POCA, which follows closely the American Racketeer Influenced Corrupt Organisations Act\(^7\), thus provides a powerful new weapon in the armoury at the State's disposal in combating organised crime, money laundering, criminal gang activities and crime in general.

In May 1999 the South Africa established the Asset Forfeiture Unit ("the AFU") and has set up almost thirteen offices\(^8\) countrywide to implement the provisions of POCA and will most probably continue to open new ones to cover all nine Provinces. This leads to a need to ascertain South African statutes with forfeiture provisions prior to POCA, problems, successes and failures encountered during the implementation process of POCA and whether, taking into account developments elsewhere in the world, there is any room for improvement.

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\(^7\) Also known as RICO is contained in title 18, chapter 96 of the United States Code, and was also passed mainly in response to difficulties in policing drug laws and in tackling syndicates and gangs taking part in illegal activities in the US; Pretorius et al "The Constitutionality of civil forfeiture" (1998) 13 SAPR/PL 387 – 8; Simser at 21 in "Civil Asset Forfeiture in Common Law Jurisdictions: Developments in 2006 – 2007" states that legislatures may have inadvertently imported an American problem from 1998 without incorporating the American solution from 2000.

\(^8\) There are offices in Pretoria, Johannesburg, Cape Town, Durban, Port Elizabeth, East London, Mthata, Bloemfontein, Minabatho, Limpopo, Nelspruit, Middleburg and Kimberley.
Chapter 3
South African legislation on seizure, forfeiture and victims: prior to 1999 – a historical overview

3.1 Introduction

An historical overview of our legislation permitting asset forfeiture may reveal the essential principles that apply to the issue under discussion. It will show that in various ways, as discussed below, the concepts of both criminal and civil forfeiture, although not in the comprehensive POCA way, have possibly been part of our jurisprudence for quite a long time but, other than our criminal procedure, no other special mechanism was put in place to implement them. It also shows that victims of the underlying asset forfeiture crimes were not at all taken into consideration in all these statutes discussed below. Instead, any asset recovery process was intended to benefit the State. The two concepts were also used to target individual wrong doing.

A discussion on these pieces of legislations becomes important when the following sentiments expressed in Mohunram are taken into consideration:

An additional consideration that enters the equation in the proportionality analysis must be whether the crime in relation to which the "criminal property" was used is subject to asset forfeiture provisions. If it is, it is a relevant and important factor whether the forfeiture provisions are exhaustive so as to render forfeiture under POCA redundant or doubly punitive. This is particularly so if the offence in question has resulted in a criminal conviction and the operative law provides for confiscation. In the present case, the LRP argued with considerable force that, in framing the provisions of the KZN Gambling Act, the legislature: (a) made specific provision for forfeiture in section 94(4) thereof; and (b) in so doing signified an intention that the forfeiture regime so created would suffice to meet the mischief sought to be cured by the enactment.
Ordinarily, it may be accepted that, when the legislature designates a set of remedies to combat a specified crime, the remedies are intended to be effective and exhaustive. This is particularly so in the present case. The KZN Gambling Act was passed well ahead of POCA. Therefore, it cannot be inferred that the KZN legislature intended that the provisions of POCA would supplement those of the KZN Gambling Act. The legislature created adequate remedies, which do not encompass the forfeiture of immovable property on which an unlawful casino is situated.\(^99\)

This means that any determination of proportionality should take into account the extent to which the common law and statutes with asset forfeiture provisions that existed before POCA prove (or threaten to be) inadequate in the circumstances.\(^100\)

3 2  **Currency and Exchanges Act, No. 9 of 1933**

In terms of this Act the State President may issue regulations which may impose criminal or civil sanctions and provide for the blocking, attachment and obtaining of interdicts by the Treasury. The regulations may also provide for the forfeiture and disposal by the Treasury of any money or goods reasonably suspected to be involved in an offence or which are in possession of an offender. The latter must have benefited or been enriched as a result of such an offence as provided in section 9.

Any decision to forfeit and dispose of such monies or goods shall be published in the Gazette. This is in order to alert any persons other than the true owner and the notice of the decision must be sent per registered mail to any person affected by it. Any person who feels aggrieved with such a decision may lodge, within 90 days of publication in the Gazette, an application for the revision or setting aside of such a decision or action. It can

\(^{99}\) At pars 127 – 128; Asset forfeiture should not be used a supplement or top up.

\(^{100}\) At par 145.
also be observed that the period within which the affected person may lodge an application limits his/her rights which are safeguarded by the fact that he/she is entitled to approach Court for a relief.

This Act has very few features that are akin to civil forfeiture. The reference to the word 'decision' implies an administrative decision to forfeit such money or goods arrived at by the Treasury without resorting to Court or securing a conviction against any offender or suspect. An administrative forfeiture is thus envisaged in this regard. There must, however, be a link to an offence.

Regulation 3\textsuperscript{101} provides that currency\textsuperscript{102} may be seized and forfeited to the State if an individual fails to declare that he/she has any currency on his/her person, unless a certificate has been issued by the Treasury showing that the exportation of the currency from any point of entry of this country. Any person convicted of contravening this Act is liable to a fine not exceeding R250 000.00 or imprisonment for a period not exceeding five years or both such fine and such imprisonment.\textsuperscript{103}

The rationale behind this Regulation is to ensure timely repatriation into the South African banking system of currency acquired by residents whether through transactions of a current or a capital nature. It also prevents the loss of currency resources through transfer abroad of real or financial capital assets held in South Africa. It would appear


\textsuperscript{102} In the form of bank notes, gold, securities or foreign currency.

\textsuperscript{103} See Regulation 22.
that the envisaged seizure or forfeiture does not follow a conviction, a process that is akin to civil forfeiture.

In *Armbruister and Another v The Minister of Finance and Others*\(^\text{104}\) Mokgoro J dealt with the seizure at OR Tambo international airport, the forfeiture of foreign currency\(^\text{105}\) under Regulation 3 and the constitutional validity of the latter Regulation's forfeiture provision. After Mr. Armbruiser lost in the High Court, he was granted leave to appeal to the Constitutional Court in which he argued that Regulation 3(5) provided Treasury officials with discretion to forfeit property which is a punishment, without guidelines to show how the discretion is to be exercised. This, he contended, violated sections 25(1),\(^\text{106}\) 165(1)\(^\text{107}\) and 34\(^\text{108}\) of the Constitution.

On the interpretation of Regulations 3(3) and (5) the Court\(^\text{109}\) held that the seizure of the currency is a temporary measure, that its forfeiture only takes place after the Treasury has afforded the person concerned a fair hearing and then decides not to return the currency. The purpose of the forfeiture was explained\(^\text{110}\) to be threefold:

\(^{104}\) A reportable judgment of the CC, Case no CCT 59/2006 delivered on the 25/09/2007; See also Van der Merwe and Another v Nel and Others 2006 2 SACR 487 (C); [2006] 4 All SA 96 (C) at pars 20 – 23; Action Engineering and Fencing (Pty) Ltd v Moysses NO and Others 2004 5 SA 399 (T); [2003] 3 All SA 263 (T) at par 15.
\(^{105}\) Valued at R102 675.65.
\(^{106}\) Which guarantees the right not to be arbitrarily deprived of property.
\(^{107}\) Which vests the judicial authority of the Republic in the Courts.
\(^{108}\) Which guarantees the right to access to Court.
\(^{109}\) Par 39.
\(^{110}\) Par 48.
It has a deterrent effect in that it gives a strong message to the person concerned and the public at large that currency sought to be unlawfully exported will be forfeited;

- It ensures that foreign currency is available to the police as evidence in any criminal charge that might ensue; and

- It is to avoid unlawful possession of the foreign currency being granted to anyone else not entitled to it.

With this in mind the Court held\textsuperscript{111} that\textsuperscript{112} although the Regulation had a punitive effect, it is by no means a criminal punishment and accordingly was held to be constitutional. It reasoned as follows:\textsuperscript{113}

I have already said that the objectives of forfeiture under Regulation 3(5) are to deter commission of the crime, to prevent unlawful possession of the currency and to have evidence for a criminal trial. However, any mechanism aimed at deterrence will probably have some punitive effect. Therefore, although the forfeiture of currency under Regulation 3(5) is designed to deter, it at least to some extent, effectively penalises those who contravene the regulations. Although it has this punitive effect, it is by no means a criminal sanction.

In \textit{NDPP v Starplex CC}\textsuperscript{114} South African and foreign currency, documentation and various other articles were seized as evidencing a money exchange business. The possessor thereof was charged with contravening the provisions of Regulation 2(1)\textsuperscript{115} but

\textsuperscript{111} As it did in the \textit{Shaik} case in relation to the purpose of chapter 5 of POCA.
\textsuperscript{112} At par 55.
\textsuperscript{113} At par 55.
\textsuperscript{114} A reportable judgment of the CPD, Case no 12099/2007 dated 20/03/2008.
\textsuperscript{115} Which provides that except with the permission granted by the Treasury, and in accordance with such conditions as the Treasury may impose no person other than an authorized dealer shall buy or borrow any
the criminal case was struck off the roll when the docket went missing. Instead of the Treasury proceeding by way of an administrative procedure, the NDPP successfully obtained a Preservation Order. One explanation for this may be the effectiveness of civil forfeiture as opposed to the use of the Regulations. This may be viewed, following the Law Review Project’s argument in Mohunram\textsuperscript{116} and the reasoning of the SCA in Vermaak\textsuperscript{117} as the so called topping up exercise.

3.3 Customs and Excise Act, No. 91 of 1964

Any goods imported, exported, manufactured, warehoused, removed or otherwise dealt with or any plants used in contravention of the provisions of this Act shall be seized by an officer, magistrate or member of the police and be liable to forfeiture.\textsuperscript{118} Any affected person must give notice in writing to the Commissioner, within 90 days after the date of seizure, of any intention to institute any proceedings. Those items forfeited may be sold or destroyed. It is not clear in this Act where the proceeds of the sold forfeited items are meant to go. It can be assumed that the State would be the benefactor.

There is no reference to a notice that has to be given to the affected person or Court procedure that has to be followed before the seizure of the goods or plants. It appears that the seizure and the forfeiture are also done administratively based on the decision of the officers or members of the police that the provisions of this Act have been contravened.

\textsuperscript{116} Mohunram \textit{v} NDPP (Law Review Project as \textit{Amicus Curiae}) 2007 4 SA 222 at par 38.

\textsuperscript{117} NDPP \textit{v} Vermaak 2008 1 SACR 157 (SCA) at par 12; NDPP \textit{v} Lewis – a reportable judgment of the CPD, Case no 2459/2005 delivered on 03/12/2007 at 8.

\textsuperscript{118} S 87.
No procedure is expressly set out in this Act as to what should precede forfeiture. The onus is on the affected person to apply to Court for the release of the seized items.

The features in this Act are also, in a limited way, similar to civil forfeiture. There is no need for a conviction to precede forfeiture. If the officer is of the view that a contravention has taken place a seizure and forfeiture will follow. In The Commissioner for the South African Revenue Service v Saleem\(^{119}\) a duty officer seized\(^{120}\) goods from a warehouse and thereafter a notice of detention of the goods was served on the owner for an opportunity to prove that the goods were lawfully imported. Mr. Saleem brought an application for the return of the goods and the Court \textit{a quo} held that the duty officer's suspicion that the goods were illegally imported was unreasonable.

The SCA disagreed. It confirmed\(^{121}\) that the seizure of the goods was an administrative act which had to be exercised fairly and reasonably in conformity with the purpose and spirit of the Constitution and with due regard to the rights of the individual. The goods, brought into the country without declaring them and paying the necessary custom duty were held to be liable to forfeiture.

\subsection{3.4 National Parks Act, No. 57 of 1976}

Section 21 of this Act deals with restrictions on entry into a park or into a residence situated in a park as well as the prohibition of some acts. Any weapon, explosive, trap or poison used in contravening any provisions of this Act and any wild animal or article in

\footnote{A reportable judgment of the SCA, Case no. 21/2007 dated 27/03/2008.}
\footnote{In terms of s 88(1)(a).}
\footnote{At 6 and 9.}
respect of which the provisions of section 21 have been contravened shall, in addition to any other punishment which may be imposed, be declared forfeit to the State.

It is observed that these are items that may not be lawfully possessed i.e. contrabands. Reference to 'punishment imposed' means that imposed by a criminal Court after conviction. Accordingly the forfeiture to the State would be declared by such a Court. Any vehicle or vessel used in contravention of section 21 provisions may, if the contravention is wilful, be declared forfeited to the State unless it is proved that the person convicted is not the owner of such an item and that the owner thereof could not have prevented its use by the person convicted.\textsuperscript{122}

It is clear in this Act that the forfeiture of any item will have to be preceded by a conviction and there is thus an introduction of what is known in POCA as an innocent owner defence. The procedure envisaged is in line with criminal forfeiture. It can be safely assumed that an implied cross reference to the Criminal Procedure Act, No. 51 of 1977 is contained in this Act.

3.5 \textbf{Criminal Procedure Act, No. 51 of 1977}

The State has a general power to seize articles used or to be used\textsuperscript{123} in the commission of an offence or which may afford evidence in order to obtain evidence for the institution of prosecution.\textsuperscript{124} The phrase 'concerned in the commission of an offence' may best be

\textsuperscript{122} S 24(9) (a) and (b).
\textsuperscript{123} The phrases 'to be used' or 'intended to be used' are discussed below when the definition of an instrumentality of an offence is dealt with.
\textsuperscript{124} S 20.
described as having some connection or involvement or is of some importance to the crime.\textsuperscript{125}

Prosecution should take place within a reasonable time.\textsuperscript{126} Where the owner of the seized article has been located the article should, with the consent of the person it was originally seized from, be given to the former.\textsuperscript{127} Where no prosecution follows and the person from whom the article was seized cannot lawfully possess it, the article should be forfeited to the State.\textsuperscript{128} This would be the case with respect to contrabands. Upon conviction of the accused the Court may declare forfeit to the State any article used in the commission of the offence.\textsuperscript{129}

The forfeiture in this Act is clearly conviction based and any party with interest in the seized property is to be properly notified of the seizure and intended forfeiture proceedings. The State has an obligation to ascertain the identity of parties having interest in the article. The test is on the balance of probabilities\textsuperscript{130} and the forfeiture is subject to an appeal by any affected party. The principles of the presumption of innocence and the protection of right to property are first principles to be considered when seizure and forfeiture are allowed.\textsuperscript{131}

\textsuperscript{125} NDPP v RO Cook Properties 2004 2 SACR 208 SCA at 221 – 225.
\textsuperscript{126} Niyakhe v The Minister of Safety and Security & Others 1999 2 SACR 349 (ECD).
\textsuperscript{127} S 30.
\textsuperscript{128} S 31, 32 and 34.
\textsuperscript{129} S 35.
\textsuperscript{131} Pretorius et al at 387.
Section 35 also contains a significant safeguard in that this forfeiture does not affect the rights of an innocent owner who proves that he/she had no knowledge of the instrument's use in the commission of the offence or that he/she could not prevent such use, and that he/she may lawfully possess the instrument which has become liable to forfeiture. The Court hearing the forfeiture application brought by the prosecutor must consider:

- the nature of the instrument and the role it played in the commission of the offence;
- the ease with which the instrument may be used to commit further offences;
- the financial implications of the forfeiture for the person against whom the order is made; and
- the financial value of the instrument liable to forfeiture.

These requirements are applicable to civil forfeiture and the last two deal with the issue of the proportionality of the forfeiture which will be dealt with later on. In Nkpepe the Court convicted the accused of driving an unregistered motor vehicle and driving without a driver's license. The Court declared the motor vehicle forfeit to the State under the then section 360(2) of the Criminal Procedure Act, No. 56 of 1955 which spoke of a weapon, garden instrument or another article. On review De Wet, J held that since a motor vehicle was not an article the section was not applicable. The forfeiture was, accordingly, set aside.

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132 S 35(1)(b) read with s35(4)(a); Pretorius et al 388.
133 S v Hlongote 1979 4 SA 199 (B); S v Matisane 1978 3 SA 821 (T); R v Ndhlovu 1980 3 SA 46 (R); S v Khunong 1989 2 Sa 218 (W); Ex parte die Minister van Justisie 1968 1 SA 380 (A).
134 As set out in Chapter 6 of POCA.
135 S v Nkpepe 1973 1 SA 331 (O).
The possibility of a forfeiture of motor vehicles in general, it appears, existed then, and
the emphasis was placed on a consideration of a fine that could be imposed in lieu of the
value of the vehicle. The *Nkpeane* decision may be used as an authority in this regard.
Where a vehicle is used in a robbery, murder and theft it is clear that it could be forfeited.
Whether the word ‘instrument’ in section 35 of this Act should include motor vehicles
involved in traffic offences is still a moot point which will be dealt with later. The Courts
in the two cases\(^{136}\) were of the view that if it was so the Legislature should have
categorically said so.

In *Dlova*\(^{137}\) the accused had been convicted of unlawfully dealing in liquor and was fined
R100.00. In addition, a motor vehicle used to store the liquor was forfeited to the State.
On appeal the forfeiture was set aside because it was held that it was not the subject of
prosecution i.e. it was not an exhibit and that the Court *a quo* had erred in finding that it
was used, beyond reasonable doubt, that it was used in connection with the offence of
dealing in liquor. It further held that section 35 gave Courts sufficient power to declare
forfeit to the State objects used in connection with crimes.

The reference by the Court in this case to the test of proof beyond reasonable doubt and
that the vehicle had to be an exhibit is, with respect, misplaced. These two requirements
are essential for the purposes of a criminal case and not forfeiture proceedings, which are
civil in nature. The enquiry into whether an object was used in connection with an

\(^{136}\) *Nkpeane* and *S v Dlova* 1986 3 SA 248 (NC).
\(^{137}\) See footnote 133 *supra*.
offence, in order to be liable to forfeiture, must be approached differently. The test should have been held to be on a balance of probabilities and that the vehicle was used in facilitating the commission of the offence.

3.6 **Sea Fishery Act, No. 12 of 1988**

A Court convicting any person for the first time of an offence in terms of this Act may, in addition to any punishment it may impose, declare forfeit to the State any fish, aquatic plants, shells or implements in respect of which an offence was committed. If a person is convicted for a second time a fishing boat, vessel or vehicle so used may also be forfeited to the State. Such a declaration, however, shall not affect any other person with interest in the forfeited property if it is proved that such a person had taken all reasonable steps to prevent the use thereof in connection with the offence.\(^{138}\) A cross reference to the Criminal Procedure Act, No. 51 of 1977 is contained in this Act and what is explained in paragraph 3.5 above regarding the requirement of a conviction prior to forfeiture also applies here.

3.7 **Environment Conservation Act, No. 73 of 1989**

Again a Court convicting any person of an offence under this Act may declare forfeit to the State any vehicle or other thing by means of which the offence concerned was committed. The rights of other persons with an interest in the forfeited item will not be

\(^{138}\) S 48.
affected if it is proved that they did not know that the item was or would be used to commit the offence or could not prevent such use.\textsuperscript{139}

3.8 **Agricultural Product Standards Act, No. 119 of 1990**

A Court convicting any person of an offence under this Act may, on request by a prosecutor, order that a quantity of the product, material, substance or other article concerned, which is the subject of the charge sheet against that person be forfeited to the State.\textsuperscript{140}

3.9 **Drugs and Drug Trafficking Act, No. 140 of 1990**

Any scheduled substance, drug, animal, vehicle, vessel, aircraft, container or immovable property by means of which an offence was committed under this Act or for the storage, conveyance, removal or concealment may be forfeited to the State.\textsuperscript{141} The interests of innocent owners are protected. Any person with interest\textsuperscript{142} in the forfeited property may, within three years from the date of declaration, apply for its return. If the property has already been disposed of by the State the person with interest therein may be compensated.

3.10 **Marine and Living Resources Act, No. 18 of 1998**

A Court may order, in addition to any penalty given against any person convicted of an offence in terms of this Act\textsuperscript{143} that any fishing vessel, diving gear, equipment, vehicle, proceeds of the sale of fish unlawfully caught, vehicle or aircraft involved in the

\textsuperscript{139} S 38.
\textsuperscript{140} S13.
\textsuperscript{141} S 25 – 27.
\textsuperscript{142} Excluding a convicted person.
\textsuperscript{143} S 68.
commission of such an offence be forfeited to the State. This Act deals, amongst others, with the illegal poaching of abalone along our coastline. Any innocent owner is entitled to approach Court and apply for the release of the forfeited property if he/she was not implicated in the commission of the offence or he/she could not have prevented it.

3.11 Proceeds of Crime Act, No. 76 of 1996

Subsequent to the recommendations of the South African Law Commission this Act ("the Proceeds Act") came into effect on the 16th May 1997. Its purpose was for the recovery of proceeds of crime, introducing money laundering as an offence and placing an obligation on persons who carry on business to report suspicious transactions. It imported criminal forfeiture in a form of restraint and confiscation orders as presently known in POCA. A Court having convicted an offender is authorized to enquire into any benefit which an offender may have derived from an offence or any related criminal activity. Such a benefit may then become subject to a confiscation order. It is only in this Act that the existence of victims of crime is noticed which is followed by the need to reimburse them of what they lost through the activities of the criminal.

In practice this could mean that even a benefit derived from a related criminal activity other than the one for which the offender was convicted of may be confiscated by the State. Thus, once the triggering event has occurred – the conviction for the predicate

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144 Which was repealed by s 76 of POCA.
146 Which is strongly influenced by the English Drug Trafficking Offences Act 1986.
147 S 3.
148 S 28.
149 S 74.
150 S 8.
offence – the Court is entitled to broaden its investigation to cover illegal activities that
belong to the same genus as the one for which the offender was convicted but which
occurred at another time and in relation to facts which have no connection to those
underlying the predicate offence and for which no criminal conviction was registered.¹⁵¹

Notable in all these statutes is the fact that criminal and civil forfeiture have been part of
the South African jurisprudence for at least three decades before the coming into effect of
POCA. The law enforcement agencies had the right to seize items suspected to be used or
of having been used in the commission of the relevant offences and the Courts, in
addition to any penalty imposed on the convicted accused, have discretion to declare such
items forfeit to the State, provided that the interests of innocent owners are taken into
account. It is implied that the State would make the application for the forfeiture.

Of significance is the fact that in the absence of a conviction civil forfeiture could also
take place albeit administratively. Absent in this period is an all encompassing legislation
setting out in full the procedure to be followed in applying for asset forfeiture on a much
broader basis. No specific unit existed then to implement the forfeiture provisions in the
various statutes. It is also not clear where the proceeds of sold forfeited items were to go.
It is with this in mind that there is an express indication in the preamble of POCA

¹⁵¹ Pretorius et al at 389.
that the South African common and statutory laws 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 crime.

What is missing in all these pieces of legislation, including POCA, is the issue of bulk cash seizures which is normally associated with money laundering. South Africans are free to leave this country with R5 000.00\textsuperscript{152} but there is no threshold for the amount of foreign currency entering South Africa. This means that anyone may bring and possess large cash amounts into the country as long there is an acceptable explanation for it. This may also prove dangerous to the possessor in the light of high crime rate. There is no legislation that prohibits carrying of any amount of cash inside the country or threshold in this regard or legislation that deals with bulk cash seizures. For any law enforcement official to seize any bulk cash he or she must link it to a specific crime.

Financial institutions are implementing the provisions of the Financial Intelligence Act, No. 38 of 2001 and are making life difficult for the criminals and terrorist organizations. The latter are more likely to utilize the weakness in our justice system of not having legislation on bulk cash seizure. In the United States of America\textsuperscript{153} it is a criminal offence for anyone with intent to evade a currency reporting requirement to conceal more than $10 000 in currency or any other monetary instrument and transport or attempt to transport the currency into or out of the US.

\textsuperscript{152} \url{http://www.reservebank.co.za} – regulation manual – travel allowances accessed 25\textsuperscript{th} June 2007.

\textsuperscript{153} In terms of the Bulk Cash Smuggling Statute (31 U.S.C 5332).
Violation may occur before the smuggler reaches an international border. In other words, even inland currency transportation above the threshold is criminalized. The purpose of this statute is to make the act of smuggling cash itself a criminal offence, authorize forfeiture of any cash or instruments of the smuggling offence and emphasize the seriousness of the act of bulk cash smuggling. It is designed principally against money laundering, drug trafficking, corruption and tax evaders.

In the United Kingdom sections 294 - 298 of the Proceeds of Crime Act 2002 give a constable power to seize any cash in any premises if he/she has reasonable grounds for suspecting that it is recoverable property i.e. obtained through unlawful conduct in or outside the UK or is intended by any person for use in unlawful conduct. The Secretary of State initially imposed a threshold of £10 000 which was reduced in March 2004 to £5 000 and then £1 000 in 2006.\textsuperscript{154} Importantly there is no threshold for terrorists. Cash includes notes, coins in any currency, postal orders, phone cards, casino chips, cheques of any kind including traveller’s cheques, bankers’ drafts, bearer bonds, bearer shares found in any place in the UK.\textsuperscript{155} It is will be submitted below that South Africa needs legislation with similar provisions in its fight against money laundering.

In 1996 the Constitution came into effect and property rights\textsuperscript{156} and the rights of accused persons\textsuperscript{157} were protected. In an effort to serve the public interest in effective policing of serious crime, forfeiture legislation creates dramatic state powers to

\textsuperscript{154} This is set out in a statutory instrument made under section 303 of the Proceeds of Crime Act 2002 (Recovery of Cash in Summary Proceedings: Minimum Amount: Order 2006 – SI 2006 No 1699). This amount can be amended by a further Order made by the Secretary of State - officers should be made aware of any such Order made.

\textsuperscript{155} S 289(6).

\textsuperscript{156} S 25.

\textsuperscript{157} S 35.
interfere with property, and hence generates conflict with the protection of private property in terms of the Constitution.\textsuperscript{158}

In respect of the right to property, the SALRC conceded that the operation of a Confiscation Order may deprive the offender of compensation because there will not necessarily be a causal link between the property realized in execution of such an Order and the offence from which the benefits were derived. It is submitted that the offender's rights to property would be limited to the value (as assessed by the Court) of that from which he/she had deprived the victim of his or her criminal activities.\textsuperscript{159} The limitation of rights clause\textsuperscript{160} in the Constitution is more likely to make justifiable any 'interference' with the rights of the accused when it comes to asset forfeiture.

\textsuperscript{158} Van der Walt at 2.
\textsuperscript{159} De Koker et al at 277.
\textsuperscript{160} S 36.
Chapter 4

The traditional criminal v civil recovery of the benefit

4.1 Introduction

Crimes are generally viewed as public wrongs. Criminal law addresses those who harm society through morally culpable acts in order that punishment may be imposed and potential offenders be deterred from committing similar offences. The notion of compensating victims of crimes exists in our criminal procedure. Furthermore, in its report the SALRC proposed a victim compensation scheme.

The SALRC was of the view that South Africa is far behind the rest of the world in respect of victim support in general and victim compensation in particular. It appeared to the SALRC that the introduction of a central compensation scheme for victims of crime had become a matter of urgency. As early as 1997 it submitted that the State has a moral duty to compensate victims and such compensation should be awarded out of sympathy, goodwill and for humanitarian reasons to restore confidence in the administration of justice. To date, although there are still discussions and some initiatives taken in this regard no such a scheme exists in South Africa.

Civil law, on the other hand, does not aim to punish. It is designed to provide a remedy requiring a return to the way things were, the status quo ante, so as to restore the position of an injured party and to compensate for harm done to him/her. The

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161 S 300 of the Criminal Procedure Act, No. 51 of 1977.
163 At 44.
164 At 45.
SALRC indicated\textsuperscript{166} that the right of a victim of crime to recover damages by way of civil action is of little comfort having regard to the financial position of most criminals, their ability to compensate and the unprecedented crime wave that is sweeping the country.

Sections 13 and 37 of POCA provide that all proceedings under both criminal and civil forfeitures are civil in nature. Admittedly POCA is a mechanism to use civil procedure to fight crime but it is not the first in our jurisprudence. The Special Investigating Units and Special Tribunals Act\textsuperscript{167} provides for the establishment of Units to investigate serious malpractices in the State administration, State assets and public money.\textsuperscript{168} These Units adjudicate upon justiciable civil disputes emanating from such investigations. The Domestic Violence Act, No. 116 of 1998 is another statute utilising the structure of civil procedure to protect victims of violence.

4.2 The principle of unjust enrichment

This concept applies in cases relating to \textit{condictio indebiti}, deceased's estates, illegal contracts, liens, \textit{locatio conductio opera} and \textit{negotiorum gestio}.\textsuperscript{169} For the purposes of this paper unjust enrichment is used in relation to the offence of theft. Where it has been proved in a civil case that X stole a sum of R50 000.00 from Y, Y would be entitled not only to the payment in the latter amount but also to interest\textsuperscript{170} at the applicable legal rate from the date the theft was committed, and costs, if successful. This is based on the fact that X has been unjustly enriched and should not be allowed to benefit from crime. There would be nothing stopping Y from, simultaneously,
lodging a theft complaint resulting in the prosecution, conviction, sentence of X and the granting of a compensation order in favour of Y. Y’s approach in following both civil and criminal procedures in dislodging X’s benefit is not viewed in our jurisprudence as double jeopardy.

4.3 Section 300\(^\text{171}\) and limitations

On conviction of an accused a victim of theft or the prosecutor, acting on the instructions of such a victim, may apply for a compensation order. The convicting Court may award such an order for the damage or loss suffered. As at 14\(^\text{th}\) February 2003 the Magistrates’ Court is limited to making compensation orders not in excess of R100 000.00 and the Regional Court not in excess of R500 000.00.\(^\text{172}\) An order made has the effect of a civil judgment and the victim’s right to seek redress by way of civil recourse is maintained\(^\text{173}\) only if the victim, within sixty days from the date of a compensation order was granted, renounces the latter. In cases where some money was seized during the arrest of a convicted accused, the Court may make an order for compensation to be made from such seized money.

For this application to be made an accused must have been convicted of an offence and the application must be made orally or in writing. The enquiry by the convicting Court is based on evidence led and the Court has discretion in respect of the amount awarded. The order granted is not meant to be an additional punishment. The underlying rationale for such an order is that society requires from the convicted

\(^{171}\) See footnote 161 supra.

\(^{172}\) Government Notice R239 (Government Gazette 24393 of 2003).

\(^{173}\) In s 300(5)(a). It cannot be said to be the intention of the Legislature to make a victim who accepts a compensation order to be in a worse off position when it comes to interest on the benefit amount which is not covered in s300.
offender to make good the loss which he/she has unlawfully and directly caused by the commission of the very offence of which he/she has been convicted.\textsuperscript{174}

The order of Court does not apply only to instances where the accused had cash in his/her possession. Lack of means, generally, is the problem.\textsuperscript{175} The Court may not lay down a date before which compensation should take place, unless it is a condition of suspension.\textsuperscript{176} There is no alternative imprisonment in the event of non payment of the compensation\textsuperscript{177} and no mechanism exists to enforce such an order or to investigate whether the criminal has assets or not in order to settle such an order. Whilst the criminal process is taking place there is nothing stopping the suspect, in anticipation of such an order, from dissipating his/her assets.

There is no provision for the payment of interest. Such an order will not compensate the victim of non - patrimonial loss, like emotional suffering. Where an accused is to be given direct imprisonment and has no assets or means to settle it, an order for compensation is usually inappropriate.\textsuperscript{178} Thus prosecution and conviction of a thief may not necessarily dislodge all the ill - gotten benefit nor lead to the complete satisfaction of the loss incurred by a victim.

Due to the number of such pitfalls criminals may easily get away with their crimes and illegally obtained benefits by pleading poverty. They may shield their assets by registering them in the names of their relatives, trusts, close corporations or

\textsuperscript{174} S v Crane 1994 2 SACR 197 (C) at 211J.
\textsuperscript{175} S 300(4) refers to cash seized on arrest and s 301 deals with refunds to purchasers where stolen property was sold.
\textsuperscript{176} S v Tlame 1982 4 SA 319 (B).
\textsuperscript{177} S v N & Others 1980 3 SA 529 (Tk).
\textsuperscript{178} S v Baloyi 1981 2 SA 227 (T); S v Medell 1997 1 SACR 682 (C).
companies prior to the commencement of prosecution. This would result in the
frustration of the victims, the consequent loss of confidence in legal remedies
available to them and in the justice system. To the criminals, especially highly
organized ones, crime would, in this way definitely pay and there would be no
deterrence. This is an unacceptable state of affairs.

4.4 Civil recourse and limitations

If Y were to prefer recovering the sum of R50 000.00 from X by way of civil action Y
would best have to find an attorney to institute a civil recovery process. This involves
a number of consultations, the assembling of the necessary evidence, issuing of a
letter of demand and/or summons and taking judgment against X. It would also
involve issuing a notice calling upon X to appear in Court for a section 65 enquiry\(^1\)
where X may agree to repay the stolen money at once or over a period of time and in
monthly instalments if X has the means, failing which X may plead poverty.

The attorney may also establish, usually after judgment has been granted, whether X
has any assets registered in his name or not. This might be too late as X may have
already dissipated assets. The attorney may issue a warrant of execution against such
property, which, provided that it has not been dissipated in the meantime, would be
sold in an auction in satisfaction of the judgment amount obtained, costs and interest.
It is only in rare situations that the proceeds of an auction would bring about
satisfactory results for Y.

\(^1\) Of the Magistrate's Court Act, No 32 of 1932 (as amended).
The following might be obstacles in recovering the amount: the availability of funds to cover attorney’s fees, the time it may take to actually recover the stolen money, whether X has money to repay or not and failing which whether X has any assets to sell on auction. In theft and fraud cases the thief may have used all the money, is more often than not unemployed, may die or disappear before the often long recovery process is completed and may have no assets or may have registered them in someone else’s name. The end result is that civil recovery becomes a frustrating option for a victim, who may simply opt to forget about the stolen money.

4.4 Confiscation Orders\textsuperscript{180}

As much as it could be said that the common and the statutory laws fail to deal effectively with organized crime, it could also be added that both the traditional criminal and civil recovery models have serious limitations to assist the victims in recovering ill – gotten gains from offenders. The repealed Proceeds Act\textsuperscript{181} provided and now POCA provides for both Restraint and Confiscation Orders.\textsuperscript{182} In the preamble one of objectives of POCA in both criminal and civil forfeiture is to provide for the recovery of the proceeds of unlawful activities.\textsuperscript{183}

A Restraint Order acts as some form of security in that the defendant’s\textsuperscript{184} assets are usually frozen prior to a conviction and should a defendant be unable to settle a

\textsuperscript{180} As provided in s 18 – 24 of POCA.
\textsuperscript{181} No 76 of 1996.
\textsuperscript{182} POCA confiscation provisions are modelled on the English asset forfeiture law; In this regard see discussions by SALRC project 98 “International Co-operation in Criminal Prosecutions”, December NDPP v Joubert unreported judgment of the TPD Case no 24541/2002 dated 2003/03/02 at 13 – 37; R v Smith 2002 1 All ER 367 (HL).
\textsuperscript{183} In s 1 of POCA this is defined as 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 are after the commencement of POCA, in connection with or as a result of any unlawful activity carried on by any person, and includes any property representing property so derived.
\textsuperscript{184} S 12 of POCA defines a defendant as a person against whom a prosecution for an offence has been instituted, irrespective of whether he/she has been convicted or not.
Confiscation Order such assets are sold in satisfaction thereof. The State makes use, amongst others, of the victims’ affidavits in support of its applications for Restraint Orders. The freezing stage of assets should be viewed as a significant improvement in the civil recovery process of proceeds of unlawful activities. This should serve, in a great deal, the interests of victims. It may also obviate, in some cases, the need by the victims to follow the traditional criminal and civil recovery routes. Where a defendant is married in community of property to a respondent it will not be of any assistance for the latter to use the marital regime as an excuse for the Confiscation Order not to be granted.\textsuperscript{185}

The irony here is that the application for a Confiscation Order is made by a prosecutor on behalf of society (and not of the victims).\textsuperscript{186} It is not required of the prosecutor to be instructed by a complainant as it is the case in the section 300\textsuperscript{187} compensation applications. The prosecutor is expected to show that a defendant derived a benefit from the offence he/she has been convicted of\textsuperscript{188} and that such a benefit has not been refunded to the State. Nothing in section 18 of POCA is stated about compensating a victim\textsuperscript{189} with moneys paid by a convicted defendant to the State. Why this is so is difficult to explain? The intention of the Legislature in section 18 of POCA is understandable only in so far as cases where there are no victims. The money paid to the State by a defendant, it would appear, is meant to be in State coffers. The victims,

\textsuperscript{185} NDPP v Maponya and Others, unreported judgment of the Limpopo Regional Court, case no RC 2005/927 delivered on 18/10/2006.

\textsuperscript{186} S 18 of POCA does not mention a complainant or a victim.

\textsuperscript{187} Of the Criminal Procedure Act, No 51 of 1977.

\textsuperscript{188} NDPP v Noongwane and Others 2005 2 SACR 377 (N) at 381; NDPP v Phillips and Others 2002 4 SA 60 (W) at 109G - H.

\textsuperscript{189} In the Debates of the National Assembly (Hansard) V 21 5 – 6 November 1998 at 8062 it was indicated that the committee hoped that moneys from CARA will, amongst others, be used to fight crime and empower victims of crime.
in the scheme of POCA are expected to make representations to Court for payments only at the realisation stage in terms of section 30 of POCA.

Section 6 of the Botswana Proceeds of Serious Crime Act, No. 8 of 2003 (as amended) deals with victims as follows:

(1) **Notwithstanding** the provisions of section 5,\(^{190}\) the Court instead of issuing a confiscation in favour of the Government, may on the application of the victim of the offence make a confiscation order in favour of the victim of the offence.

(2) A Confiscation Order made under this section shall be deemed to be an exercise of the civil jurisdiction of the court in an action between the victim of the offence as plaintiff and the offender as defendant and may be enforced as if it were an order made by the court in civil proceedings instituted by the plaintiff against the defendant to recover a debt due by him to the plaintiff.

This provision is in line with restorative justice. **Notwithstanding** the clear provisions\(^{191}\) in POCA, the AFU has made payments to victims at the confiscation stage and without any applications for payment from them. In the absence of reliable national statistics in this regard and for the purpose of this paper reference may be made to the following cases\(^{192}\) drawn from the Port Elizabeth office:

<table>
<thead>
<tr>
<th>Name</th>
<th>AFU No.</th>
<th>Order Nature</th>
<th>Order Date</th>
<th>Payment Date</th>
<th>Amount R</th>
</tr>
</thead>
<tbody>
<tr>
<td>Siebert</td>
<td>481/2003*</td>
<td>18/2003</td>
<td>Confiscation</td>
<td>01/07/2003</td>
<td>07/2003</td>
</tr>
</tbody>
</table>

\(^{190}\) Which deals with the issuing of a Confiscation Order and the payment of its amount to the State.

\(^{191}\) S 18 and 30(5) of POCA.

\(^{192}\) Details extracted from individual restraint files.
<table>
<thead>
<tr>
<th>Case Number</th>
<th>Date</th>
<th>Amount</th>
<th>Date Due</th>
<th>Amount Due</th>
</tr>
</thead>
<tbody>
<tr>
<td>Bradfield 2555/2004*</td>
<td>38/2004</td>
<td>Confiscation</td>
<td>07/03/2005</td>
<td>11/03/2005</td>
</tr>
<tr>
<td>Benson 1247/2006*</td>
<td>38/2005</td>
<td>Confiscation</td>
<td>05/04/2006</td>
<td>24/04/2006</td>
</tr>
<tr>
<td>Matomane 996/2006*</td>
<td>126/2005</td>
<td>Confiscation</td>
<td>18/04/2006</td>
<td>20/04/2006</td>
</tr>
</tbody>
</table>

This was achieved by not mentioning in the Confiscation Order that payment be made to the State and also by obtaining consent from the defendants. It is further included in the Confiscation Order granted that the appointed curator should deduct his expenses and pay the balance to the victims. Almost in all these cases only cash was restrained and thus no assets needed to be realised. This is in direct contrast to the scheme of POCA and it is apparent that the AFU is acting ultra vires POCA in allowing payments to the victims at this stage of the process. In the absence of a defendant’s consent and when there are assets to be realized a victim would thus be forced to wait for a realisation stage to take place.

193* These are Port Elizabeth High Court cases.
194 See discussion of the Namibian asset forfeiture statute below in this regard.
Section 18(1) gives the Court making the Confiscation Order discretion to make any further Orders as it may deem fit to ensure the effectiveness and fairness of that Order. Could this phrase be interpreted in favour of the current practice by the AFU to mean that payment to victims at confiscation stage is in a way authorized? It is submitted that this would be an artificial interpretation of the phrase and it will not assist the AFU. A Confiscation Order should contain a provision for the payment to the State. An example of ‘any further order’ may be when a Court orders that a defendant be afforded legal representation or that a confiscation enquiry is postponed to another date. An amendment of POCA or a Regulation will be recommended later on in this regard.

In section 18 proceedings the prosecutor must lodge an application in the middle of a criminal trial i.e. immediately after conviction.\textsuperscript{195} Should a Court sentence a defendant without hearing a confiscation application, postponing it or granting a Confiscation Order, the State will be unable to recover the benefit.\textsuperscript{196} In Botswana this aspect appears to have been dealt with differently. An application for a Confiscation Order may be made within 12 months of the date of conviction.\textsuperscript{197} Unlike a section 17(b) of POCA, section 7 of their Act only provides for two grounds for a Confiscation Order to be discharged:

(a) on the satisfaction of the pecuniary penalty;
(b) where the conviction or the confiscation order is set aside on appeal or where free pardon is granted by the President in respect of the conviction.

\textsuperscript{195} This linkage and connection between criminal law and civil law was applauded at 8051.
\textsuperscript{196} See s 17(b) of POCA.
\textsuperscript{197} See s 3(1) of the Proceeds of Serious Crime Act, no 8 of 2003 (as amended).
Since confiscation is a new process to defendants in South Africa, it may be viewed by some as intrusive or disruptive. A defendant would by then have had an opportunity at the commencement of the criminal trial to have his/her rights to legal representation explained and may have opted to have or not to have one. To an unrepresented defendant a section 18 process would be difficult to comprehend and POCA makes no reference to the issue of affording legal representation at confiscation stage.

In *S v Marangula*[^198] Magistrate Allers was confronted with this problem. He held that it was important that a defendant be afforded legal representation. He reasoned that the confiscation enquiry was inextricably linked to the offences of which the accused had been convicted and that continued legal representation by his attorney was essential as provided in section 35 of the Constitution. If this was not done substantial injustice would otherwise result.

The ambit of a Confiscation Order is evidently wide. It includes a benefit derived from crime(s) upon which a defendant has been convicted plus any other crime sufficiently related to the offence a defendant was facing but has not been convicted of. Should it transpire that a defendant did receive but did not retain a benefit a Confiscation Order will still be granted.[^199] This would be the case where a defendant’s assets have been transferred to others like friends or relatives or to offshore bank accounts prior to the conviction.

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[^198]: Unreported judgment of the Port Elizabeth Regional Court, Case no CCC/1/93/1995 dated 2006/05/19 at 11 – 12.

[^199]: *NDPP v Mthopi* unreported TPD judgment, Case No. 2003/5925 delivered on 06/02/2004 at 13 – 15. *NDPP v Shaik and Others* reportable judgment of the Durban High Court, Case no CC27/2004 dated 2006/01/31 at 8 – 9; 2005 3 All SA 211 (D); *NDPP v Kyriacou* 2004 1 SA 379 (SCA) at paras 12, 38 and 49; *NDPP v Joubert* unreported judgment of the TPD, Case no 24541/2002 dated 2003/03/02 at 37; *Swanepoel v The State* unreported judgment of the WLD, Case no A3129/2003.
Section 13 of POCA defines an affected gift as any gift made by a defendant at any
time, if it was a gift of property received by that defendant in connection with an
offence committed by him/her or any other person. It goes further to cover gifts of
property, or any part thereof, which directly or indirectly represented in that
defendant’s hands property received by him/her in that connection. Property is
defined widely and includes any money, movable, immovable, corporeal or
incorporeal thing and any interest therein and all proceeds thereof. This allows for a
strong tool to restrain and take control of sufficient property to realize at a later stage.

The criminal Court determines the benefit, if it is not evident to it, after an enquiry
and orders a defendant to pay to the State a specific amount it considers
appropriate. The enquiry also extends to the benefits a defendant derived from any
other criminal activity which the Court finds to be sufficiently related to the offences
a defendant has been convicted of. This shows that the intention of the legislature is
to dislodge the entire or gross benefit.

Any offence may underpin a Confiscation Order as long as a defendant derived a
benefit from it. This aspect raises the question whether POCA only applies to

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200 S 1 of POCA; see also Angelina Procopos v NDPP – an unreported judgment of the SCA, Case no 401/2007 delivered on 19/09/2008 where the issue of affected gifts is discussed. POCA does not define the word ‘gift’. The appellant’s daughter, in this case had opened a Bank account (a conduit) in the appellant’s name and deposited proceeds of fraud in the sum of R9.7 million which was in turn used by the daughter in the running of business. The appellant had however transferred some amounts, at her daughter’s instruction, to other accounts. The SCA referred the case to hearing for oral evidence.

201 S 18(1) and 23 of POCA.

202 Where there are a number of defendants, they may pay jointly and severally the one paying the other to be absolved.

203 S 18(1)(c) of POCA.

204 See Shaik v The State, a reportable judgment of the Constitutional Court Case no CCT 86/2006 delivered on the 29/05/2008 at pars 59 – 62, 68 – 71.

205 NDPP v Cook Properties 2004 2 SACR 208 (SCA) at pars 64 – 66.
organized crimes like racketeering, money laundering, or criminal gang activities. The Prevention of Organised Crime Bill was introduced in Parliament as a having an arsenal to deal effectively with organized crime or legislation comprising extraordinary measures to combat organized crime. The concept of 'organised crime' as set out in the title of POCA is not defined. It has been submitted already that a definition in POCA in this regard is not necessary and that POCA also applies to individual wrongdoing.

Criminal forfeiture is only about the recovery of proceeds of unlawful activities. In Monhuram it was submitted that the proceeds of unlawful activities, which by virtue of its definition include crimes, can be declared forfeit whatever the nature of the unlawful activity or crime, giving expression to the ancient doctrine that no one should be permitted to profit from his/her wrongdoing. On two occasions the SCA held that the provisions of POCA are designed to reach far beyond organized crime and also apply to cases of individual wrongdoing. This is more so when it comes to criminal forfeiture which focuses on offences for example of fraud and theft by individuals which are not necessarily committed in an organized fashion.

Confiscation is usually preceded by a capped or uncapped restraint on the property of a defendant or sometimes with no restraint at all. The order, which becomes a civil

206 Ch 2 of POCA.
207 Ch 3 of POCA.
208 Ch 4 of POCA.
209 Debates of the National Assembly (Hansard) V 21 5 – 6 November 1998 at 8044.
210 At 8047.
211 Monhuram and Others v NDPP unreported judgment of the CC, Case No. CCT 19/06 delivered on the 26/03/2006 at 10.
212 See Cook Properties note 15 supra at par 19; NDPP v Van Staden and Others 2007 1 SACR 338 (SCA) at par 1 and 10.
judgment once granted, is meant to deprive a defendant of the gross proceeds\(^{213}\) of his/her crime thus demonstrating that crime does not pay. In addition the State is assisted in dislodging a benefit by the presumptions in section 22\(^{214}\) of POCA.

The holding of an enquiry is normally an easy exercise particularly in cases of theft, corruption and fraud, but might be difficult in drug and abalone cases.\(^{215}\) It is expected of the State in the latter cases to assist the Court in placing evidence in front of it. The types of benefit, whether direct or indirect, include any property, service, advantage, benefit or reward which must have an economic value.\(^{216}\)

If a defendant derived or received a benefit but did not retain it because he lost or spent it the Court is not deprived\(^{217}\) of its discretion to make the order. This means that the State may (in fact should) obtain the order even in cases where a defendant has no assets (i.e. this being the expressed intention of the legislature the focus of which is proceeds of crime and not the availability of assets). A defendant should be expected to satisfy the order immediately he/she starts, after conviction, acquiring or accumulating assets. In this way both the *backward and forward – justification of stripping criminals of proceeds of crime and reduction of the levels of crime by deterring people from engaging in crime would be met.*

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\(^{213}\) *Shaik v State* a reportable judgment of the SCA, Case no 248/2006 dated 06/11/2006 at 12 – 13; *NDPP v Joubert* unreported judgment of the TPD, Case no 24541/2002 dated 02/03/2003; *K v Smith* 2002 1 All 367 HL.

\(^{214}\) s 22(3)(a)(i) of POCA provides that, for the purpose of determining the value of the defendant’s proceeds of unlawful activities in an enquiry, if the court finds that the defendant has benefited from an offence and that he/she held property at any time at, or since, his/her conviction, the fact must be accepted as *prima facie* evidence that the property was received by him/her at the earliest time at which he/she held it, as an advantage, payment, service or reward in connection with the offences or related criminal activities.

\(^{215}\) In these cases the amount is illiquid and must be quantified using the current black market value on which there isn’t always a consensus.

\(^{216}\) *NDPP v Shaik and Others* of the Durban High Court Case no CC 27/2004 dated 31/01/2006 at 7; 2005 3 All SA 211 (D).

\(^{217}\) See note 177 supra.
The Court has to have regard to all the evidence adduced in all the phases of the
criminal trial as well as that adduced during a section 18 enquiry. The discretion given
to the Court has, however, been curtailed by section 18(2) to what is known as upper
and lower limits. The section provides that:

The amount which a court may order the defendant to pay to the State...:
(a) shall not exceed the value of the defendant's proceeds of the
offences or related criminal activities ...[upper limit] or
(b) if the court is satisfied that the amount which might be realised ...
is less than the value referred in paragraph (a), shall not exceed an
amount which in the opinion of the court might be so realised.[lower limit]."218

One gets the impression that this section (and section 20(1) of POCA) is misplaced
and actually belongs to the realisation stage.219 Further it appears that it frustrates the
scheme of confiscation in that it provides a defence to a defendant the consequences
of which would be the reduction of the defendant's benefit when recovered. In the
result the 'lost benefit' issue may result in the Court, if the provisions of the lower
limit are taken into account, granting no Confiscation Order as it was the in
Schmitt.220

On the other hand, there is no doubt that the section only speaks to the Court that
adjudicates on the section 18 enquiry. It is the responsibility of the State to place

218 Insertion provided; NDPP v Hautenbach and Others 2005 1 SACR 530 (SCA) at par 53.
219 S 30 of POCA.
220 NDPP v Schmitt and Others, un-reportable judgment of the SECLD, Case no 257/2003 dated
12/04/2006. On appeal the full Bench concurred with the decision of the Court a quo although on other
reasons.
before Court evidence of the value of the defendant’s proceeds failing which it would not be in a position to make the order. In *Ncongwane*\(^{221}\) Msimang J held that:

[T]here was no evidence before Court that any of the defendants ever took delivery or took into his (sic) possession any of the amount of R1 200 000.00 which disappeared during the robbery.

On the proper and strict construction of the statute, the Court held that none of the defendants could therefore be said to have derived any benefit from the crime.

The upper limit comes into effect in cases where there is no restraint in existence or where there is a capped or uncapped restraint on the defendant’s assets and the value thereof is equal to or exceeds the upper limit. Should the Court enquire whether a defendant has assets or not (or what the value thereof is) where no restraint exists, it would be fair to respond that the State would still investigate but the order, once granted, would serve as a civil judgment\(^{222}\) if it turns out that the defendant has no assets.

For the purpose of the lower limit section 20(1) sets out the amount that might be realised. It is the sum of two amounts:

(a) The value of the defendant’s own realisable property less certain secured and preferent claims against his/her estate; and

(b) The value of affected gifts made to others.

\(^{221}\) *NDPP v Ncongwane and Others*, reportable judgment of the NECLD, Case no 984/2004 dated 20/05/2005 at 11 – 12.

\(^{222}\) S 73 of POCA.
This information is usually contained in the appointed curator’s first report after the defendant’s assets have been restrained and/or the defendant has made a proper disclosure. This report reveals to the State whether the value of the defendant’s proceeds of crime is less or more than the amount that might be realised. In *Luthuli*\textsuperscript{223} the curator reported a realisable value of R1 631 628.77 and the order was granted in the sum of R1 593 783.39 as the benefit amount. The lower limit only comes into play if the Court is satisfied that the realisable value is less than the amount of the upper limit.

The questions that immediately come to mind are who (between the State and the defendant) has the obligation to satisfy the Court in this regard and whether the issue of the lower limit is relevant in a section 18 enquiry. The case law presents a conflicting response to these issues. The Courts should be of the view that the issue of the lower limit is important during the enquiry and they should expect the State to reveal the curator’s findings and thereby enabling the Court to limit the amount of the order to the lower limit should this be the case. This in effect has, as alluded to above, an element of frustrating the idea of the order on the upper limit serving as a civil judgment for *forward justification* and supporting the defendant’s submissions that he/she has lost the rest of the benefit. In *Shaik*\textsuperscript{224} it was submitted that it is incumbent upon any party (i.e. the State or the defendant) who seeks to rely on the lower limit to satisfy the Court of its application. Inherent in these two instances is the recognition

\textsuperscript{223} *NDPP v Luthuli and Others*, un-reportable judgment of the Durban Regional Court, Case no 41/374/1999 dated 31/07/2003.

\textsuperscript{224} *NDPP v Shaik and Others* reportable judgment of the Durban High Court, Case no CC27/2004 dated 31/01/2006; 2005 3 All SA 211 (D).
that the lower limit is much more relevant during the enquiry. In *Meyer*\(^{225}\) it was stated that:

The amount which a court may order a Respondent to pay shall not be in excess of the value of the Respondent’s proceeds of the offence or if the Respondent’s assets do not permit, shall not exceed an amount which in the opinion of the court might be so realised. The burden would be on the Respondent to show that he does not have the necessary property to be so realized, the information of and knowledge regarding the value of realizable property falls within the direct personal knowledge of the Respondent.

If the defendant argues that he/she would be prejudiced should the Order be fixed on the upper limit he/she should satisfy the Court not only that the value of his/her realisable assets are less than the upper limit but also that he/she has made full disclosure. This appears to be the correct approach when one has regard to the wording of the section.

In the *Mokhabukhi* appeal\(^{226}\) it became apparent that it was not possible for the trial court to determine what precisely the lower limit of the two appellants was due to the fact that they failed to make full disclosure. The trial magistrate accepted the upper limit and the question on appeal was whether that was correct. It was submitted on behalf of the State that the lower limit would be given further attention at the realisation stage. The appeal Court accepted this submission.

This submission may be understood in various ways. It would appear that the issue of the lower limit did not arise in the determination of benefit by the trial Court because

\(^{225}\) *NDPP v Meyer* unreported judgment of the Durban Regional Court, Case no 041/2410/1999 dated 20/04/2005 at 7.

the appellants did not rely on it. Accordingly, it also did not concern the appeal Court. However the fact that it did not arise does not remove its consideration in the normal course of events to the realisation stage. It is an issue that rightfully belongs to the confiscation stage. The submission might also be understood to mean that at realisation stage the value of the realisable assets might be known for the first time when a curator has been appointed in terms of section 30(1) of POCA.

In the quest in POCA to recover all the benefit another aspect comes to mind. Does POCA make provision for the recovery of the benefit from an estate where a defendant dies before being convicted? Section 24(2)(a) of POCA deals with a defendant who dies and states:

Whenever a defendant who has been convicted of an offence dies before a confiscation order is made, the court may, on the application of the National Director, enquire into any benefit the person may have derived from that offence if the court is satisfied that there are reasonable grounds to believe that a confiscation order would have been made against him or her were it not for his or her death.

This provision does not deal with a defendant who dies before a conviction. This is understandable because criminal forfeiture is conviction-based. One may infer that this is an intentional omission by the Legislature. This, however, has the potential of leaving many defendants outside the net and making their estates benefit from proceeds of unlawful activities. Further, this omission may be taken by defendants as a signal that suicide before conviction is the best weapon to avoid the provisions of criminal forfeiture being successfully invoked. It will be recommended later on that this section be reconsidered.
In cases where an employee who dies before conviction had defrauded or stolen from the employer the estate might be prevented from receiving a benefit. Section 37D(1)(b)(2)(bb) of the Pension Funds Act, No. 24 of 1956 provides for the deduction of certain benefits where theft, dishonesty, fraud or misconduct by a member is concerned, or where there was a judgment obtained from Court.

In conclusion, section 18 of POCA, when compared with the traditional criminal and civil recovery processes, is partly an excellent weapon in dislodging all the proceeds of crime from the criminal, but section 18(2) read with section 20(1) has a strong potential of frustrating the whole exercise. For instance in *Ayoob Toffee*\(^{227}\) the benefit amount was R690 000.00 but the order was granted in the sum of R465 545.00 meaning that the defendant got away with R233 455.00 which will never be recovered nor dislodged. The estates of those defendants who die before any conviction (and where the proceeds of crime are not identifiable to invoke civil forfeiture proceedings or the defendants are not State employees) are likely to benefit from crime. Section 18 does not make provision for interest\(^{228}\) from the date of the offence and payment, at confiscation stage, is to be made to the State and not the victim. Its use by prosecutors will depend on how many of them are aware of its existence.

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\(^{228}\) In *NDPP v Basson* unreported judgment of the Port Elizabeth Regional Court, Case no RC10/53/2004 dated 01/09/2005 at 7 the Court held that the policy of compensating the victim does not extend the Regional Court's limited jurisdiction and therefore such policy cannot be used to amplify the provisions of the Act. It could not grant the NDPP an order for interest at the applicable legal rate, because section 18 of the Act does not permit it; S 15 of POCA cannot be interpreted as referring to the applicable legal rate of interest and nothing in s 18(1) grants discretion to the court to grant interest. In *State v Mrs L.L. Makgolane* unreported judgment of the Pretoria Regional Court Case no 2006/318/111 dated 23/05/2008 the State applied and was granted a confiscation order with interest from the date of the offence.
Looking at international jurisdictions in this regard the Chief of AFU US Department of Justice, 7 Southern District of California, Lundberg\(^{229}\) indicates that the US also had a similar problem of both civil and criminal forfeiture not being victim friendly. It was solved by amending their Act. A Regulation was passed to the effect that after forfeiture to the State in a matter where a victim still wanted its money the State calculates the victim’s claim and pays it. Such payments do not, however, include interest.

Confiscation Orders are not meant to substitute the traditional criminal and civil recovery procedures but are meant to be utilized parallel to them. It is submitted that in the absence of the proposed central scheme for victim compensation, POCA may also go a long way as a recovery mechanism in restoring confidence in the justice system.

In the province of Toronto section 11(3) of the Remedies for Organized Crime and Other Unlawful Activities Act, 2001 enables victims, municipal corporations and other public bodies to submit claims for compensation or cost recovery against forfeited assets. A public notice directed to victims is published for each case. The notice can also be sent directly to individual victims if their addresses are known. In order to be considered for compensation, claims must normally be filed within three months of the publication of the notice. The three months’ notice may be extended. Independent adjudicators determine eligibility for and the amount of each payment. No payments are made until all the claims filed by victims have been adjudicated\(^{230}\).


It appears that in Canada the provision for payment of victims is only made at the end of the asset forfeiture process.

The current law on confiscation and asset forfeiture in Scotland is similar in all major respects to that which applies in England, Wales and Northern Ireland though it is largely contained in different statutes and case law and there are certain differences in detail. Both Confiscation and Forfeiture Orders make provision for payment to the State. In addition to these Orders a Court may make a compensation order, requiring a person convicted of an offence to pay compensation to a victim for any personal injury, loss or damage caused by the offence. This appears not to be different from our section 300 order as discussed supra. There is no reference to compensation of asset forfeiture victims. The Northern Island Assets Recovery Action Plan 2007 - 8 mentions improving compensation for victims as one or its ideals.

In Namibia section 32 of the Prevention of Organised Crime Act, No. 29 of 2004 deals with the making of Confiscation Orders. It is the first statute in this regard to recognize victims of crime at confiscation stage of asset forfeiture. Notwithstanding the requirement that a defendant must pay to the State it provides that making a Confiscation Order may include in that Order:

... orders as to compensation arising from an agreement between the public prosecutor and a person who has suffered damages to or loss of

232 S 249 of the Criminal Procedure (Scotland) Act 1996; Wallace at 8.
234 This Act has many provisions that are very similar to those of POCA.
235 In s 32(3).
property or injury as a result of an offence or related criminal activity ... which was committed by the defendant.\textsuperscript{236}

It goes further and provides\textsuperscript{237} that when a Confiscation Order is made:

The court may also authorise a curator bonis appointed ... to realise a sufficient amount of realisable property in order to satisfy the order for compensation.

This means that the Court does not only depend on the consent of a defendant in order to take care of victim’s interests. The curator is not limited to cases of paying out cash. Where there are assets they can be realized at confiscation stage and victims be paid without waiting. In the next chapter the position of victims when it comes to restraint and realization proceedings is further explored.

\textsuperscript{236} Emphasis supplied.
\textsuperscript{237} In s 32(4).
Chapter 5

Criminal Forfeiture

5.1 Introduction

Following a widely accepted notion in the international community that criminals should be stripped of proceeds of their crimes - the objective being to remove the incentive for the commission of crime - Chapter 5 of POCA provides for forfeiture to the State of the benefits derived from crime. Its machinery may be invoked only when a defendant is convicted of an offence and it is only targeted at proceeds of unlawful activities. Criminal forfeiture provides for a three-stage process in achieving the objects of POCA. Confiscation proceedings have already been dealt with and this chapter will only focus on last two stages i.e. restraint and realisation proceedings.

5.2 Restraint Proceedings

Sections 25 and 26 of POCA provide for the making of a Restraint application and Order prior or subsequent to a conviction. Such an application may be brought by the NDPP on behalf of the State, ex parte and at a High Court for an order prohibiting any person from dealing in any manner with any property to which the Restraint Order relates. In cases where there are victims the State relies on their affidavits in

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238 Comprising s 12 to 36 of the POCA.
239 [NDPP v Rehuzzi 2002 2 SA 1 (SCA)] at 3H –1.
240 s 18(1) of POCA, hence the name criminal forfeiture.
241 When comparing it with civil forfeiture, which targets both proceeds of unlawful activities and instrumentalities of crime.
242 In Ch 3 of this paper. It must be remembered that there is nothing in POCA requiring confiscation to be preceded by a restraint application. Criminal forfeiture may also be commenced by applying for a confiscation order.
243 As set out in s 30 – 38 of POCA.
244 s 26(1) of POCA.
245 For example fraud and theft.
support of the application. The short term purpose of a restraint is to preserve property which in due course will be realized in satisfaction of a Confiscation Order. It is to provide, in the long term, for a recovery mechanism of proceeds of unlawful activities. A Court granting a Restraint Order may, amongst others, appoint a curator, from private practice, to take charge of the property, order any person to surrender the property to the curator, authorize the police to assist the curator in seizing the property and place restrictions upon encumbering or transferring immovable property. Howie P, in Phillips v NDPP pointed out the following serious consequences for a defendant once a Restraint Order is granted or confirmed, prior to a conviction:

Absent requirements for variation or rescission laid down in section 26(10) (a) (and leaving aside the presently irrelevant case of an order obtained by fraud or in error) a Restraint Order is not capable of being changed. The defendant is stripped of the restrained assets and any control or use of them. Pending the conclusion of the trial or the confiscation proceedings he is remediless. That unaltered situation is, in my opinion, final in the sense required by the case law for appeal ability.

The period from the date of granting of a Restraint Order to the granting of a Confiscation Order may be a very lengthy time which may take months or years.

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246 This is likely to leave a perception on the victims that they do not have to do anything because the recovery is conducted on their behalf.
247 This may, in terms of s 26(2) of POCA, include property specified in the restraint order and held by a defendant or unspecified property held by a defendant and all property transferred by a defendant to another person after the order was made. Excluded as realizable property are clothing items, bedding, ordinary household furniture, kitchen and laundry appliances and utensils. The Curator is also given discretion to leave behind those items deemed to be reasonably necessary for the day-to-day use of a defendant and family.
248 NDPP v Kyriacou 2004 1 SA 379 (SCA) at 383G; NDPP v Basson 2002 1 SA 419 (SCA) at 424E–G; NDPP v Rautenbach 2003 1 SACT 530 (SCA) at 554F; NDPP v Rehuzzi 2002 2 SA 1 (SCA) at 4D
249 NDPP v Rautenbach 2003 1 SACT 530 (SCA) at 554G.
250 It is essential that a Curator be not attached to the State (i.e. be independent) and comply with the requirements of the Administration of Estates Act, No. 66 of 1965 (as amended).
251 Part 3 of Ch 5 of POCA; NDPP v Rehuzzi 2002 2 SA 1 (SCA) at 4E.
252 2003 6 SA 447 (SCA) at 453 par 22.
253 Or an acquittal or a withdrawal of criminal charges against a defendant.
Criminal cases these days are known to be postponed several times. \textsuperscript{254} Should a defendant decide to appeal a conviction or sentence the period of being 'remediless' would be far longer. If the curator removed a defendant's property for storage, the costs related thereto are likely to be huge and the condition of the property is more likely to deteriorate, if not properly maintained, over such a long period. This aspect of time is one of the disadvantages of requiring criminal forfeiture to be conviction based but it should make anyone think seriously before committing crime about what is likely to happen to his/her assets. \textsuperscript{255} The curator should administer the restrained assets and do everything in its power that its value does not diminish.

5.2.1 \textit{Ex parte} proceedings

Section 26(1) of POCA gives authority to the State to apply \textit{ex parte} for a Restraint Order. The rationale behind this is for the State to get to a defendant's assets without the latter knowing about it and before any possible dissipation thereof.\textsuperscript{256} In \textit{David G. Alexander and 4 Others},\textsuperscript{257} Van Der Westhuizen, J stated the intention of the Legislature in this regard as follows:

The Act clearly and expressly allows the Applicant to apply \textit{ex parte},... But to require an applicant to convince a court of some special circumstances to justify an \textit{ex parte} application would be to ignore the wording of section 26(1), or to render it meaningless.

...But the clear intention of the legislature that applications of this nature may be brought \textit{ex parte} is unavoidable. Presumably the legislature regarded these proceedings as inherently sufficiently urgent, or otherwise of such nature as to justify this particular procedure. It can be accepted

\textsuperscript{254} \textit{ABSA Bank Ltd v Fraser and Another}, unreported judgment of the CC, Case no 66/05 delivered on the 15/12/2006 at 32, Van Der Westhuizen J indicated that it is an unfortunate fact that the wheels of justice often turn slowly and that delays occur in criminal trials. This reality is recognised in section 35(3)(d) of the Constitution and its jurisprudence.

\textsuperscript{255} Assets are returned to those acquitted.

\textsuperscript{256} \textit{NDPP v Rautenbach and Others} 2005 1 SACR at par 13.

\textsuperscript{257} Unreported judgment of the TPD, Case No. 2000/5792 delivered on 22/05/2000 at 21 - 22.
that the legislature intended application(s) of this nature to contain some element of surprise, as far as a defendant is concerned.

The entitlement of the State to apply *ex parte* comes with a huge responsibility. In *Basson*\(^{259}\) Nugent AJA stated:

> Where an order is sought *ex parte* it is well established that the utmost good faith must be observed. All material facts must be disclosed which influence a court in coming to its decision, and the withholding or suppression of material facts, by itself, entitles a court to set aside an order, even if the disclosure or suppression was not wilful or *mala fide*.

In exercising that discretion the Court dealing with an application to make a provisional restraint final will have regard to the extent of the non-disclosure, the question whether the first Court might have been influenced by proper disclosure, the regard for non-disclosure and the consequences of setting the provisional order aside.\(^{259}\)

522 Standard of proof

There are specific jurisdictional requirements that must be met by the State before a Restrainment Order is granted. A prosecution for an offence must have been instituted against a defendant, either a Confiscation Order must have been already made or it must appear to the Court hearing the application that there are reasonable grounds for believing that such an Order may be made against a defendant.\(^{260}\) Further, the

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\(^{258}\) 2002 All SA 255 (A) at 261; *Schlesinger v Schlesinger* 1979 4 SA (W) at 348E - 349B; *NDPP v Van Zyl*, unreported judgment of the TPD, Case No 2007/39358 delivered on 03/06/2008 at 16 – 17.

\(^{259}\) *Phillips v NDPP* 2003 6 SA 447 (SCA) at par 29; *The Reclamation Group (Pty) Ltd v Smit and Others* 2004 1 SA 215 SECJ at 223C – D. See also *NDPP v Walsh and Others*, unreported judgment of the TPD, Case No 5201/2007 delivered on 10/12/2008.

\(^{260}\) *NDPP v Kyriacou* 2003 2 SACR 524 (SCA) at par 10; *NDPP v Basson* 2001 2 SACR 821 (SCA) at par 19.
criminal proceedings against a defendant should not have been concluded.\textsuperscript{261} The Order may also be granted if the Court is satisfied that a defendant is to be charged\textsuperscript{262} or it appears that are reasonable grounds for believing that a Confiscation Order may be made against such a defendant.\textsuperscript{263}

Clearly an objective test is envisaged and the burden of proof on the State is light.\textsuperscript{264} It is not adequate for the State to present a Court with a summary of allegations against a defendant and express an opinion that a confiscation may be made; the nature and tenor of the available evidence\textsuperscript{265} need to be disclosed.\textsuperscript{266} Based on such evidence the Court should only be satisfied that there are reasonable grounds to believe that a conviction and a Confiscation Order "may"\textsuperscript{267} follow. The State does not have to show that a defendant threatened to dispose of any of his/her property with the intention of defeating the State's claim.\textsuperscript{268} The Court does not have to make a finding

\begin{itemize}
\item \textsuperscript{261}S 30(1)(c) of the POCA. Criminal proceedings are considered as being concluded when a defendant has been acquitted, sentencing commenced without making a confiscation order, a conviction was set aside on appeal or review and a defendant has satisfied a confiscation order.
\item \textsuperscript{262}NDPP v Alexander and Others 2001 2 SACR 1 (T) at 8.
\item \textsuperscript{263}S 25(1)(a) and (b) of POCA. It must be an objectively justifiable belief based on reason in which a factual basis for the reason exists; Hurley and another v Minister of Law and Order and another 1985 4 SA 709 (D) at 7161 -717A; Hurley and another v Minister of Law and Order and another 1986 3 SA 568 (A).
\item \textsuperscript{264}When compared with proof beyond reasonable ground or proof on a balance of probabilities. NDPP v Phillips 2001 2 SACR 542 (W) at 553; NDPP v Mungwa 2006 1 SACR 122 (N) at 128.
\item \textsuperscript{265}NDPP v Basson 2002 1 SA 419 (SCA) at 423B-C; A case for a restraint must be set out clearly on the founding papers; See generally a discussion on this in NDPP v Van Rensburg and Others - an unreported judgment of TPD. Case no 15380/05 delivered on the 24/01/2005 and the decision on appeal in the unreported judgment of the SCA Case no 75/06 delivered on the 23/03/2007.
\item \textsuperscript{266}The Courts expect full disclosure of material issues especially when an application is brought on ex parte basis; NDPP v Naidoo and Others 2006 2 SACR 403 (T) at 412.
\item \textsuperscript{267}S 25(1)(b)(ii) of POCA.
\item \textsuperscript{268}NDPP v Phillips 2001 2 SACR 542 (W) at 552H, Heher J held that the legislature has in effect accepted that a person who faces restraint proceedings is not one in whom any confidence can be reposed: succinctly, a defendant is assumed to be not simply a debtor but also a rogue.
\end{itemize}
that a defendant is guilty or probably guilty\textsuperscript{269} and that a defendant probably benefited from the offence or from other unlawful activity.\textsuperscript{270}

5.2.3 **Amount of the restraint order**

At the time of instituting a restraint application the State might have some idea\textsuperscript{271} of the amount of the benefit that a defendant may have received from alleged unlawful activities. This is an indication of the value of a defendant’s realised property that needs to be restrained. POCA, however, does not require that the amount of the anticipated Confiscation Order be made specific at the restraint stage.\textsuperscript{272} It is thus more likely that the value of the property under restraint may exceed the amount of the alleged benefit.

The extent of the restraint order has been left for the Court’s discretion to limit. The SCA\textsuperscript{273} summarized the Court’s approach in this regard as follows:

Furthermore, a person affected by a provisional order is entitled, in terms of s 26(10) (a) of the Act, to apply to the same High Court that made the initial order to vary or rescind the order... There are thus statutory safeguards to prevent overreaching and abuse. However, it would be offensive if the effect of a restraint order was disproportionate to the contemplated future conviction and Confiscation Order... Courts should be vigilant to ensure that the statutory provisions in question are not used in terrore.

\begin{itemize}
\item \textsuperscript{269}**NDPP v Rebbuzi** 2002 2 SA 1 (SCA) at 7H-I; **NDPP v Rautenbach and Others** 2005 1 SACR 530 (SCA) at par 27.
\item \textsuperscript{270}**NDPP v Rautenbach** 2005 1 SACR 530 (SCA) at 540E-H. In this matter Nugent JA stated that a Court 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. It is not called to decide on the veracity of the evidence unless it is manifestly false; it is the responsibility of the criminal Court to pronounce on the guilt or not of a defendant and whether or not such a defendant benefited.
\item \textsuperscript{271}After financial and asset investigation.
\item \textsuperscript{272}**NDPP v Rautenbach** 2005 1 SACR 530 (SCA) at 554I.
\item \textsuperscript{273}**NDPP v Rautenbach** 2005 1 SACR 530 (SCA) at 547 and 554J – 555E.
\end{itemize}
Our Courts have indeed been vigilant and have applied this notion in the defendant’s favour and in cases where a benefit was proved but had been recovered and/or retained by the victim. In Schmitt the State attempted to recover R6.93 million received by the defendants through fraudulent means in six loans for land development purposes. Instead, the defendants used amounts of two of the six loans to repay earlier loans amounting to some R 1.79 million. They also used the money to buy feed for ostriches which later died. They had perpetrated the fraud with the help of sympathetic bank officials. The defendants agreed with their two banks (Standard and Land Bank) to an informal sequestration of their estates, which they regarded as being in full and final settlement of their indebtedness to the banks. Both the Court a quo and the Court of Appeal held that this was an appropriate case to exercise their discretion against the State.

In Duhanco the defendant had repaid its indebtedness in question to the receiver over many years but such repayments were allocated to arrear debts. The Court regarded this as recovery of the benefit and discharged on return date the provisional Restraint Order. In Van Zyl the amount of the benefit was held to be R387 650.00 and the victim had retained in its trust account an amount of R742 140.00 in respect of monies supposedly due and owing to the defendant pending the finalisation of investigation. The State wanted (but was not allowed) to restrain assets to the value of R2 404 619.05. It is clear that such an amount in trust could be set off against the benefit amount on conviction without a need to grant a Confiscation Order.

274 NDPP v Schmitt, reportable judgment of the ECD, Case no CA 2006/385 delivered on 02/04/2007; NDPP v Duhanco, unreported judgment of the ECD Case no 2007/2092 delivered on 13/05/2008; NDPP v Van Zyl, unreported judgment of the TPD Case no 2007/39358 delivered on 03/06/2008.
275 See footnote 274.
276 See footnote 274.
It is thus prudent to avoid any 'overreaching' when it comes to the value of property to be restrained. This is to prevent, on the one hand, the effects of a restraint on a defendant being tantamount to an arbitrary deprivation of property and thus being unconstitutional. On the other hand, should it be discovered at a later stage that the amount of the Restraint Order should have been higher POCA makes no provision for variation. The State would be forced to rely on common law or Rule 42 to increase the amount. It is submitted that this does not necessitate an amendment of POCA in this regard. The reference by the SCA to a restraint order being 'disproportionate' should not be mistaken with the proportionality test which, it is submitted, only applies to instrumentalities of offences as opposed to proceeds of unlawful activities. Here the SCA had in mind only the amount of the Restraint Order versus that of a Confiscation Order.

5.2.4 **Interests of the creditors of a defendant**

Section 26(6) of POCA makes provision for a Restraint Order to make way for the defendant's reasonable living and legal expenses if a Court is satisfied that a defendant has disclosed all interests in property under restraint and that a defendant cannot meet such expenses out of his/her unrestrained assets. The disclosure must be under oath. A defendant is expected to apply to Court for such expenses and give a full explanation on disclosure made and whether there are unrestrained assets or not.

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277 There is already consensus that POCA is a draconian piece of legislation.
278 See discussions on this in *First National Bank of SA Ltd v/ Wesbank v Commissioner, South African Reserve Service and Another; First National Bank of SA Ltd v/ Wesbank v Minister of Finance 2002 4 SA 768 (CC); NDPP v RO Cook Properties (Pty) Ltd 2004 2 SACR 208 (SCA) at par 15.
279 Of the Uniform Rules of Court.
280 This concept is dealt with in the next chapter.
281 *NDPP v Mcasta and Others* 200 1 SACR 263 (Tb) at par 85.
It often occurs that prior to a restraint application being instituted the defendant owed money to a number of creditors some of whom had obtained default judgments. A question that arises is how protected those concurrent creditors' rights are should a defendant apply to Court, at restraint stage, for payment to be made out of restrained property for living and legal expenses. Section 30(3) of POCA creates an opportunity for creditors to make representations to Court, at realisation stage in connection with the sale of restrained property. There is no similar provision at the restraint stage even though the application for living and legal expenses is more likely to be lodged at the latter stage.

In *ABSA Bank Ltd v Fraser and Another* some of the first defendant's property was placed under an interim restraint. The first defendant launched an application seeking an order directing the curator to sell the restrained immovable property and pay the proceeds thereof to the defendant's attorney to meet reasonable legal expenses in the criminal trial the first defendant was facing. The bank intervened arguing that should the first defendant be allowed to dissipate or deplete the proceeds of the restrained property in this way it would be deprived of the means for recovering its judgment debt in due course, which it would ordinarily, absent the restraint, have been entitled to do by a warrant of execution.

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282 These are creditors with unsecured debts who enjoy no preference under the Insolvency Act, No 24 of 1936 and/or are unable to execute against restrained property due to the provisions of s 28 of POCA.
283 The Legislature made this provision because it realized the harsh consequences a restraint may have on a person whose assets become subject to the order. See *Nel and another v NDPP*, unreported judgment of the NCD, Case no 100/2004 delivered on the 02/06/2004 at par 20; *Mohamed NO v NDPP* 2002 4 SA 366 (W) at 374C.
284 Unreported judgment of the Durban and Coast Local Division, Case no 18832/2004 delivered on 08/04/05.
The court a quo dismissed, with costs, the bank’s application to intervene and granted the first defendant’s application for legal expenses. It reasoned\textsuperscript{285} that the effect of sections 30(3) and 33(1) of POCA, taking into account the first defendant’s rights to legal representation, was that a Restraint Order deprived third parties of some of their ordinary rights as creditors. The Court thus placed a higher value on the first defendant’s right to defend at trial than on the creditor’s right to redress. The consequences of this ruling, it is submitted, meant that the first defendant was allowed to hide behind the Restraint Order, enjoy or profit from alleged illegal activities and, in that way, frustrate the bank’s claim. This is untenable.

On appeal\textsuperscript{286} it was held that section 31(1) of POCA empowers a Court to apply section 26 of POCA and take into account concurrent creditors, subject to the approval of the Court at the time of realisation of the first defendant’s property but before satisfaction of a Confiscation Order. In other words the first defendant’s legal expenses and the State’s claim in terms of POCA are not elevated to that of the creditors. The State’s interests were held to be subordinate to that of the first defendant’s concurrent creditors. The bank’s intervention was, accordingly, allowed.

The first defendant took the matter to the Constitutional Court\textsuperscript{287} on the grounds that the ruling of the SCA violated his right to a fair trial as protected in sections 35(3) (d), (f) and (h) as well as his right not to be arbitrarily deprived of his property in terms of section 25 of the Constitution. The State was granted leave in the proceedings as amicus curiae and urged the Constitutional Court to give guidance explaining under

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\textsuperscript{285} At 15 - 16.
\textsuperscript{286} Absa Bank Ltd v Fraser and Another 2006 2 All SA 1 (SCA). See also Nel and another v NDPP, unreported judgment of Lacock J NCD Case no 100/2004 delivered on the 02/06/2004 at par 16.2
\textsuperscript{287} Trent Gore Fraser v Absa Bank Limited and another, unreported judgment of the CC Case no 66/05 delivered on the 15/12/2006.
which circumstances concurrent creditors could intervene in opposing a defendant’s application for living and legal expenses and which party bears the burden of notifying creditors about such an application.

The Constitutional Court pointed out\(^\text{288}\) that the wording in POCA may be open to more than one interpretation and the provisions of sections 26(6), 30(5), 31(1) and 33(1) of POCA are not easy to harmonise. It held\(^\text{289}\) that on the wording the High Court has discretion to allow a creditor to intervene but creditors do not have a right to be joined in the application for legal expenses. The State does not have to give notice of the application to creditors. The financial circumstances of a defendant are a factor to be taken into account when legal representation is an issue\(^\text{290}\) and that, indeed, a defendant’s legal expenses should not be elevated to that of secured or preferent obligations. It set out\(^\text{291}\) the circumstances to be considered as follows:

(a) the seriousness and complexity of the charges against the defendant or the civil proceedings in which he or she may be involved;
(b) the conduct of the defendant, preceding, and in, the section 26(6) application proceedings (including whether a full disclosure of all his or her interests in the restraint property has taken place and whether the defendant is attempting to benefit from a restraint order, or has acted fraudulently);
(c) the value of his or her interests;
(d) the number and amount of known creditors’ claims; and
(e) the history of the specific claim of the creditor who seeks intervention.

The ruling that the creditors do not have to be joined is understandable. The one that the State does not have to give notice of a defendant’s application to creditors is rather disappointing. There may be cases where creditors have made themselves known to

\(^{288}\) At 27.
\(^{289}\) At 32 and 37.
\(^{290}\) At 34 – 35.
\(^{291}\) At 36.
the State prior to the institution of restraint proceedings or such creditors are victims of the defendant's criminal activities. At least where such creditors are known to the State, it should be expected of the State to alert them for their interests to be secured. In any event and where such creditors are victims the State would rely on their affidavits in securing the restraint. It is thus suggested that, in the interests of justice, that the State should give at least the known creditors notice of a living and legal expenses application.

525 Committee

A Court that granted a restraint order may at any time appoint a curator to perform certain duties related to the restrained property, to take care of it and where the property is a business, to carry on with its business. A curator is an independent officer of the Court. Nugent AJA indicated that the curator acts throughout under the supervision of the High Court which may direct how the property is to be realised and to whom the proceeds are to be distributed. Notwithstanding this there are problems that may arise when it comes to curators and their functions.

Where a curator performs a function which is unacceptable to a party to a restraint the aggrieved party may, on good cause shown, seek variation or rescission of the order granted. In Yanta v Viteka NO the appointed curator was ordered on the 25th June

292 NDPP v Mungwa 2006 1 SACR 122 (N) at 125G.
293 s 28 of POCA; Fraser v Absa Bank Ltd (NDPP as amicus Curia) 2007 3 SACR 484 (CC) at par 12.
294 s 28(1) of POCA; NDPP v Mccsa and Another 2000 1 SACR 263 (Tk) 294 at par 3; NDPP v Alexander and Others 2001 2 SACR 1 (T) 18.
295 NDPP v Rebuzzi 2002 2 SA 1 (SCA) at 6H.
296 E.g. Curator taking too long to finalize an estate and release excess assets to a defendant; hanging on released assets; poor inventorying of assets; removing assets without considering storage costs; paying living and living expenses when no disclosure and application to Court is made and many more.
297 s 28(3)(a) of POCA.
2000 to release certain property to the applicants. Almost three years thereafter the curator had failed to comply with such an order and it was alleged that she operated illegally from the date of her appointment. Ebersohn J suggested\textsuperscript{299} that the State compiles a compendium of applicable acts and keep curators appointed under POCA to it and check every instance where orders are obtained to see to it that the provisions of the Administration of Estate Act\textsuperscript{300} are complied with.

The State has since this judgment complied therewith and has issued a Curator’s Manual. It is important that such problems should not affect the nature and the function of the curator’s office. In \textit{Mngomezulu and Others}\textsuperscript{301} the provisional Restraint Order granted the curator a novel\textsuperscript{302} power to sell assets\textsuperscript{303} under restraint in order to properly administer assets under his control.

The defendant objected to such power on the basis\textsuperscript{304} that it far exceeded powers envisaged in POCA. Ismael AJ\textsuperscript{305} pointed out that a curator is not free or at liberty to do whatsoever he desires as his functions are at all times subject to a High Court Order and under scrutiny of any interested person who could seek variation, or rescission of the order or even the discharge of the curator. He further stated that a curator with no authority to perform a certain act may approach a Court for a variation of its terms of appointment to enable it to perform the desired act. The Court, however, found nothing wrong with the power complained of.

\textsuperscript{299} At 6 – 7.
\textsuperscript{300} No 66 of 1965.
\textsuperscript{301} Unreported judgment of the WLD, Case no 19884/2004 dated 21/01/2005.
\textsuperscript{302} In all previous AFU restraint orders no such a power was included.
\textsuperscript{303} After consultation with the owner thereof.
\textsuperscript{304} At 9.
\textsuperscript{305} At 15.
On appeal\textsuperscript{306} the defendant argued that section 28(1)(a)(i) of POCA should be interpreted restrictively so as to exclude the power to alienate restrained property otherwise such a power to sell or encumber restrained property would defeat the purpose of POCA. The SCA disagreed. It pointed out that the phrase ‘such order ... as it deems fit’ in section 28(3)(e) of POCA confers a wide discretion on the Court as to the source from which the curator could recover its expenditure in respect of the administration of the property entrusted to it.\textsuperscript{307} It concluded that the power to sell\textsuperscript{308} assets under restraint is therefore required to preserve the value of the property under restraint and serves the purpose of a Restraint Order.\textsuperscript{309}

It is submitted that all the mechanisms discussed above go a long way in making the restraint proceedings one of the safest mechanisms used in securing adequate assets which may be realised in satisfaction of a Confiscation Order – thereby dislodging the benefit. The restraint stage should act as an excellent security for any loss suffered by victims of underlying crimes. It may be regarded as a relief to the limitations of a compensation order and the traditional civil recovery process. The Legislature must be applauded for this improvement. The interpretation accorded by the Courts in this regard is also consistent with the overall purpose of POCA.

5.3 \textbf{Realisation Proceedings}

Part 4 of POCA\textsuperscript{310} deals with the selling of restrained assets by the curator in satisfaction of a Confiscation Order. The State can only apply in the High Court for a

\textsuperscript{306} Mngomezulu and Others v NDPP 2007 2 SACR 274 SCA at par 19.
\textsuperscript{307} At 8.
\textsuperscript{308} S 80 of the Administration of Estates Act provides for a Court to authorize a Curator to alienate or mortgage any immovable property.
\textsuperscript{309} At 9; \textit{Ex parte Hallet} 1968 4 SA 172 (D) at 175D; \textit{Ex parte Thompson} 1983 4 SA 392 (E) at 393E – G.
\textsuperscript{310} S 30 – 36 of POCA.
Realization Order if (i) a Confiscation Order has been made and has not been settled by the defendant; (ii) a Confiscation Order is not subject to an appeal or review; and (iii) a defendant has not been acquitted or the criminal charges against him/her have not been withdrawn.\(^{311}\) All persons known to have interests in the restrained assets should be given notice of the application for realization.\(^{312}\) This includes both creditors and victims. It is submitted that such notice should be given by the State. POCA is not clear on what form this notice should take and who would monitor compliance.

531 Victims and Realisation

Section 30(4) of POCA makes provision for the Court to take into account the interests of those persons who are likely to be affected by a Confiscation Order and interests of those persons who suffered damage to or loss of property or injury as a result of an offence or related criminal activity committed by a defendant. It is submitted that in the latter group the legislature had in mind the victims of the underlying crimes. Such persons are entitled to make representations to the Court hearing the realisation application about their interests in the restrained assets.

POCA is not clear as to the form the making of representations should take and how those with interest should be informed. Section 43(3) of the Namibian POCA leaves it to the Minister to prescribe the manner in which those persons are to be informed of the proposed application. The State is likely to know some of the parties with interests in the property and it is submitted that it would be just and fair to expect the State to

\(^{311}\) S 30(1) of POCA.

\(^{312}\) S 30(3) of POCA.
communicate with them. **Representation**\textsuperscript{313} in Court may take various forms: it might be by way of affidavits or oral testimony.

The victims may be legally represented in Court or appear in person. They are expected to prove to Court that they instituted civil proceedings or intend instituting them within a reasonable time against the defendant or have already secured a default judgment which needs to be satisfied. This appears to be a precondition for them to be heard. Once the Court is satisfied it may suspend the sale of restrained assets in order to settle a victim’s claim or judgment and related legal expenses whereafter the Confiscation Order would be settled with what is left as a balance\textsuperscript{314}, if any.

It must be recalled that where there are victims the State uses affidavits by victims in support of the restraint applications. Where such victims have obtained civil judgments or have instituted civil action against a defendant prior to the institution of restraint proceedings this would obviously be alleged in their affidavits in support of the restraint. A proper reading of section 30(5) of POCA makes it clear that the reliance by the State on the victims’ affidavits at restraint stage is not meant to serve their interests at realisation. It is the victim that should make representation and not the State. This, it is submitted, is another indication that POCA is not victim friendly.

Should a victim allow (knowingly or not) his/her civil claim against a defendant to prescribe he/she may be unable to make successful representations to Court which may result, in the scheme of POCA, in his/her loss being paid to the State. This, however, should not be allowed as it would be contrary to restorative justice. It

\textsuperscript{313} Section 44(4) of the Namibian POCA provides for the victim to give 14 days’ notice to the State.

\textsuperscript{314} Section 30(5) of POCA.
would be in the interest of justice that the recovered benefit be paid to the victim notwithstanding the fact that the victim’s claim had prescribed.

Those victims whose civil claims against a defendant have not prescribed and have not instituted them are, at realisation, suddenly put under pressure to institute them within reasonable time. It may turn out that they did not institute them due to lack of funds but that will not assist them. POCA does not address this issue and the implication is that should the victims not do so within reasonable time they may even lose their claims and their money may find its way, as proceeds of crimes, into the State’s coffers. This should be avoided. One, once more is left with an impression that the provisions of criminal forfciture are not victim friendly and should rather only be invoked in victimless cases.

This was the impression Goldstein J had in Rehuzzi915 in which the State applied on behalf of PG Bison Ltd, the victim of theft of R897 066.00, for a Restraint Order. On the extended return date the provisional Restraint Order was set aside. The learned Judge was of the view that the Legislature could not have intended a Confiscation Order to be made where there was an identifiable victim who had a claim for recovery of the proceeds of crime.

He reasoned that the sale of the defendant’s assets at realisation stage in satisfaction of the Confiscation Order would otherwise deprive the victim of the means of satisfying his/her loss.316 He went further and stated317 that the Legislature could hardly have intended a Court to make a Confiscation Order which would have the

915 2000 2 SA 869 (W).
916 At 875C-F.
917 At 878B-C.
effect of any money being paid to the State but would merely put the complainant to
the expense of Court proceedings in order to protect its rights to the proceeds of the
assets to be realised or already realised.

On appeal\textsuperscript{318} it was held that a Court is not precluded from making a Confiscation
Order merely because a victim of crime has a claim and such an Order does not
deprive the victim of the means for recovering his/her loss. The victim will enjoy
precedence to any claim the State might have. This interpretation places the victims in
a better position, echoes the notion of restorative justice. It is submitted that it creates
an opportunity for the State to assist victims as much as it can. Nugent AJA explained
the position as follows:\textsuperscript{319}

There is no reason to think that a court that is called upon to give such
directions\textsuperscript{320} will not recognize the claim of a victim and order that it
be paid before any moneys accrue to the State bearing in mind that
section 31(1) expressly provides that it does not have a preferential
claim. Thus the making of a Confiscation Order need not deprive the
victim of the means of recovering his loss, nor is there reason to think
that it will ordinarily do so... The primary object of a Confiscation
Order is not to enrich the State but rather to deprive the convicted
person of ill-gotten gains. In my view, it is therefore not significant
that in some cases the State might end up receiving nothing.

This decision does not remove, amongst others, the cause for following complaints:

\begin{itemize}
\item that victims are expected to wait until realisation, unnecessarily, for their money
  that the defendant has paid to the State;
\item that it is not clear what form representations should take; and
\end{itemize}

\textsuperscript{318} \textit{NDPP/Rebuzzi 2002 2 SA 1 (SCA) at 6E.}
\textsuperscript{319} At 7A.
\textsuperscript{320} Of the manner in which the proceeds are to be distributed.
the legal expenses the victims would be exposed to in order to protect their rights.

It is thus settled law that criminal forfeiture makes room for the consideration of the loss suffered by victims of crime committed by a defendant. It however does not distinguish between those victims who participated willingly in the commission of the crime and those who did not. This distinction is crucial when it comes to the issue if reimbursement. In order to avoid the concerns raised by Goldstein J it is submitted that it would be just and fair when invoking the provisions of criminal forfeiture at restraint stage for the State to bring the provisions of section 30(5) to the attention of the victims, if reasonably identifiable. This is possible and will not place any additional burden on the State.

The State should also point out to such a victim that the recovery by the State of the proceeds of unlawful activities is not necessarily done on behalf of the victim and should never be perceived as a substitute to the institution by the victim of civil recovery procedure. It is submitted that this will again not put undue pressure on the State. The latter should invoke criminal forfeiture even in cases where it can foresee that the realisable assets would only satisfy the victim’s loss or would be less than that because it is incumbent on the State to recover proceeds of unlawful activities and to prevent benefit accruing unjustly to a defendant.

The Namibian POCA addresses the plight of victims in a slightly more satisfactory manner by providing that:

\[ \text{S 44(2); this is in keeping with the tenets of restorative justice.} \]
A court may make [an order in favour of a victim] if it is satisfied that-

(a) the applicant …

(i) has suffered damage to or loss of property or injury as a result of an offence or related criminal activity … which was committed by the defendant;

(ii) did not willingly take part in that offence or related criminal activity; and

(iii) has acted reasonably and in good faith in so far as he or she is concerned in that offence or related criminal activity; and

(b) that it is in the public interest to make such an order.

This conveys a clear warning to those victims who allow themselves to be accomplices that their claims will not be entertained. It goes further. If it is not in the public interest a victim’s claim may also not be entertained. Section 45 of the same Act makes it clear that a Confiscation Order should be the last payment from the proceeds of the sale of the restrained assets after any award or compensation order, victim’s claim, the curator’s fees and disbursements as well as the State’s costs for the application have been paid thus reiterating notion of Nugent AJA that the State might as well receive nothing.

5.3.2 Representations by victims

No reported case law dealing with representations made by victims in terms of section 30(5) of POCA could be found from the AFU. In the absence of national statistics on the number of cases where victims made representations, the following cases in which the realisation stage was reached were sourced from the Port Elizabeth office:

322 Insertion added.
323 See footnote 315 supra at par 19.
<table>
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<th>Name</th>
<th>AFU No.</th>
<th>Order Nature</th>
<th>Order Date</th>
<th>Payment Date</th>
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<td>60/2005</td>
<td>Realisation</td>
<td>23/02/2006</td>
<td>Not Yet</td>
<td>135 048.79</td>
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<tr>
<td>Rockman 2729/2005*325</td>
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<td>Realisation</td>
<td>03/10/2006</td>
<td>17/04/2008</td>
<td>68 577.89</td>
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</table>

It is significant to note that only in the Coetzee\(^{327}\) matter was there a formal representation as envisaged in section 30(5) by a victim, Woodlands Dairy (Pty) Ltd. This was after Liebenberg J, and in strict compliance with the provisions of POCA, granted a realisation order on the 11\(^{th}\) October 2005 for the curator to make payment, after realisation to the State\(^{328}\) in the absence\(^{329}\) of such a representation. Woodlands Dairy applied\(^{330}\) for the rescission of such an order stating that it resolved to institute civil recovery which was not carried out because of the instituted restraint

\(^{324}\) This is a Grahamstown High Court case.
\(^{327}\) These are Port Elizabeth High Court case numbers.
\(^{326}\) These are Port Elizabeth High Court case numbers.
\(^{327}\) Port Elizabeth High Court Case number 2910/2004.
\(^{328}\) This was in line with the fact that the amount of the confiscation order is payable to the State and if not satisfied proceeds of realization should also be payable to the State.
\(^{329}\) At 14 of the record.
\(^{330}\) In terms of Rule 42(1) of the Rules of the High Court.
proceedings. The State did not oppose this application. Instead of following the scheme of POCA and suspending the realisation process and affording Woodlands Dairy an opportunity to institute civil recovery, the Court made an order directing the curator to make payment to the victim. This is in terms of the provisions of section 30(5), which gives the Court discretion and power to “make such ancillary orders as it deems expedient”.

In the rest of the matters the victims made no representations and the Realisation Order had a clause to the following effect:

The curator is hereby authorised, after deduction of his fees and disbursements necessarily incurred in the execution of his duties, to pay the balance to the victim of the underlying crime.

Section 30(4)(b) (read with 30(2)) gives the Court discretion to give a victim an opportunity to make representations. This implies that there might well be cases where no representations are made. A question that follows is if no representations are made but payment is made to victims anyway how will the Court satisfy itself that the victims instituted civil proceedings or intend instituting them within reasonable time or have obtained judgement against the defendant.

Although considered as separate from a restraint application, the realisation application flows from restraint proceedings. The Court may, to satisfy itself, have regard to the evidence in this regard by the victim at restraint stage. The State may make mention in the realisation application that there is a victim and pray that

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331 At 22 of the record.
332 This would mean that a victim is not a party to the proceedings and no affidavit from a victim is presented as it was the case in matters under discussion.
payment be made to the victim. This may sound as if the State places itself into the
shoes of the victim but it is submitted that this, given the scheme of POCA, should be
acceptable and it is in the interests of justice. A defendant has all the rights to object
to this where payment to a victim should not be made.

5.4 Criminal Assets Recovery Account

POCA provides\footnote{S 63 of POCA.} for the establishment of CARA where all the asset forfeiture
proceeds are to be deposited.\footnote{S 64 of POCA.} The CARA Committee is made of\footnote{S 65 of POCA.} Ministers of
Justice, Safety and Security, Finance and the National Director. The Committee’s
function is to advise the Cabinet on all aspects of asset forfeiture and make, amongst
others, recommendations on allocation of property and moneys from CARA to law
enforcement agencies or institutions.\footnote{S 69 of POCA.}

There are only three purposes to which an allocation may be made:

\begin{itemize}
  \item To specific law enforcement;
  \item To any institution, organisation or fund established with the object to render
        assistance in any manner to victims of crimes;\footnote{S 68(e) of POCA.} and
  \item To the administration of CARA.
\end{itemize}

Once an allocation has been made the Minister of Justice should table it in Parliament.
It is submitted that the mentioning of 'victims of crimes' here does not include
victims of underlying asset forfeiture offences because the latter should have made
their representations at realisation stage in order to recover their loss. Reference is made to victims of crimes in general. It follows then that all moneys due to victims of underlying asset forfeiture crime should be paid out to them prior to any deposit made into CARA. Should this not occur, it might be an arduous process for such victims to get their money paid out of CARA. As indicated elsewhere herein, no fund exists for the assistance of victims of crime. The Legislature should, however, be applauded for anticipating the existence of such a fund.

The aspect of donating property (instead of selling it) is envisaged in POCA. This would be the position for instance in cases where vessels used to poach abalone or immovable property used to manufacture drugs are forfeited to the State. The Committee has discretion to allocate such property, prior to its sale. It is, however, disappointing that, after almost eight years of POCA having been in existence, an AFU written policy pertaining to donation or allocation of property to law enforcement agencies is still in draft form. The current State’s practice is to unofficially make a donation to a law enforcement agency and thereafter await the approval of the Committee. It is submitted that this is not a happy state of affairs.

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338 It was reported in the Business Day of the 28/08/2007 that the Treasury has called for more research on the establishment of a fund to compensate victims of violent crime. Figures presented showed that compensating South Africa’s robbery victims in line with the model used in Texas would amount to a staggering R56 billion. The amount received from fines paid in compliance with court sentences, all bail monies forfeited to the State, donations, bequests and amounts voted by Parliament in the 2006 – 7 financial year would have been only R161 million. It is significant to note that the Namibian POCA directs in s 73 that all amounts paid in terms of cost orders made in favor of the Prosecutor General, fines imposed by any court in terms of the Act, money payable to the State pursuant to a confiscation order should be paid into the Account. These are possible sources where money for such a fund may originate.

339 Forfeited items like diving gear and boats should rather be donated as it often happens that if they are sold on public auction those who lost them through forfeiture might repurchase them thus defeating the very objective of removing them from public circulation. It is also true that law enforcement agencies are not always better equipped in their crime combat.
In *re Rubber Duck*\(^{340}\) the State, subsequent to a Forfeiture Order being granted, applied for a declarator for a temporary allocation of the use of a rubber duck and trailer to a law enforcement agency in order to combat the scourge of abalone poaching in the Eastern Cape Province. In dismissing the application Goosen AJ stated\(^{341}\) that:

> The applicant has not placed before me the policy in terms of which such allocation is made, nor has it set out any basis upon which it may reasonably be inferred that the assets will in due course be allocated to MCM. There is no indication when the Committee may deal with the matter...

It is apparent from this judgment that there is a need for policy in this regard the absence of which will result in forfeited property deserving to be donated simply depreciating whilst awaiting allocation by the Committee. In the next chapter civil forfeiture is dealt with.

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\(^{340}\) *With registration number DTP 988; Boat Trailer with Registration DNT 118 EC* an unreported judgment of the ECD case no. 1446/2007 delivered on the 17/06/2008.

\(^{341}\) At par 19.
Chapter 6

Civil Forfeiture

6.1 Introduction

Redpath\footnote{Redpath "Forfeiting rights? Assessing South Africa’s asset forfeiture laws." African Security Review Vol 9 No 5/6, 2000.} explains the concept of civil forfeiture as the case where no person is to be charged, the action is against the thing\footnote{Hence in rem proceedings and the guilt of the owner thereof is considered irrelevant; NDPP v Mohamed 2002 4 SA 843 (CC) at par 17.} and the allegation of ‘involvement’ may be that the property is contraband, represents the proceeds of crime, or somehow ‘facilitates’ crime. Family homes, vehicles and other assets have been seized in pursuance of this law in relation to organised crime, especially drug-dealing.

Civil forfeiture\footnote{In the scheme of POCA; NDPP and Another v Phillips 2002 4 SA 843 (CC) at par 16; NDPP v Prophet 2003 6 SA 154 (CPD) at par 4.} provides a mechanism for freezing and subsequently forfeiting to the State criminally tainted assets with the object of making the proceeds thereof available for boosting State resources to combat crime. It is essentially a law enforcement mechanism aimed at contributing towards the reduction in the levels of crime.\footnote{NDPP v and Another v Mohammed and Others 2002 1 SACR 196 (CC); NDPP v Matjeka a reportable judgment of the TPD Case no 17051/2004 dated 20/06/2007 at 4; In the US forfeitures are designed primarily to confiscate property used in violation of the law, and to require disgorgement of the fruits of illegal conduct – United States v Ursery 518 US 267 1996.} The SCA stated\footnote{RO Cook Properties (Pty) Ltd 2004 2 SACR 208 (SCA) at par 18.} the interrelated purposes of civil forfeiture as including removing the incentives for crime, deterring persons from using or allowing their property to be used in crime, eliminating or incapacitating some of the means by which crime may be committed and advancing the ends of justice by depriving those involved in crime of the property concerned. Civil forfeiture has an important role to
play in the justice system, particularly when it comes to drugs and other types of organised crime.  

In this chapter the two civil stages involved in this procedure, the problems encountered, how our Courts have developed civil forfeiture as a concepts as well as its treatment of victims are dealt with. Both stages are instituted by the State in the High Court by way of motion proceedings. Reliance is made on affidavits by investigation officers, other experts and the victims. Notwithstanding this civil forfeiture does not expressly envisage any payment of such proceeds to the victims despite the fact that, like criminal forfeiture, it also targets proceeds of unlawful activities. This aspect is dealt with in detail below.

If there are criminal proceedings taking place parallel to civil forfeiture the latter process does not have to be stayed or delayed to allow the former process to be finalized. Erasmus J stated the reasons as follows:

To delay the determination of civil forfeiture proceedings until the finalization of related criminal cases would have a dramatic impact on the purpose of an asset forfeiture programme. After all the 'present Act (and particularly chaps 5 and 6 thereof) represents the culmination of a protracted process of law reform which has to give effect to South Africa's international obligations and domestic interest, to ensure that criminals do not benefit from their crimes'.

Moreover, such a delay would have an adverse effect on the various parties who have an interest in the proceedings:

347 NDPP v Parker 2004 3 All SA 745 (W).
348 s 37 of POCA.
349 Preservation as set out in Ch 6 Part 1 and 2 of POCA and forfeiture as found in Part 3.
350 In NDPP v Prophet 2003 6 SA 154 (CPD) at par 6.
351 NDPP v Mohamed NO and Others 2002 4 SA 843 (CC) at pars 15 and 16.
Those individuals who have an interest in the property and seek to have it excluded from the proposed forfeiture order, by taking advantage of the 'innocent owner' defence;

- Also the accused, who has an opportunity to show that the property is probably not an instrumentality or the proceeds of unlawful activities; and

- The State, which is burdened with the costs of curatorship.

6.2 Preservation application

The State may apply\textsuperscript{352} for a Preservation Order which may include provisions for an appointment of a curator,\textsuperscript{353} seizure of property\textsuperscript{354} and prohibition of any person from dealing in any manner with any property if there are reasonable grounds\textsuperscript{355} to believe that such property is an instrumentality of an offence or is proceeds of unlawful activities.\textsuperscript{356} Once granted service of a Preservation Order must take place on all persons with interest in the property concerned and be published in the Gazette.\textsuperscript{357}

Since the Preservation Order may have been obtained ex parte POCA makes no provision for its opposition.\textsuperscript{358} Instead it may be varied or rescinded if its operation will deprive a person of the means to provide for his/her reasonable living expenses and cause undue hardship.\textsuperscript{359} A further ground for such relief is when such hardship outweighs the risk that the property may be destroyed, lost, damaged, concealed or transferred.

\textsuperscript{352} The application may also be brought ex parte and what has been stated in Ch 5 supra in this regard applies.

\textsuperscript{353} s 42 of POCA. The purpose is to preserve the property pending a forfeiture order to be lodged in due course.

\textsuperscript{354} Like in a restraint order, the purpose is to prevent dissipation of property. It is similar to an interim interdict; NDPP v Van Heerden and Others 2004 2 SACR 26 C at 33.

\textsuperscript{355} See discussion in this regard in Ch 5 supra as well as NDPP/Starplex CC – a reportable judgment of the CPD, case no 12099/2007 dated 20/03/2008 at 5 – 6; NDPP v Stander and Others 2008 SACR 116 (E) at par 13.

\textsuperscript{356} s 38 of POCA.

\textsuperscript{357} s 39 of POCA. This is to get to those persons with interest in the property but are unknown to the State. One wonders how many people read the Gazette.

\textsuperscript{358} An option for opposing a preservation order may be applicable when the State proceeds by way of notice or rule nisi.

\textsuperscript{359} s 47(a) of POCA.
It may also be rescinded in terms of section 47(b) of POCA when the proceedings against the defendant concerned are concluded. For lack of a better word, this ground for rescission, it is submitted, is a misfit. Any reference in POCA to a defendant implies, for the purpose of criminal forfeiture, the existence of an accused. Furthermore, proceedings against an accused are concluded when (i) he/she has been acquitted, (ii) the charges have been withdrawn, (iii) a sentence was imposed with no confiscation order made against him/her, or (iv) the confiscation order has been satisfied. A person with interest in the property concerned in civil forfeiture is referred to as a respondent. Civil forfeiture is not conviction based. Accordingly, it is not likely that this ground will ever be used in civil forfeiture.

It is significant to note that the Namibian POCA has omitted this clause and instead allows for rescission or variation when:

(b) there is an ambiguity or a patent error in, or omission from, that order, but only to the extent of that ambiguity, error or omission.

In POCA any person affected by a Preservation Order may enter an appearance to oppose the making of a Forfeiture Order or apply for his/her interest to be excluded in the operation of a Forfeiture Order to be instituted by the State against the same property in due course. The requirements which any person opposing the making

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360 S 12 of POCA defines a defendant as a person against whom a prosecution for an offence has been instituted, irrespective of whether he/she has been convicted or not, and includes a person who is to be charged or against whom a confiscation order may be granted.
361 S 17 of POCA.
362 S 58.
363 See Rule 42(1) (b) of the Uniform Rules of Court.
364 This, together with a 90 period discussed in footnote 362 below, makes it clear that a Preservation Order is an interim relief.
of the Forfeiture Order must meet are set out in section 39 of POCA. The Preservation Order's duration is 90 days\textsuperscript{366} from the date of its publication in the Gazette and if a forfeiture application has not been instituted by the State the Preservation Order shall lapse.\textsuperscript{367}

It is clear that the Legislature intended persons with interests in the property to have their day in Court. More importantly it also intended to provide for a procedural mechanism, for both the State and persons with interests, to counter any unnecessary delays in bringing civil forfeiture to finality.\textsuperscript{368} It is submitted that these limitations are peremptory due to the serious nature of POCA.\textsuperscript{369} Should persons with interests fail to act within the set strict limits, it is submitted that they should utilize the provisions of Rule 27\textsuperscript{370} and apply for condonation\textsuperscript{371} failing which non-compliance would be fatally defective.

In Levy\textsuperscript{372} the State obtained a Preservation Order and filed a forfeiture application within the 90 days' period. The application was, however, served on the Attorneys for

\textsuperscript{365} A person who received service of the preservation order should deliver his/her notice of opposition within 14 days from the date of service and those who got notice via the Gazette should do so within 14 days from the date thereof. The appearance to oppose should contain full particulars of the chosen address for service and an affidavit containing the identity of the person opposing, the nature and extent of his/her interest in the property and the basis of defense for the opposition or exclusion application.

\textsuperscript{366} The Namibian POCA in s 53 provides for 120 days.

\textsuperscript{367} S 40 of POCA

\textsuperscript{368} This is apparent in the time periods provided in s 39(4) (a) & (b), s 40, s 48(2), s 49(1), s 53(3) and s 54(1) & (3).

\textsuperscript{369} Nkisimane and Others v Sautam Insurance Co Ltd 1978 2 SA 340 AD at 434B – E; Maharaj and Others v Rampersad 1964 4 SA 638 (A) at 643E and 646C – E.

\textsuperscript{370} Of the Uniform Rules of Court on extension of time, removal of bar and condonation. Consideration should, however, be made about the provisions of S 62(2) of POCA. It appears that Rule 27 might be held to be inconsistent with the procedure set out in civil forfeiture. The ground of inherent jurisdiction of the High Court may, however, be used to support condonation; S.W. A. Munisipale Pers. Vor. v Minister of Labour 1978 1 1027 WLD at 1038B – C; Moulded Components and Rotomoulding South Africa (Pty) Ltd v Coucourakis and Another 1979 2 457 WLD.

\textsuperscript{371} Darries v Sherriff, Magistrate's Court, Wynberg, and Another 1998(3) SA 34; United Plant Hire (Pty) Ltd v Hills and Others 1976 1 SA 717 (A) at 720E – G.

\textsuperscript{372} 2002 1 SACR 162 (WLD).
the other side 91 days after its publication in the Gazette. Mr. Levy applied for an order setting aside the application for a Forfeiture Order as irregular or improper proceedings on the basis that when the application was served the Preservation Order had already expired.

The Court considered whether the fact that the forfeiture application was filed meant that it was pending within the meaning of section 40(a) of POCA. The answer was in the negative and the forfeiture application was accordingly set aside. Goldstein J explained the correct position as follows:373

At best for the National Director the word ‘pending’ is ambiguous and thus may be interpreted as requiring service of the application on a respondent or not doing so. Where a statute makes serious inroads on the rights of an individual the Court ought to lean in favour of a construction which will result in such inroads being as limited as possible... It follows that service of the application is necessary to make it pending.

In Jabbar374 the Respondents served their section 39(5) affidavits 72 days late375 and applied for condonation. Mokhafola AJ, in refusing condonation stated376 that among the factors the Court has to have regards to are the:

- degree of non-compliance;
- explanation of the delay;
- prospects of success;
- importance of the case;
- respondent’s interest in the finality of his/her judgment;
- convenience of the Court;
- avoidance of unnecessary delay in the administration of justice; and
- the degree of negligence of the person responsible for the non-compliance.

373 At 166 par 9.
374 Reported judgment of the TPD Case no. 25640/2004 delivered on 18/10/2005.
375 After 14 days service upon them.
376 At 6.
The Court held\textsuperscript{377} that the language used to couch section 39(5) requires strict compliance because the use of ‘shall’. Non-compliance with this provision renders any party’s conduct fatally destructive to its case. The 72 days’ delay was held to be unreasonable. In \textit{Matjeka},\textsuperscript{378} Motata J described the procedure set out in section 39\textsuperscript{379} as unique.\textsuperscript{380} The State had filed the forfeiture application on the 91\textsuperscript{st} day after the publication in the Gazette but applied for condonation. The Court granted condonation holding that the filing was one day late only and the State did not attempt to disregard the existence of the time frames nor did it prejudice any interested party. It is submitted that when the rate of depreciation of preserved property is taken into account, it is not unreasonable to expect the State to file and serve a forfeiture application within the 90 day period. Should the State, during forfeiture proceedings be faced with an application that its Preservation Order has lapsed it may also apply \textit{meru moto} for the Court to grant, on the papers as they stand, a fresh Preservation Order.\textsuperscript{381}

6.3 Forfeiture application\textsuperscript{382}

Section 48 of POCA provides for the institution of a forfeiture application by the State if a Preservation Order has not lapsed and that a 14 days’ notice of the application

\textsuperscript{377} At 8.
\textsuperscript{378} Reportable judgment of the TPD, Case no 17051/2004 delivered on 20/06/2007.
\textsuperscript{379} S 39(3) and (4) governs the entering of appearance to oppose and s 39(5) provides that an appearance shall set out full particulars of the service address and be accompanied by an affidavit stating full particulars of the person opposing, the nature and extent of interest in the preserved property and the basis of defence for opposition or an application for exclusion. No reference is made to the setting out of facts underlying the defence. Compare with Rule 32 of the Uniform Rules of Court which deals with Summary judgment. Rule 32(3) (b) provides that upon hearing of an application for summary judgment the defendant may satisfy the court by affidavit ... or with leave of the court by oral evidence of himself or of any other person who can swear positively to the fact that he has a bona fide defence to the action; such affidavit or evidence shall disclose fully the nature and grounds of the defence and the material facts relied upon therefor’ [my underlining].
\textsuperscript{380} At 3.
\textsuperscript{381} As set out in s 53 of POCA.
\textsuperscript{382} For an explanation of its purpose see \textit{Mohamed N.O. v NDPP} 2003 1 SACR 286 (W) at para 57 to 58; \textit{NDPP v Prophet} 2003 6 SA 154 (CPD) at par 3.
should be given to any person with interest in the preserved property. Such a service is conditional upon the fact that such a person had entered an appearance in accordance with section 39 of POCA. It is submitted that in cases where no appearance at all was entered the State is entitled to apply for forfeiture by default.

Section 48(4) provides as follows:

Any person who entered an appearance in terms of section 39(3) may appear at the [hearing of the forfeiture] application –
(a) to oppose the making of the order;
(b) to apply for an order –

(i) excluding his or her interest in that property from the operation of the [forfeiture] order; or
(ii) varying the operation of the [forfeiture] order in respect of that property,

and may adduce evidence at the hearing of the [forfeiture] application.

This section presupposes that a person with interest in the preserved property would have entered an appearance and set out the basis of his/her opposition to the making of the Forfeiture Order. The exclusion and variation applications may follow the procedures set out in sections 52 and 54 of POCA. It is, however, significant to note that a person opposing the making of the Forfeiture Order may also ‘adduce evidence’ at the hearing of the forfeiture application not only for opposition but also in support of exclusion and variation applications.

This, it is submitted, introduces a novel procedure which might defeat the whole objective of the exchange of pleadings akin to motion proceedings. It is therefore

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383 Of POCA.
384 Inserted and emphasis added.
385 The very essence of pleadings and a Rule 37 conference is to expedite trial and limit issues before Court thus preventing avoidable efforts and costs - Erasmus et al: Superior Court Practice B1 – 274.
likely that a litigant may enter an appearance to oppose, set out a brief basis for the opposition and simply state his/her intention to utilize the provisions of section 48(4)(b)\textsuperscript{386} and thereby avoid filing and serving an answering affidavit as expected. The same litigant may opt not to disclose in a Notice of Motion that he/she will apply for exclusion or variation and only do so orally at the hearing of the forfeiture application.

This was the situation that confronted Van Rooyen AJ in \textit{Geyser and Others}.\textsuperscript{387} It was argued on behalf of Mr. Geyser, after he failed to file an answering affidavit that he was entitled\textsuperscript{388} to arrive at Court on the date of the forfeiture hearing and lead \textit{viva voce} evidence. The State argued that there was a duty on him to file an answering affidavit and that he should be directed to do so within a certain period of time failing which forfeiture should be granted. The Court confirmed that the section created an entitlement to adduce evidence and it allowed it to be led.

When the matter resumed later on the State requested Van Rooyen AJ to revoke his earlier decision of allowing oral testimony. The learned Acting Judge held in passing as follows\textsuperscript{389} thereby confirming the uniqueness of the provision:

\begin{quote}
I have, once again, studied the POC[A] and especially section 48(4)(b) which permits a person who has entered appearance to adduce evidence. I do not believe that this excludes \textit{viva voce} evidence in answering the founding affidavit of the NDPP. Section 39(5) explicitly defines the \textit{ambit} of the affidavit which is to be filed by the person entering appearance and relevant notice, which was delivered
\end{quote}

\textsuperscript{386} That is adducing evidence at the hearing of the forfeiture application.
\textsuperscript{387} Un-reportable judgment of the TPD, Case no 19681/2005 delivered on 06/02/2006.
\textsuperscript{388} In terms of s 48(4) (b) of POCA.
\textsuperscript{389} At par 11. The parties agreed on an order by consent to the effect that oral testimony was to be regarded as an answering affidavit to which a supplementary affidavit could be added and that the State was entitled to reply.
in this case does not, in any case, require anything more to be done. I am especially concerned about the unrepresented person who receives such a notice and can readily be brought under the impression that he only needs to file the affidavit as required in section 39(5). And, in any case, the *ipsissima verba* of section 48(4) (b) permits him or her to “adduce evidence” and nothing is said that it is limited to an affidavit. This, to my view, amounts to a provision which is inconsistent with the Rules concerning Motion Proceedings.

When dealing with this aspect of the judgment on appeal Howie P\(^{390}\) had this to say on this unconventional procedure:

[Mr. Geyser’s] testimony consisted not only of affidavits. Curiously, the Judge permitted him to give oral evidence at one stage of the proceedings. However, it was limited to his evidence-in-chief and nothing turns on this procedural eccentricity for it was subsequently agreed by the parties that oral evidence could stand, in effect as a affidavit.

POCA is silent as to the manner in which such evidence is to be adduced. Assuming that the Legislature intended this provision to apply to an unrepresented litigant POCA fails to expressly limit the right to adduce evidence to such litigants. One is inclined to think that such a limitation should have been expressly stated. Should a party who entered an appearance be allowed to adduce such evidence it is not clear what the rights of the State are in respect to cross-examination and/or filing of a replying affidavit. Should the State cross examine the witnesses? Should the State’s reply be presented orally too? Since these are motion proceedings should the State rather opt not to cross examine such witnesses and rather request the Court to declare the litigant’s oral testimony as an answering affidavit and thereafter file a reply?\(^{391}\)

In summary judgment proceedings a witness, with leave of Court, may give oral evidence but may not be cross-examined and there is no provision for a right of reply by the applicant. Is this to be the case in POCA? It is not clear. A person who entered

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\(^{390}\) In *NDPP v Geyser* a reportable judgment of the SCA, Case no 160/2007 dated 25/03/2008 at 6 - 7.

\(^{391}\) The parties in *Geyser* agreed to this procedure.
an appearance may (whether represented or not), as a result, take the State by surprise
by revealing evidence at the forfeiture hearing which should have been, in motion
proceedings, revealed at an earlier stage. Such a person may not be compelled to file
and serve an answering affidavit and may not be cross-examined. The hearing may
have to be postponed to allow the State to deal, by way of a reply, with any new
evidence that may have been led before the matter is actually argued. This may result
in over extending the forfeiture process and have negative effects on the already
deteriorating condition of the preserved property. It is submitted that this is an area of
civil forfeiture that require some attention.

6.3.1 Application for exclusion

An innocent owner of a property which is a target of civil forfeiture is entitled to
approach a Court hearing a forfeiture application for his/her interest in such property
to be excluded in the operation of a Forfeiture Order. This is done by way of a counter
application. The onus is on the innocent owner. 392 POCA sets out the grounds for the
exclusion and distinguishes between such grounds when the property is proceeds of
unlawful activities and when the property is instrumentalities of an offence. An
innocent owner must prove on a balance of probabilities that the interest in such
proceeds were acquired:

- legally;
- for consideration, the value of which is not significantly less than its value; and
- that the innocent owner has since the commencement of POCA neither
  known nor had reasonable grounds to suspect that the property is
  proceeds. 393

392 Unreported judgment of the SCA, Case no 624/2004 delivered on the 01/12/2005 at par 23; It is
submitted that this section ameliorates the draconian effects on property owners of forfeiting property
when there hasn’t been a conviction and it makes certain that only instrumentalities of offences and
proceeds of unlawful activities are forfeited.
393 S 52(2) (a) and (b).
If the interest is in an instrumentality of an offence the innocent owner would have to prove that:

- such interest was acquired legally;
- he/she neither knew nor had reasonable grounds to suspect that the property is an instrumentality; and
- he/she has since the commencement of POCA taken all reasonable steps to prevent the use of the property as an instrumentality.\(^{394}\)

It is in the application for exclusion that the property owner’s guilt, wrongdoing or innocence becomes important.\(^{395}\) This occurs in the so-called second stage of the enquiry\(^{396}\) when the Court considers whether certain interests should be excluded from the forfeiture. POCA does not define what is meant by an innocent owner or victim. The manner of the acquisition of the property and the awareness by such an owner of the property’s involvement in the commission of crime are significant to such a definition. There is no requirement that such an owner must have suffered any loss due to the commission of a crime in order to be able to apply for the exclusion of interest. The reading of section 52 indicates that this section only applies to innocent owners. It is difficult to imagine an innocent owner and a victim being the same person in the same set of facts. It is accordingly submitted that in asset forfeiture cases an innocent owner cannot be the same person as a victim of an underlying crime.

Section 52(3) (a) uses the words ‘adduces evidence’ in reference to an innocent owner. This was discussed supra.\(^{397}\) It is not clear whether or not the Legislature envisaged in the exclusion application the same situation as in the adducing of viva

\(^{394}\) S 52(2A) (a) and (b)
\(^{395}\) RO Cook (SCA) at par 21.
\(^{396}\) After it has been ascertained in the first stage whether the property is an instrumentality or not; RO Cook (SCA) footnote 385 supra.
\(^{397}\) In relation to section 48(4) (b) of POCA.
voce evidence at the hearing of the forfeiture application. Section 52(1) refers to an application which, in the normal course of events, founding, answering and replying affidavits would be used in support thereof. Section 48(4) is applicable to any person who entered an appearance in terms of section 39(3) of POCA. An innocent owner may not have done so. It is likely that an innocent owner may not have been cited in the civil forfeiture proceedings because he/she was unknown to the State. It thus appears that the unique procedure as envisaged in section 48(4) has been extended to cover innocent owners. The procedural problems discussed supra in this regard apply mutatis mutandis to section 52(3) of POCA.

The same section goes further. The Legislature spells out to the State what to do if an innocent owner adduces evidence in support of an exclusion application. It assumes that prior to the institution of the forfeiture application the State obtained an Order in terms of section 51(3) of POCA and served it on the innocent owner. In rebuttal of the evidence adduced by the innocent owner the State may furnish the Court hearing the matter with the return of service pertaining to the said Order.

It is not clear, with respect, why the Legislature had to legislate on this aspect. POCA does not set out the format the procedure in this regard would take. Will the State be allowed to cross-examine the innocent owner and also lead viva voce evidence when leading evidence in rebuttal? These and other problems raised supra make POCA in this regard difficult to understand. 398

398 Writing the judgment for the minority in Monhumram and Another v NDPP 2007 6 BCLR 575 (CC) at par 25 Van Heerden AJ, whilst dealing with the question whether POCA applies to individual wrongdoing or not, confirmed that it is certainly true that POCA, even as amended is not a model of legislative clarity and coherence. See also Meza at par 61.
6.3.2 Meaning behind the phrase ‘instrumentality of an offence’

This phrase has been considered by our Courts on numerous occasions. Its consideration in civil forfeiture is the first leg followed by the proportionality analysis\(^{399}\) in ascertaining the liability or not of property to forfeiture. Its meaning must be determined in the light of the overall purpose of POCA.\(^{400}\) It is defined\(^{401}\) as:

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.

The word “offence” refers to offences mentioned in schedule 1 of POCA which also include any conspiracy,\(^{402}\) incitement\(^{403}\) or attempt to commit any offences mentioned in the Schedule. All these three concepts entail the fact that there is no need for an additional crime to be committed and in cases where the State cannot prove the presence of these concepts the property concerned will not be liable to forfeiture. For a proper analysis of the definition of instrumentality it would be prudent to first discuss section 20 of the Criminal Procedure Act, No. 51 of 1977 which provides that:

The State may, in accordance with the provisions of this Chapter, seize anything (in this Chapter referred to as an article) –

(a) which is concerned in or is on reasonable grounds believed to be concerned in the commission of an offence, whether within the Republic or elsewhere;

\(^{399}\) Discussed below.
\(^{400}\) RO Cook (SCA) at par 6.
\(^{401}\) In § 1(1) of POCA.
\(^{402}\) See Snyman at 293 where it is stated that conspiracy can only be committed if what the parties agree (meeting of minds) to do is crime.
\(^{403}\) Snyman discusses this concept at 295.
(b) which may afford evidence of the commission or suspected
commission of an offence, whether within the Republic or
elsewhere; or
(c) which is intended to be used or is on reasonable grounds believed
to be intended to be used in the commission of an offence.

Du Toit et al state that this section contains the general power to seize certain
articles in order to obtain evidence and that literally everything may be seized. They
submit that the section is very wide. Section 35 of the same Act makes provision for
the forfeiture to the State of the article concerned in the following terms:

A court which convicts an accused of any offence may, without notice to
any person, declare—
(a) any weapon, instrument or other article by means whereof the
offence in question was committed or which was used in the
commission of such an offence; or
(b) if the conviction is in respect of an offence referred to in Part I of
Schedule 2, any vehicle, container or other article which was
used for the purpose of or in connection with the commission of
an offence in question or for the conveyance or removal of the
stolen property.
And which was seized ... forfeited to the State.

The definition of instrumentality in POCA, as opposed to that set out in the Criminal
Code, it is submitted, fails to include property that is intended or is believed to be
intended to be used in the commission of an offence. It is proposed that the best way
of dealing with what this phrase means is to outline the chronicle of the major
pronouncements by the Courts in this regard which have brought up three

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405 At 2 – 2B.
406 In NDPP v Swart 2005 2 SACR 186 (SE) at 191 – 192 Leach J sets out the differences between
these two forms of forfeiture and points out that s 35 proceedings are no bar to civil forfeiture.
407 Emphasis added.
408 NDPP v Parker 2006 1 All SA 317 (SCA); 2006 3 SA 198 (SCA); NDPP v R O Cook properties
(Pty) Ltd 2002 4 All SA 692 (W); 2004 2 All SA 491 (SCA); 2004 2 SACR 670 (SCA); NDPP v Cole
and Others 2004 1 All SA 745 (W); Prophet v NDPP 2003 6 SA 154 (C); 2005 2 SACR 670 (SCA);
2006 2 SACR 525 (CC); NDPP v Van Staden and Others 2007 1 SACR 338 (SCA); Singh v NDPP
2007 3 All SA 510 (SCA).
crystallized instances of closer connection or the means by which; adaptation and repetition for a property to be declared an instrumentality of an offence.

6321 Closer connection or the means by which

It is settled law that the mere fact that a particular offence was committed on a particular property would not necessarily entail the consequence that it was ‘concerned in the commission’ of an offence. Evidence of some closer connection or clearer nexus than mere presence on the property would ordinarily be required in order to establish that the property had been concerned in the commission of an offence. This means that a restrictive interpretation is called for. The property must be used as a means by which or as an instrument or play a role in a reasonably direct sense in the commission of the offence. This connotes the idea that the property should be indispensable or instrumental in the commission of the offence i.e. the use thereof should be a sine qua non for the commission of the offence.

A classical example of this restrictive interpretation is found in the matter of In re

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409 NDPP v Patterson and Another 2001 2 SACR 665 (C) at 668; NDPP v Prophet 2003 SA 154 (CPD) at par 22.
410 NDPP v Van Heerden and Others 2003 4 All SA 380 (C); DPP (NSW) v King 2000 NSWSC 394 at par 14.
411 NDPP v Cole and Others 2004 1 All SA 745 (W).
412 In NDPP v Cook Properties (Pty) Ltd and Others 2004 2 SACR 208 (SCA) the Court stated at paras 12 to 15 that the Legislature sought to give the phrase a very wide meaning. It found that a literal interpretation could lead to forfeiture of property whose role in or utility to a crime is entirely incidental to its commission. That one meaning of ‘concerned’ is to be in relation of practical connection with, to have to do with, to have a part or share in, to be engaged in and concluded that unbounded literalism is not appropriate because (i) the purport of POCA suggest some restriction. Thus the use of property for the commission of crime denotes a relationship of direct functionality between what is used and what is achieved; (ii) the provisions of POCA must be construed consistently with the constitution and that a literal interpretation would lead to arbitrary deprivation of property.
413 NDPP v Carolus 1999 2 All SA 607 (C) at 618H; NDPP v Seleane 2003 3 All SA 102 (NC); NDPP v Mohamed and Another - unreported judgment of the TPD, Case no 19055/2002 delivered on 17/09/2003.
414 S v Bissett 1980 (1) SA 228 (N) at 230A; S v Mjezu and Another 1982 2 PH H164 (C); S v Masanganyi 1989 2 SA 759 (C); NDPP v Seleane unreported judgment of the NC, Case no. 869/2003 delivered on 09/05/2003; Simser J - “Civil Asset Forfeiture in Common Law Jurisprudence: Developments in 2006 - 2007” at 24.
Two accused were arrested for being in possession of stolen property. They attempted to bribe an Inspector responsible for their arrest by offering him R15 000.00 and a motor vehicle. They proceeded with the Inspector to an ATM and in total handed to the Inspector R4 750.00. They were charged with corruption. The R4 750.00 was preserved as an instrumentality of corruption and the Court a quo dismissed an application to have it forfeited to the State because the money, it was held, was not an instrumentality of corruption.

On appeal Tshabalala JP adopted a different view:

I am therefore required to look at the facts and to the property in question to ascertain whether it was instrumental in the crime. It must also be taken into account that the money in this case was used in an unlawful manner to achieve an unlawful result; i.e. to entice the Inspector not to arrest them for being in possession of a stolen vehicle. Therefore its use in this way directly relates to the offence of the bribery... As in the facts in casu the money was employed for a purpose, i.e. to bribe the Inspector not to perform his official duties, thus it is the instrumentality of the offence of corruption... It was in close relation to the commission of the offence.

In Swart the Court acknowledged that the phrase is awkward and defined it to mean a thing employed for a purpose or end. It held that a motor vehicle was a means by which or played a direct role in the offence of fishing abalone without a permit because it was used to convey the abalone units.

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416 2005 2 SACR 610 (N) at 7.
417 At 8.
418 At 9.
419 2005 2 SACR 186 (SE) at par 1.
The interpretation of closer connection was used in three decisions\textsuperscript{420} to dismiss forfeiture applications in which owners of property\textsuperscript{421} were not involved in the commission of the offences. This may leave a wrong\textsuperscript{422} impression that the knowledge or presence of the owner is essential. In \textit{Patterson}\textsuperscript{423} the State sought forfeiture of a house on the basis that drugs were sold from it over an extended period. During numerous police searches dagga, mandrax and cocaine were seized and arrests were followed by convictions of the drug runners but not the owner. In \textit{37 Gillespie}\textsuperscript{424} hotel premises, known as Blenheim had become a hive of drug dealers, prostitutes and other criminals and its owner was renting the premises out. The Court stated:

\begin{quote}
In my view, the notion that immovable property, merely because it is the venue for the commission of the schedule 1 offences, is to be regarded as ‘an instrumentality of an offence’ is simply unsupportable not to say preposterous. There is no suggestion on the papers that the respondents condone, are associated with or in any way participated in any illegal activities which may occur on the property or that either of them does so.\textsuperscript{425}
\end{quote}

In \textit{RO Cook}\textsuperscript{426} a house leased to a third party was a subject of a forfeiture application on the grounds that there was ample evidence that kidnapped persons were held hostage and it was used as a brothel. In \textit{Seevnarayan}\textsuperscript{427} the State sought forfeiture, as an instrumentality, of money used to commit fraud or tax evasion. Both applications

\begin{itemize}
\item \textsuperscript{420} \textit{NDPP v Patterson} 2001 2 SACR 665 (C) and \textit{NDPP v 37 Gillespie Street, Durban (Pty) Ltd}, unreported judgment of the D+CLD, Case no. 509/2002 delivered on 10/09/2003; \textit{NDPP v RO Cook Properties (Pty) Ltd} 2002 4 All SA 692 (W); \textit{NDPP v Seevnarayan} 2003 2 SA 178 (C).
\item \textsuperscript{421} In the \textit{Singh} matter it was stated that the question of knowledge of (or lack thereof) criminal activities on the property, on the part of the owner of the leased property does not have any bearing whatsoever on whether or not the property is concerned in the commission of an offence. It is only relevant to establish an innocent owner defence.
\item \textsuperscript{422} \textit{RO Cook (SCA)} at par 20 where the Court stated that this approach is not correct. The guilt is not primarily relevant to the proceedings. The phrase must be interpreted independently of the guilt or innocence of the property owner.
\item \textsuperscript{423} See footnote 409 supra.
\item \textsuperscript{424} See footnote 409 supra.
\item \textsuperscript{425} At par 13.
\item \textsuperscript{426} See footnote 409 supra.
\item \textsuperscript{427} See footnote 409 supra.
\end{itemize}
were dismissed. In the latter case the act of making an investment was not prohibited but rather it was the falsifying of the investor's identity which constituted an offence. Thus the use of the money did not stand in a close relationship to the actual offence.

In *Van Staden and Others*, the Court dealt with an appeal against the refusal by the Court a quo to preserve motor vehicles as instrumentalities in the commission of the offences of driving under the influence of intoxicating liquor or with excessive alcohol in the driver's blood. The Court pointed out that the presence of a motor vehicle was indispensable to the commission of the offences in that they made the commission of the offences possible. This, however, was inadequate to make them an instrumentality. Nugent JA, on appeal, disagreed and reasoned as follows:

A motor vehicle is not merely the unique venue at which the activity becomes criminal, and thus incidental to the commission of the offence, nor is it merely the subject of the criminalized activity. The essence of the offence is the use of the vehicle while the driver is in a particular state. The vehicle is the very means, or instrument, that is used to commit the offences.

In *Mohunram* the Constitutional Court dealt with an immovable property that was used to operate a casino without the requisite licence and declared the property an instrumentality of the offences. Van Heerden AJ had this to say:

It follows that the use or allowing the use, of the property was a necessary part of the offences the applicants committed. It was not

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428 2007 1 SACR 338 (SCA).
429 At par 12.
430 At par 14.
431 2007 4 SA 222 (CC); 2007 6 BCLR 575 (CC).
432 At par 49 with which the majority agreed; *NDPP v Geysen* a reportable judgment of the SCA, Case no 160/2007 dated 25/03/2008 at par 16.
possible to commit the offences without using the property. In the
language of Cook Properties (supra) the property was “employed ... to
make possible or facilitate the commission of the offence”.\textsuperscript{433} Thus the
causal connection between the property and the offences was certainly a
direct one. The offences themselves pivoted on the use of the property
for gambling purposes. It is common cause that neither applicant had the
requisite licence. That was, however, not the essence of their crimes. The
essence was that the applicants used the property or allowed it to be used
as an illegal casino. The property was thus integral to the commission of
the relevant offences.

\textit{In re Mercedes Benz CA 57768}\textsuperscript{434} five suspects conspired in Cape Town to commit
armed cash - in - transport robbery at Mt. Fletcher in the Transkei, but few kilometres
before they reached their destination they were stopped by the police. It turned out
that they were in possession of R5 rifles. Instances of fire fight ensued between them
and the police resulting in one policewoman being injured, robbed of a pistol and a
cellular phone. Most of the times, the suspects fired at the police whilst they were
outside their vehicle using it as their shield. Four suspects, later on abandoned the
vehicle but were arrested and charged.

The State brought a preservation application on the basis that the vehicle was an
instrumentality of the offences of robbery, defeating or obstructing the course of
justice in that the suspects fled from the scene thereby attempting to evade police
custody, armed robbery of the policewoman’s pistol and cellular phone, conspiracy to
commit armed cash - in - transit robbery and attempted murder in that they fired at
other policemmen. The Court found that the link between the crime(s) committed and
the vehicle was not reasonably direct and that the vehicle did not play a real and
substantial part in the commission of the offences.

\textsuperscript{433} At par 34.
\textsuperscript{434} Unreported judgment of the Tki Case no 1215/2007 delivered on the 18/10/2007.
Whilst the vehicle conveyed the suspects from Cape Town to Transkei in order to achieve the goals of their conspiracy it could never be said that the vehicle was the means by which the conspiracy was committed. It is difficult to imagine any instance where a property would be declared an instrumentality of the offence of the so called 'meeting of minds' as the offence of conspiracy is known to be. Further, whilst it is so that the shots were fired at the police from within the moving vehicle, the connection between the vehicle and the offence of attempted murder in this regard is, indeed, at best tenuous.

The robbed pistol and the cellular phone were conveyed in the vehicle but again the link between this robbery and the vehicle would be incidental. A combination of all these connections would take the matter no further in that what took place after the suspects were stopped by the police was rather fortuitous if not incidental. The lesson that may be learned from the Court's interpretation in this case is that Courts will always look for the link between the actual use of the property and the offence committed.

6.3.2.2 Adaptation

In *Prophet*\(^{435}\) residential premises were used by its owner to manufacture methamphetamine, known as 'Tik', allegedly for personal use. The owner had been observed receiving the phenylacetic acid and taking it, and other substances\(^{436}\) necessary in the final process of manufacturing methamphetamine, into the premises. The police discovered a small room or a mini laboratory adjacent to the kitchen fitted

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\(^{435}\) 2003 6 SA 154 (C).

\(^{436}\) Distilled water, caustic soda and benzene.
with an industrial – quality extractor fan,\(^{437}\) and containing other equipment such as a magnetic stirrer, hot plate and a vacuum sealer. They also found literature relating to chemical processes and other chemicals.

Relying on both the US and Australian asset forfeiture jurisprudence for guidance both the Court \textit{a quo}\(^{438}\) and the SCA\(^{439}\) reaffirmed the closer connection instance as a determining factor in considering whether the premises were an instrumentality of the offence of drug manufacturing. But the SCA went further\(^{440}\) and stated that the employment of the property must be functional to the commission of the crime. That is, in its nature or through the manner of its utilization the property must have been employed in some way to make possible the commission of an offence\(^{441}\). Mpati DP developed the instance of adaptation as followed:

Where premises are used to manufacture, package or distribute drugs, or \textit{where any part of the premises has been adapted or equipped} to facilitate drug dealing, they will in all probability constitute an instrumentality of an offence committed on them.

The following factors (not necessarily all of them) suggested by the Court of Appeals in \textit{Chandler}\(^{442}\) as useful in measuring the strength and the extent of the \textit{nexus} between the property sought to be forfeited and the offence, are of assistance in the inquiry into whether property was an instrumentality of an offence:

* Whether the use of the property in the offence was deliberate and planned or merely incidental and fortuitous;
* Whether the property was important to the success of the illegal activity;
* The time duration which the property was illegally used and the spatial extent of its use;

\(^{437}\) To expel the noxious and harmful gases and smells caused by chemical reaction.
\(^{438}\) At par 26
\(^{439}\) \textit{Prophet v NDPP} 2005 2 SACR 670 (SCA) at par 17.
\(^{440}\) At 681B.
\(^{441}\) At par 26.
\(^{442}\) 36 F 3d 358 1994.
* Whether its illegal use was an isolated event or had been repeated; and
* Whether the purpose of acquiring, maintaining or using the property was to carry out the offence.  

It is manifest, in my view, that the property, although used by the appellant as his home, was adapted and equipped (by fitting of an extractor fan and other laboratory paraphernalia) to unlawfully manufacture drugs from chemical substances. Its use was deliberate and planned and important to the success of the illegal activities, which could not be conducted openly.  

The Constitutional Court\textsuperscript{445} found that the premises were, beyond doubt, appointed, arranged, organized, furnished and adapted or equipped to enable or facilitate the commission of the illegal activities. It is significant to note that in this case there was no evidence of a link to organised crime. In the case of Cole and Davies\textsuperscript{446} the first respondent was HIV/AIDS positive and there was evidence of devastating consequences of drug addiction. The house was used to produce ecstasy, CAT\textsuperscript{447} and Meth\textsuperscript{448} and there was a secret laboratory with extensive equipment, drugs, debt lists, text books and substantial proof that the owner was actively involved in the business of drug dealing, using and storing drugs on the premises. A computer kept at the house included a document with detailed instructions on how to manufacture ecstasy, a list of amounts owing to the respondents apparently for sales of drugs and a spreadsheet of what appeared to be income from drug sales.

\textsuperscript{443} At par 27.
\textsuperscript{444} Emphasis added.
\textsuperscript{445} Prophet v NDPP 2006 2 SACR 525 (CC) at par 57.
\textsuperscript{446} 2004 3 All SA 745 (W).
\textsuperscript{447} Ketamine.
\textsuperscript{448} Methamphetamine.
Willis J stated\textsuperscript{449} that the clear implication is that where the premises are used to manufacture, package or distribute drugs or any part of the premises was adapted or equipped to facilitate drug dealing, then they do constitute instrumentaltics of the offences committed on them. The learned Judge considered\textsuperscript{450} a long series of the US cases and held that the employment of the property was functional to the commission of the crimes.

In \textit{Parker}\textsuperscript{451} where a drug house was surrounded by a high metal - spiked wall, access limited to a front gate and where customers waited on a couch, Nkabinde AJA pointed out that the respondent did not deny that the property was adapted for customer service and to facilitate the illegal activities on it.

In \textit{Mohunram}\textsuperscript{452} in declaring that the immovable property was an instrumentality of the offences Van Heerden AJ added\textsuperscript{453} that:

\begin{quote}
The property was specifically adapted in various ways to operate as a casino. Mr. Mohunram had portioned the property for this use. The windows of the building housing the casino had been tinted in order to make it difficult to see into the building from the outside. It contained 57 gambling machines, arranged in rows, and a cashier’s booth had been constructed on the property to facilitate gambling activities. To use the words of Nkabinde J in \textit{Prophet} case, the property had been “appointed, arranged, organized, furnished and adapted or equipped to enable or facilitate the applicant’s illegal activities”.\textsuperscript{454}
\end{quote}

\textsuperscript{449} At 751G.
\textsuperscript{450} At par 9.
\textsuperscript{451} Unreported judgment of the SCA, Case no 624/2004 delivered on the 01/12/2005 at par 21; 2005 JOL 16202 (SCA).
\textsuperscript{452} See footnote 431 \textit{supra}.
\textsuperscript{453} At par 50.
\textsuperscript{454} At par 57.
6323 Repetition

Govender AJ coined this instance of instrumentality as follows:455

Property that is used regularly for the purposes of storing drugs, or a venue from which the transactions relating to the sales of the drugs are undertaking (sic), or which is identified as a place where one may obtain drugs, or where drug dealers are housed, and from where they conduct their drug dealing activities, must in my view, be regarded as an instrumentality for drug dealing.

In Engels456 the Court dealt with an illegal possession and transportation of 916 units of abalone. A large quantity of diving equipment, a vessel and a Toyota 4 x 4 were forfeited to the State as instrumentalities of the offence. The Court, although it relied on the closer connection instance,457 looked at the role the property played in the events leading to the arrest of its owner and Griesel J stated458 that:

The NDPP's case for a forfeiture order is not dependent solely on the events of 22 and 23 January 2003; it is based on the allegation that the property in question is an instrumentality of an offence, as contemplated by the Act. In order to prove this point, the NDPP cannot be confined to an isolated incident of criminal conduct; on the contrary, the more such incidents that can be established, the more easily the inference may be drawn that the property in question is indeed an instrumentality of an offence.

In Parker459 the owner had a residential property in which she lived in a granny flat, her son living in the main building and there were various lodgers. The property was surrounded by a high metal – spiked wall and access was limited to a front gate. The drugs were hidden at an adjacent plot. The police conducted ten successful controlled sales or police traps on the property over a course of a year. Evidence indicated that

455 At par 43 in Singh v NDPP 2007 3 All SA 510 (SCA).
456 2005 3 SA 109 (C).
457 At pars 37 to 40.
458 At par 13.
drug buyers would wait on the couch in the driveway whilst the drugs were fetched from the plot. Thus drugs were sold from the property with considerable regularity. When the police searched the property they found drugs stored there and the arrests were followed by convictions. The owner was advised about a possibility of civil forfeiture proceedings should she not stop the property’s use as an instrumentality of an offence.

The Court a quo compared the facts of this case with a situation where a drug dealer uses a secluded alley in a city as a place from which drugs are regularly sold and held that the property was not an instrumentality of an offence. The SCA disagreed. It distinguished RO Cook from the facts of this case. In setting some of the features that enabled it to hold that the property was indeed an instrumentality of an offence, the Court mentioned the frequency of the entrapment operations over a protracted period which clearly showed that drug dealing on the property occurred regularly.

In Mohunram the Constitutional Court held that the property was also used to commit a series of offences over an extended period of time. This, the Court held was another indicator of instrumentality.

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460 See also NDPP v April and Another 2007 4 All SA 1183 (C).
461 At par 16 and 17.
462 See footnote 412 supra.
463 At par 20.
464 See footnote 431 supra.
465 At par 51.
6324 Facilitation

It is submitted that from the analysis of the case law supra a fourth instance of property that facilitates the commission of an offence may be added. Mpati DP referred to this as where the property in a real or substantial sense facilitates or make possible the commission of the offence.

633 Proportionality\textsuperscript{467} analysis

Asset forfeiture is a serious matter.\textsuperscript{468} In civil forfeiture the guilt of the property owner does not necessarily have to be determined at the onset. Its provisions make significant inroads into the common law rights of ownership, since property is liable to forfeiture even where the owner was not involved in any crime at all.\textsuperscript{469} Although civil forfeiture has remedial objectives these cannot disguise the fact that, once exacted, it operates as a punishment.\textsuperscript{470} The Bill of Rights provides that no law may permit arbitrary deprivation of property.\textsuperscript{471} Moseneke DCJ pointed out that:

Civil asset forfeiture constitutes a serious incursion into well entrenched civil protection particularly those against arbitrary and excessive punishment and against arbitrary confiscation of property. Courts in this country and elsewhere have generally been astute to the fact that forfeiture of the instrumentalities of crime can produce arbitrary and unjust consequences.

In the same breath,

\textsuperscript{466} In Prophet v NDPP 2005 2 SACR 670 (SCA) at 681B; NDPP v RO Cook Properties (Pty) Ltd 2004 2 SACR 208 at par 26.
\textsuperscript{467} This has, as its primary purpose, the avoidance of an imbalance between the adverse and beneficial effects of an action and to encourage the administrator to consider both the need for the action and the possible use of less drastic or oppressive means to accomplish the desired end; NDPP v Kleinbott - a reportable judgment of the CPD, case number 9651/2004 delivered on 03/12/2007 at 13.
\textsuperscript{468} RO Cook (SCA) at par 17; Mohunram v NDPP (Law Review Project as Amicus Curiae) 2007 4 SA 222 at paras 118; NDPP v Cole and Others 2005 2 SACR 553 (W) at par 15.
\textsuperscript{469} RO Cook (SCA) at par 23; Mohunram at par 20.
\textsuperscript{470} At par 17; Mohunram at par 118.
\textsuperscript{471} S 25 of the Constitution.
\textsuperscript{472} Mohunram at par 120.
Property owners cannot be supine... The State is constitutionally permitted to use forfeiture, in addition to the criminal law, to induce members of the public to act vigilantly in relation to goods they own or possess so as to inhibit crime. In a constitutional State law - abiding property owners and possessors must, where reasonably possible, take steps to discourage criminal conduct and to refrain from implicating themselves or their possessions in its ambit. And the State is entitled to use criminal sanction and civil forfeiture to encourage this. Here constitutional principle recognizes individual moral agency and encourages citizens to embrace the responsibilities that flow from it.\(^{473}\)

This requires that civil forfeiture be given a constitutional construction.\(^{474}\) The Courts are enjoined by section 39(2) of the Constitution to interpret legislation in a manner that promotes the spirit, purport and objects of the Bill of Rights and to ensure that its provisions are constitutionally justifiable. It is with this background in mind that the SCA\(^{475}\) accepted that at the final stage of the enquiry as to whether or not a property is an instrumentality of an offence that a proportionality\(^{476}\) analysis may be added as a constitutional imperative.

This analysis entails an assessment of the nature and the value of the property subject to forfeiture in relation to the crime involved\(^{477}\) and the role it played in its commission, the interests and deprivation of owners, and those of the community in insisting on the prevention of crime.\(^{478}\) Its purpose is to determine

\(^{473}\) RO Cook (SCA) at par 28.
\(^{474}\) RO Cook (SCA) at par 19.
\(^{475}\) In RO Cook (SCA) at par 30.
\(^{476}\) The notion of 'significant disproportionality' has been dispelled by the Constitutional Court in Mohunram because this would lead to confusion. See discussion at par 67 – 75.
\(^{477}\) This entails the seriousness of the offence and the guilt of the accused.
\(^{478}\) First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service, and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance 2002 4 SA 768 (CC); Austin v United States 509 US 602 1993; United States v Bajakajian 524 US 321 1998; NDPP v Gouws 2005 2 SACR 193 (SE) at 197B; Prophet v NDPP 2007 2 BCLR 140 (CC); Mohunram and Another v NDPP and Others 2007 6 BCLR 575 (C) at par 57.
whether the grant of a Forfeiture Order would amount to an arbitrary deprivation of property in contravention of section 25 of the Constitution.\footnote{Mohunram at pars 56 and 123.}

In \textit{Gouws}\footnote{2005 2 SACR 193 (SECLD).} a 32 year old Respondent was convicted, after pleading guilty, by the criminal court of being in unlawful possession of 62 units of abalone worth no less than R5 400.00 and was sentenced to payment of a fine of R1 500.00 or 90 days imprisonment. At the conclusion of the criminal trial the Court ordered that the motor vehicle, valued about R17 000.00, be returned to the Respondent. This was not done. The vehicle was held by the State, subsequent to its seizure, for two and a half years. The Respondent had received R300.00 as payment to transport the abalone.

The Court hearing a forfeiture application declared the vehicle an instrumentality of an offence of transporting abalone without the requisite permit. It however dismissed the application for its forfeiture to the State relying on the proportionality analysis. Ludorf J reasoned as follows:\footnote{At 197E – G. Mohunram at par 60.}

In my judgment the particular facts of this case demonstrate that the respondent had been suitably punished, that his deprivation of his motor car for two and a half years has augmented his punishment and that his use of the Opel in the commission of the crime concerned as an instrument in furtherance of the crime, has, in the circumstances, been sufficiently vindicated to satisfy the public demand for neutralization of the Opel as such instrument when measured and considered by way of a proportional analysis of the objectives of POCA, the personal circumstances of the respondent and the public interest also in preserving the protection which the law ordinarily affords an owner in his undisturbed ownership and possession of property.
The proportionality analysis was also used in *Mohunram*\(^{482}\) to dismiss an application for forfeiture of an immovable property. Mr. Mohunram had, prior to the application for forfeiture, been convicted and paid a fine of R\(88\) 500.00 for the same offence. Monies and equipment worth R287 000.00 had been seized and forfeited. The immovable property was bonded for R600 000.00 the balance of which was R470 000.00. It was partly used for a legitimate glass business which had some employees. These factors weighed heavily in his favour in the analysis.

The Courts must be commended for having developed proportionality as an equitable constitutional requirement to curb excesses in civil forfeiture.\(^{483}\) One question remain though: Who is responsible for placing in front of the Court evidence that forfeiture of a property would be disproportional and at which stage? Since proportionality is nowhere mentioned in POCA one is not likely to find an answer in the statute. The first impression would, however, lead one to state that the party who alleges disproportionality should prove it and this should occur at the forfeiture stage.

Moseneke DCJ was of a different view. He stated that:\(^{484}\)

The office of the NDPP, as applicant for forfeiture, bears the initial duty to disclose all relevant facts within its knowledge to the court hearing the asset forfeiture application if arbitrary forfeitures are to be avoided, I may even add that, in terms of section 48(1) read together with section 50(1) of POCA, the NDPP bears the onus to establish on a balance of probabilities that the forfeiture sought is justified. Naturally, the

\(^{482}\) See footnote 431 supra.

\(^{483}\) See also *NDPP v Vermaak* 2008 1 SACR 157 (SCA) at par 9; *NDPP v Kleinbooi* – a reportable judgment of the CPD, Case no 9651/2004 delivered on 03/12/2007; *NDPP v Lewis* – a reportable judgment of the CPD, Case no 2459/2005 delivered on 03/12/2007; *NDPP v Geyser* a reportable judgment of the SCA, Case no 160/2007 dated 25/03/2008 at par 18.

\(^{484}\) At par 131.
respondent in forfeiture proceedings will have to adduce evidence if she or he hopes to disturb or rebut the facts that the NDPP relies upon in the founding depositions.... The NDPP must always anticipate that the court will enquire into proportionality and must always place facts before the court to enable it to make the requisite proportionality assessment.\textsuperscript{485}

It would thus appear that even at a preservation stage of the proceedings the State may be obliged to deal with this constitutional yardstick.

6.3.4 Civil forfeiture, CARA and victims

The funds deposited into CARA after asset forfeiture may be allocated to any institution, organization or fund.\textsuperscript{486} One of the objects of the CARA Committee\textsuperscript{487} is to advise Cabinet in connection with the rendering of financial assistance to any institution, organization or fund established with the object to render assistance in any manner to victims of crime.\textsuperscript{488}

What the Legislature envisaged in this regard, it is submitted, are victims of crime in general (and not of the underlying asset forfeiture crime). If the latter were targeted the Legislature would have expressly said so. Why make compensatory payment to institutions, organizations or funds instead of expressly making direct payment to those who suffered loss of damage or of property due to asset forfeiture crimes? Non-Governmental organizations working with restorative justice, the rehabilitation of drug addicts or on counselling of victims of rape and other crimes should be eligible to apply for assistance from the Committee.

\textsuperscript{485} At par 132.
\textsuperscript{486} S 69A (b) of POCA.
\textsuperscript{487} To date the Committee has only met twice i.e. on the 16\textsuperscript{th} March and 11\textsuperscript{th} October 2007 when about R73 million was distributed.
\textsuperscript{488} S 68(c) of POCA. To date no funds have been allocated in this regard.
As pointed out in the chapter, civil forfeiture also targets all the proceeds of unlawful activities but, as opposed to criminal forfeiture, it does not expressly envisage that the victims of underlying crimes may have suffered damage or loss of property or injury as a result of the commission of the unlawful activities. There is no express provision for such victims to intervene or make representations to the Court hearing the preservation or forfeiture application in connection with the forfeiture to the State of such proceeds. There is also no provision that proceeds will only be forfeited to the State when there is no victim.

When civil forfeiture is invoked, such victims would expect, without much ado on their side, recovery of their loss to be paid to them (and not to CARA), particularly, when the State relied on their depositions in support of the applications. It is submitted that this would also be in line with restorative justice and in winning the public confidence in the justice system. The absence of express provisions in civil forfeiture in favour of victims implies that they will have to incur litigation costs in the process of reclaiming what is, in the first place, theirs. This is another indication that POCA is not victim friendly.

Section 48(1) of POCA provides for the making of a Forfeiture Order to the State of all or any property that is subject to Preservation Order. The reference to all or any property may be interpreted to mean that the Legislature envisaged situations where an exclusion application brought by an innocent owner was successful or portion of the property being declared by Court to be not liable to forfeiture. This may be due to certain reasons.
Section 50(2) provides that the Court may make any ancillary orders that it considers appropriate, including orders for the facilitation of the transfer to the State of property forfeited to the State. This, admittedly, leaves some room for the interpretation that perhaps the Legislature did envisage that the State may ask a Court hearing a forfeiture application to grant an ancillary order making payment to a victim or to declare part of the proceeds forfeit to the State and the rest to be paid to a victim. This could be the case where the State has relied on the evidence of the victim. Alternatively, and in cases where no reliance was made on the victim’s deposition, a victim may approach a Court in terms of section 50(2) for an order to make payment to such a victim. This could be in line with the reading of section 48(1) of POCA. Other than this one cannot state that victims were envisaged in civil forfeiture in the same manner as it is the case in criminal forfeiture. It is submitted that this is a regrettable state of affairs.

It is not difficult to imagine cases where victims would have claims in civil forfeiture. In Matshaya and Others489 the Special Pension Board made provisions for a special pension for political activists.490 The late Mr. Matshaya was alleged to have defrauded the Board of a total amount of R1 018 404.90 and purchased motor vehicles. Criminal prosecution and forfeiture culminated when Mr. Matshaya passed away. Civil forfeiture was invoked against the vehicles it being alleged that they are proceeds of fraud. Affidavits of the employees of the Board were used in support of the preservation application. A Forfeiture Order by default was granted against the vehicles and it had the following clause that was inserted by the State:

489 Case no 1693/2006 (SE).
490 In terms of s 1 of the Special Pensions Act, No 69 of 1996.
On the date on which this Order takes effect, to wit 45 weekdays after publication in the Government Gazette, the curator in whose custody the property remains shall cause same to be paid to the National Revenue Fund.

The vehicles were sold and the proceeds thereof were paid to the National Revenue Fund. In Pillay Mr. Pillay was alleged to have falsely, wrongfully, unlawfully and with intent defrauded and represented in February 2006 to the victim that he was:

- Involved in the shipping business with 'ISS' and Ireland and that three containers with literature had to be shipped to France;
- Too busy to take care of this deal;
- Prepared to give it to the victim who was to receive the profit thereafter, provided the victim paid R53 937.90 into his Bank account for the shipment.

The victim duly made the deposit but Mr. Pillay vanished and thus could not be arrested. Civil forfeiture was invoked against the Bank account where the cash was hidden and the victim's affidavit was used in support thereof. This resulted in a forfeiture order by default which also contained a similar clause. At the hearing of the forfeiture application the victim handed in an affidavit asking the Court to make the money payable to her, which was done. The victim could not rely on section 52 (2)(a) or (b) because the money deposited in the bank account was no longer the same as the cash forfeited.

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491 On the 04/10/2007 R92 414.60 was paid.
492 Case no 2585/2006 (SE).
493 Which she received on the 18/12/2007.
6.3.5 South Africa’s asset forfeiture Compliance with Recommendations of the Financial Action Task Force

On the 4th August 2003 a team of FATF examiners\textsuperscript{494} handed a detailed assessment\textsuperscript{495} on South Africa on anti-money laundering and combating the financing of terrorism regime. The contents of this report are beyond the scope of this paper. Reference to it will be confined to the evaluation of South Africa’s asset forfeiture and compliance with the FATF Recommendation 3 which provides:

Countries should adopt measures similar to those set out 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 these 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 liability to recover property that is subject to confiscation; and (d) take any appropriate investigative measures.

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 a requirement is consistent with the principles of their domestic law.\textsuperscript{496}

The team found that South Africa was generally compliant or largely compliant with most of the recommendations. Areas of non-compliance were:

\textsuperscript{494} That included FATF experts in legal, law enforcement, financial regulatory issues and the FATF Secretariat.
\textsuperscript{495} Entitled ‘South Africa: Mutual Evaluation Report Anti-Money Laundering and Combating the Financing of Terrorism, 04/08/2003’.
\textsuperscript{496} De Koker at ANCIL – 6; Emphasis added.
the identification of beneficial owners;

* the application of anti-money laundering rules applicable to branches and subsidiaries abroad;

* giving special attention to transactions with higher risk countries;

* criminalizing the financing of terror and freezing and confiscating terrorist assets;

* provision of assistance to other countries’ financing of terror investigation; and

* strengthening customer identification measures for wire transfers.

The report\(^{497}\) assesses South Africa’s asset forfeiture’s compliance very favourably and describes it as comprehensive. The finding in respect of asset forfeiture being comprehensive is correct when one has regard to the unique manner of combining both criminal and civil forfeiture as well as the establishment of CARA in one statute. With respect, the assessment on compliance is not entirely correct. POCA\(^{498}\) and the jurisprudence developed by our Courts in explaining the concept of instrumentality of an offence excludes or does not extend to those instrumentalities \textit{intended for the use} in the commission of offences.

In \textit{Zhong}\(^{499}\) the police found a large quantity of abalone in a warehouse and an amount of money made up of US $17 000.00 and R5 000.00 in a vehicle outside the warehouse. The State contended that the money was proceeds of abalone sale or an

\(^{497}\) At par 62.

\(^{498}\) See the short title which states that civil forfeiture provides for the forfeiture of criminal assets that have been used to commit crime. In \textit{Cook Properties (SCA)} in par 59 it was stated that the property had to be involved in the actual commission of the offence.

\(^{499}\) Unreported judgment of the WLD, Case no 26736/2003 delivered on 24/06/2004.
instrumentality of an offence in that it was *intended to be used* to facilitate the sale
and export of the abalone.

Gildenhuyys J pointed out that:500

In my opinion there is nothing to support an inference that the money
seized from the respondent is an instrumentality of an offence. Ms
Keightly suggested that the money was to be used to facilitate the sale
and possible exportation of illegal abalone. It was not shown that such an
offence has been committed. The POCA definition of “instrumentality of
an offence” which has already been committed... An intended offence
(assuming it can be inferred that there was an intention to commit an
offence) for which the property has not yet been used, is insufficient to
trigger the operation of section 50(a).

It will be recommended later on that the definition of an instrumentality of an
offence be revisited.

500 At par 12.
Chapter 7

Recommendations

7.1 Conclusion

The commission of crime will always take place as long as human beings exist. A number of international conventions are in place to deal with organized crime which should include individual wrong doing. South Africa is one of the countries that have done well in aligning itself with the fight to uproot organised crime. It has done this by signing international conventions and putting in place statutory provisions to curb the phenomenon. Its law enforcement agencies should forge ahead and replace with advanced ones the age-old practices of curbing crime. Failure in this regard may result in undermining the Rule of Law.

Crime and organized crime in particular, has been identified locally and internationally as a security threat and this is the case especially in South Africa’s newly found democracy. Asset forfeiture, which has been in our statutes as early as the 1930’s, is one of the most effective, internationally acceptable and important weapons in the fight against crime and the recovery of proceeds of unlawful activities. To achieve this, the State has to provide adequate resources to the AFU which should implement asset forfeiture within the confines of the Constitution and the Bill of Rights.

Restorative justice promotes the view that crime is a violation of relationships rather than a simple breaking of the law and that the appropriate response should go beyond punishment or retribution and must also encompass putting right the wrong caused to

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201 It is submitted that to confine asset forfeiture to organized crime would be to render useless the overall purpose of POCA.
victims and society. In this way public confidence in the justice system may be restored. This paper has concentrated on international interventions in the fight against organized criminal activities, asset forfeiture in South Africa and its treatment of victims. The FATF found that South Africa was largely compliant with most of its recommendations. It has, however, been demonstrated in the preceding chapters that POCA is not necessarily user friendly, asset forfeiture victim friendly nor easy to understand. The discussion has not focused on victims of crime generally and it is hoped that the recommendations to establish a victims’ fund or scheme in South Africa will be seriously taken into considerations and be implemented without further ado.

With lessons learned from other international asset forfeiture jurisdictions it is recommended that a solution to problems encountered in the implementation of the provisions of POCA lies in the amendment of certain of its provisions, the promulgation of Regulations or policies and an enactment of a General Law amendment statute dealing with bulk cash seizure. The following problem areas in POCA should thus be dealt with by way of a proposed amendment as set out in annexure “CNN 1” hereto:

- Its title is misleading;
- Its long title does not envisage any restorative justice;
- Its preamble makes no mention of reimbursement of victims;
- S18(2) of POCA has potential to curtail the recovery process by the State of the entire benefit;

502 Von Bonde at 272.
POCA fails to deal with the benefit received if a defendant dies before conviction and where civil forfeiture cannot be invoked to recover it;

Certain POCA provisions need to be amended or deleted (sections 47(b), 48(4) and 51(3) of POCA for example);

POCA falls short in covering instances of instrumentalities believed to be intended to be used in the commission of offences.

An amendment of POCA may take a number of years before it finally comes into effect. Section 77 (f) of POCA gives the Minister authority to make Regulations providing for any matter which she may consider necessary or expedient to achieve its objects. This is a wide power which must be utilised. For the time being, the following aspects may be dealt with by way of Regulations as set out in annexure “CNN 2” hereto:

There is no definitions for the word “victim”;

In the scheme of POCA, where there is a victim a defendant is expected to only pay to the State the amount of the Confiscation Order. This makes the AFU to be acting ultra vires the provisions of POCA;

POCA makes no provision for legal representation of a defendant at confiscation stage;

There is no legal authority for the State to pay a confiscation amount to a victim prior to realization. This also makes the AFU act ultra vires the provisions of POCA;
• POCA makes no provision for the recovery of interest that accumulated on the benefit from the date of the offence to the date of the confiscation order and this makes the criminals to enjoy that part of their benefit from crime;
• There is no duty on the State to give notice to the victims to make representations in terms of section 30(5) of POCA nor is there any provision for the monitoring of the State’s compliance in this regard. A provision in this regard would go a long way in making POCA victim friendly;
• There are no clear provisions as to how victims should make representations at realization stage. There is no indication on the aspects of legal representation and legal costs. Again a provision in this regard would go a long way in making POCA victim friendly;
• Nothing is expressed on the status of prescribed victims’ claims versus the making of representations;
• No distinction is drawn in POCA between victims who willingly participated in the commission of the underlying offence and those who did not. This distinction is essential if AFU is there to make sure that crime does not pay;
• The State has no legal authority to assist victims although it uses their depositions. A provision in this regard would go a long way in making POCA victim friendly;
• Civil forfeiture (as compared to section 30(5) of POCA) does not envisage any payment or transfer of forfeited property to victims of underlying crime and again there is no legal authority for the State to arrange this;
• The absence of AFU national statistics on victim cases or on civil forfeiture cases where victims have been paid;
• The need to define the term “innocent owner”.
Once deposited into CARA and in the scheme of POCA, no recovered money may be paid to a victim of the underlying offence; and

- There is no clear provision for a procedure to be followed when donating or allocating forfeited property to law enforcement or organizations.

It is recommended that the following aspect of South Africa having no legislation dealing with bulk cash smuggling and having no set threshold be dealt with by way of a promulgation of a General Law amendment statute as set out in annexure “CNN3”:

7.2 Final remarks

Armed with the statutory provisions South Africa is one of the countries at the centre of the global financial system in combating and disrupting trans – national criminal organisations. But this should not overlook victims of crime and the need for them to have confidence in the justice system. In this paper successes have been conceded. The recommendations are an attempt to bring a message home that more needs to be done to make asset forfeiture effective and to complement restorative justice.
To amend the Prevention of Organised Crime Act, No. 121 of 1998, so as to effect certain textual improvements to better provide for restorative justice to victims of underlying crimes in asset forfeiture; to insert certain definitions; to provide procedure for dealing with Defendants that die before conviction; to provide for variation by the State of capped restraint orders; to insert a new provision for instrumentalities intended to be used in the commission of crime.

**BE IT ENACTED** by the Parliament of the Republic of South Africa, as follows:—

**Amendment of the title of Act 121 of 1998:**

The title of the Prevention of Organised Crime Act, No. 121 of 1998 ("the principal Act") is hereby amended—

(i) by the deletion of the word 'organised' and the substitution thereof with the word 'Illicit'.

**Amendment of the long title of the principal Act:**

The long title of the principal Act is hereby amended—

(i) by the insertion of the words 'and individual wrong doing' after the words 'organised crime' in the first line thereof; and

(ii) by the insertion of the words 'and restorative justice' after the words 'unlawful activity' in the sixth line thereof.

**Amendment of the preamble of the principal Act:**

The long title of the principal Act is hereby amended—

(i) by the insertion of the word 'or economic' after the words 'and physical' in the second line of the fifth paragraph thereof; and

(ii) by the insertion of the phrase 'victims of underlying asset forfeiture crimes and,' after the words 'proceeds to' in the second line of the twelfth paragraph thereof.
Amendment of section 1 of the principal Act:

1. Section 1 of the principal Act is hereby amended—

(a) by the substitution of the definition of ‘instrumentality of an offence’ and the insertion after the definition of ‘High Court’ of the following definition:

‘instrumentality of an offence’ means any property:

(i) 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; or
(ii) which is intended to be used 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.

(b) by the insertion after the definition of ‘unlawful activity’ of the following definition:

‘victim of underlying forfeiture crime’ means an identifiable innocent person who is a non-owner, who has suffered direct or proximate damage or loss of property or injury as a result of an offence or related unlawful activity referred to in section 18(1) which was committed by a defendant or any person and which leads to a confiscation or forfeiture of property as envisaged in sections 48, 50 and 53 of POCA. This includes a person whose civil claim against a defendant has prescribed. A drug user, for an example, is not considered a victim of a drug trafficking offence under this definition. If a victim is under 18 years of age, incompetent, incapacitated, or deceased, a family member or legal guardian of the victim, a representative of the victim’s estate or any other person so appointed by court may exercise the victim’s rights, but in no event shall a defendant serve as a guardian or representative for this purpose. A victim may be a corporation, company, association, firm, partnership, society or a joint stock company;

Amendment of section 18 of the principal Act:

2. Section 18 of the principal Act is hereby amended by—

(a) by the insertion of the phrase ‘in the absence of a victim of underlying forfeiture crime’ after the word ‘State’ in the third line of subsection 18(1) (c) thereof; and

Alternatively,
(b) by the insertion of the following as section 2A:

(i) Notwithstanding the provisions of section 1, instead of making a confiscation in favour of the State, the court may on the application of the victim of the offence make a confiscation order in favour of such a victim.

(ii) A confiscation order made under this section shall be deemed to be an exercise of the civil jurisdiction of the court in an action between the victim of the offence as plaintiff and the offender as defendant and may be enforced as if it were an order made by the court in civil proceedings instituted by the plaintiff against the defendant to recover a debt due by him/her to the plaintiff.

(iii) The court may also authorise the appointed curator bonis to realise a sufficient amount of realisable property in order to satisfy the confiscation order.

(c) by the deletion of subsection 18(2) (b).

Insertion of section 24(7) of the principal Act:

3. Section 24 of the principal Act is hereby amended—
   (a) by the insertion of the following subsection:

   "(7) Whenever a defendant who has not been convicted of an offence dies before a confiscation order is made and there is sufficient evidence for putting such defendant on trial for an offence, the court may, on the application of the National Director, enquire into any benefit the person may have derived from that offence if the court is satisfied that there are reasonable grounds to believe that a confiscation order would have been made against him or her were it not for his/her death."

Amendment of section 39(5) (c) of the principal Act:

4. Section 39(5) (c) of the principal Act is hereby amended—
   (a) by the insertion of the following phrase "the facts in detail in an affidavit and" before the word "the basis" in the first line thereof.

Deletion of section 47(b) of the principal Act:

5. Section 47 of the principal Act is hereby amended—
   (a) by the deletion subsection 47(b) of the principal Act

Amendment of section 48 of the principal Act:

6. Section 48 of the principal Act is hereby amended—
(a) by the insertion of the following phrase ‘in the absence of a victim of underlying forfeiture crime’ after the word ‘State’ in subsection 48(1);

Alternatively,

(b) by the insertion of the following as section 1A:

Notwithstanding the provisions of section 1, instead of making forfeiture in favour of the State, the court may on the application of the victim of the offence make a forfeiture order in favour of such a victim.

A forfeiture order made under this section shall be deemed to be an exercise of the civil jurisdiction of the court in an action between the victim of the offence as plaintiff and the offender as defendant and may be enforced as if it were an order made by the court in civil proceedings instituted by the plaintiff against the defendant to recover a debt due by him or her to the plaintiff.

(c) by the insertion of the following phrase ‘who is not legally represented and’ after the word ‘Any person’ in subsection 48(4) (b).

Deletion of section 51(3) and (4) of the principal Act:

7. Section 51(3) and (4) of the principal Act is hereby amended—

(a) by the deletion thereof.
MEMORANDUM ON THE OBJECTS OF THE PREVENTION OF ORGANISED CRIME AMENDMENT BILL, 2009

1. PURPOSE OF THE BILL

The Prevention of Organised Crime Amendment Bill, 2009, aims to clarify a number of issues pertaining to the application of Chapters 5 and 6 of the Prevention of Organised Crime Act, No. 121 of 1998 (hereinafter "the principal Act"). It also makes certain textual improvements to the title, long title and preamble of principal Act and facilitates restorative justice.

2. OBJECTS OF THE BILL

2.1 Clause 1 will amend the definition of “instrumentality”, insert a definition of “victim of underlying forfeiture crime” and effect consequential amendments to certain definitions in section 1 of the Act.

2.2 Clause 2 will insert the phrase in section 18 of the principal Act “in the absence of a victim of underlying forfeiture crime” or insert a new section 18(2A).

2.3 Clause 3 will insert a new section 24(7) to make provision for the dislodging of a benefit from an estate of a deceased defendant who died before conviction.

2.4 Clause 4 will insert new textual improvements in section 39(5)(c) of the principal Act.

2.5 Clause 5 will delete section 47(b) of the principal Act.

2.6 Clause 6 will amend section 48 of the principal Act as done in Clause 2 supra and insert a phrase in section 48(4)(b) of the principal Act.

2.7 Clause 7 will delete section 51(3) and (4) of the principal Act.

3. OTHER DEPARTMENTS/BODIES CONSULTED

No other departments or bodies have been consulted as the recommended amendments contained in the Bill will mainly affect members of the prosecuting authority.

4. IMPLICATIONS FOR PROVINCES

None.

5. FINANCIAL IMPLICATIONS FOR THE STATE

The application of Chapters 5 and 6 of the Act is the responsibility of the prosecuting authorities and in particular the Asset Forfeiture Unit in the Office of the National Director of Public Prosecutions. These existing structures will also be responsible for the application of the Act in its amended form. No additional financial implications are therefore foreseen regarding the implementation of the Bill.
6. PARLIAMENTARY PROCEDURE

The State Law Advisers and the Department of Justice and Constitutional Development are of the opinion that the Bill must be dealt with in accordance with the procedure established by section 75 of the Constitution of South Africa, 1996 since it contains no provision to which the procedure set out in section 74 or 76 of the Constitution of South Africa, 1996 applies.
PREVENTION OF ORGANISED CRIME REGULATIONS, 2008

(as promulgated by Government Notice R1234 of 1 December 2008)

It is hereby notified that the Minister of Justice has, in terms of section 77(1) (f) of the Prevention of Organised Crime Act, No. 121 of 1998 ("POCA"), made the Prevention of Organised Crime Regulations as contained in the Schedule of this Notice. The purpose of these Regulations is to treat victims of crimes underlying asset forfeiture equitably, to give legal authority and expedite the transfer and allocation of forfeited property to victims and law enforcement agencies – thereby promoting restorative justice and giving guidance in asset forfeiture procedural aspects.

SCHEDULE

DEFINITIONS

1. In these regulations any word or expression to which a meaning has been assigned in POCA has that meaning and, unless the context otherwise indicates:

    “AFU” means the Asset Forfeiture Unit as duly represented by its Head and established in terms of the provisions of the National Prosecuting Authority Act, No. 32 of 1998;

    “Asset forfeiture” refers to the asset recovery process as contemplated in both Chapters 5 and 6 of POCA;

    “CARA” means the Criminal Assets Recovery Account established under section 63 of POCA;

    “CARC” means the Criminal Assets Recovery Committee established under section 65 of POCA;

    “CARU” means the Criminal Assets Recovery Unit which deals with CARA affairs;

    “Civil forfeiture” means the asset recovery procedure referred to in Chapter 6 of POCA;

    “Compensation Order” means an order referred to in section 300 of the Criminal Procedure Act, No. 51 of 1977;

    “Confiscation Order” means an order referred to in section 18 of POCA;

    “Criminal Forfeiture” means the asset recovery procedure set out in Chapter 5 of POCA;

    “Defendant” means a person against whom a prosecution for an offence may be or has been instituted, irrespective of whether he or she has been convicted or
not, and includes a person referred to in section 25(1) (b) of POCA and who has interest in property liable to forfeiture;

"Forfeiture Order" means an order referred to in sections 48, 50 and 53 of POCA;

"Minister" means the Minister of Justice and Constitutional Development;

"Oral Evidence" refers to the adducing of oral testimony as envisaged in section 48(4) (b) of POCA;

"Person" means an individual, partnership, corporation, joint business enterprise, estate, or other legal entity capable of owning property;

"POCA" means the Prevention of Organised Crime Act, No. 121 of 1998 (as amended);

"Preservation Order" means a Preservation of Property Order referred to in section 38 of POCA;

"Proceeds of crime" means any payment or other reward received or held by the defendant or any person or over which the defendant or any person has effective control, whether before or after the commencement of POCA, in connection with any criminal activity carried on by him/her or any other person;

"Property" means money or any other movable, immovable, corporeal or incorporeal thing and includes any rights, privileges, claims and securities and any interest therein and all proceeds thereof;

"Realisation Order" means an order referred to in section 30 of POCA;

"Representation" refers to the process followed by victims in terms of section 30(1) of POCA;

"Restraint Order" means an order referred to in section 26 of POCA;

"The State" means the State as represented by the National Director of Public Prosecution or the Applicant bringing an asset forfeiture application;

"Victim" means an identifiable innocent person who is a non-owner, who has suffered direct or proximate damage or loss of property or injury as a result of an offence or related unlawful activity referred to in section 18(1) of POCA which was committed by a defendant or any person and which leads to a confiscation or forfeiture of property as envisaged in sections 18, 48, 50 and 53 of POCA. This includes a person whose civil claim against a defendant has prescribed. A drug user, for an example, is not considered a victim of a drug trafficking offence under this definition. If a victim is under 18 years of age, incompetent, incapacitated, or deceased, a family member or legal guardian of the victim, a representative of the victim’s estate or any other person so appointed by Court may exercise a victim’s rights, but in no event shall a
defendant serve as a guardian or representative for this purpose. A victim may be a corporation, company, association, firm, partnership, society or joint stock company; and

"Unlawful Activity" means any conduct which constitutes crime or which contravenes any law whether such conduct occurred before or after the commencement of POCA and whether such conduct occurred in the Republic or elsewhere.

RESTORATION OF FORFEITED PROPERTY TO VICTIMS

2. During the institution of both criminal or civil forfeiture and where there are victims, the AFU shall as early as is possible and where it is reasonably feasible, identify all victims, provide them with the basis or reasons for invoking asset forfeiture and inform them of their eligibility to lodge a claim(s) to the AFU for reimbursement or transfer of forfeited proceeds of crime or property to them.

The most efficient and least expensive method (e.g. personal service if victims are few and known and advertisement where there is a large number) of identifying and notifying victims shall be used.

The victim’s claim must contain the following information in clear and concise terms:

(2.1) Name, address, identity number or registration number of the victim;
(2.2) The name of the seizing agency, the asset identifier or serial number, a date and place of seizure;
(2.3) A complete description of the property, including an address or legal description of immovable property, the make, model, amount, if any;
(2.4) A description of the victim’s interest in the property supported by original or certified contracts of sale, mortgages or other relevant documentary evidence;
(2.5) The docket, criminal case and AFU numbers; and
(2.6) A sworn affidavit by the victim or victim’s representative.

3. The AFU should investigate the victim’s claim in which the victim must demonstrate that:

(3.1) A pecuniary loss of a specific amount has been directly caused by a criminal offence or related unlawful activity that was the underlying basis for asset forfeiture and that the loss is supported by documentary evidence;
(3.2) The pecuniary loss is the direct or proximate result of illegal acts and is not the result of otherwise lawful acts committed in the course of a criminal offence;
(3.3) The victim did not knowingly contribute to, participate in, benefit from, or act in a wilfully blind manner towards the commission of the offence or related unlawful activity that was the underlying basis for asset forfeiture;
(3.4) The victim has not in fact been compensated for the wrongful loss of the property by a defendant or others. Any victim who has been reimbursed or later receives compensation for the loss of the property in question from any other source must reimburse the AFU for the amount received from the other source;

and

(3.5) Other than a civil recovery action and a compensation order, the victim does not have recourse reasonably available to other assets from which to obtain compensation for the wrongful loss of the property.

4. A claim may be denied at the discretion of the AFU when:

(4.1) There is substantial difficulty in calculating the pecuniary loss; and

(4.2) The total number of victims is large and the monetary amount transferable is so small as to make its granting impractical.

5. Notwithstanding any other provision of law pertaining to criminal or civil forfeiture, the AFU is authorised to:

(5.1) Take any action to protect the rights of innocent persons in the interest of justice and which are not inconsistent with the provisions of POCA;

(5.2) Transfer by way of Court - ordered restitution and prior to realisation as envisaged in section 30 of POCA, sale or deposit into CARA, property confiscated pursuant to section 18 of POCA or forfeited pursuant to sections 50 and 53 of POCA, on such terms and conditions as AFU may determine, as restoration to any victim of the offence (which includes any offence or related offence constituting the underlying specified unlawful activity) giving rise to asset forfeiture;

(5.3) Keep an inventory and full details of reimbursed victims; and

(5.4) Reimburse victims on a pro rata basis when their claims cannot be granted in full due to the limited value, or limited remaining value, of the forfeited property.

ALLOCATION/DONATION OF FORFEITED PROPERTY

6. Notwithstanding any other provision of POCA, the AFU is authorised, prior to sale or deposit of property to CARA, to identify property for donation/allocation to a specific law enforcement agency ("the LEA") in need of such a property. Once such identification has taken place the AFU shall:

(6.1) Request the identified LEA to take custody and control of the property, to confirm in writing that the LEA will keep, insure and maintain such property in good condition pending an approval of the allocation/donation by CARC and Cabinet; and

(6.2) Give to CARU a copy of the Forfeiture Order, details of the property and the written undertaking by the identified LEA.

7. CARU shall immediately present the application for allocation/donation to CARC which will in turn make a recommendation to Cabinet. Once the allocation/donation has been approved or rejected CARU will inform the AFU which will in turn advise the LEA.
8. In such event CARU, in conjunction with the appointed Curator, shall arrange for the sale of the property and the deposit of its proceeds into CARA.

APPEARANCE TO OPPOSE

9. Any appearance to oppose the making of a Forfeiture Order as envisaged in section 39 of POCA shall also set out in detail the facts upon which the opposing party's defence is based. This shall also include appearances from unrepresented interested parties.

ADUCING OF ORAL EVIDENCE

10. Only unrepresented interested persons in civil forfeiture are entitled to utilise, if they so wish, the provisions of section 48(4)(b) of POCA pertaining to adducing of oral testimony. The following shall govern the procedure of adducing of such oral testimony:

(10.1) Any unrepresented person who intends adducing oral testimony shall, when giving his/her intention to oppose the making of a Forfeiture Order in terms of section 39(3) and (5) of POCA, simultaneously give written notice to the State of such intention to adduce;

(10.2) Such a person may not be cross-examined at the hearing of the forfeiture application and his/her testimony shall be recorded and considered as an Answering Affidavit to which the State shall be entitled to reply;

Alternatively

(10.3) The forfeiture application should be referred to a date for trial proceedings for the hearing of oral evidence on the issues in dispute between the parties;

(10.4) The deponents to the affidavits the State has already filed of record must be called as witnesses at the trial;

(10.5) Any party may subpoena any person to give evidence at the trial; and

(10.6) No party shall be entitled to call any other witness unless a party:

(10.6.1) has served on the other, fourteen (14) Court days before the trial date, a statement wherein the evidence to be given in chief by such witness is set out; or

(10.6.2) is permitted by Court and ten (10) Court days before the trial date, after giving an acceptable explanation for the failure to file such a statement, to call such witness.

(10.7) Each party shall make discovery in terms of Rules of Court 35 and on oath, of all the documents relating to the issues referred in (10.3) supra, which are or have at any time been in possession or under the control of
such party. Rules of Court 35, 36 and 37 will apply *mutatis mutandis* to the trial proceedings.

**INTEREST**

11. In fraud, theft and other criminal cases with benefit, interest at the applicable legal rate shall accumulate with effect from the date of the offence to date of settlement.

**CONFISCATION AND LEGAL REPRESENTATION**

12. A Court holding a section 18 enquiry may arrange that a defendant has legal representation.

**NOTIFICATION AND MAKING OF REPRESENTATIONS**

13. (1) The AFU shall, where it is reasonably possible and at a commencement of the realisation stage as set out in section 30 of POCA, give written notice to all reasonably identifiable victims inviting them to make representation to Court in connection with the realisation of the restrained property;

(2) Representations by victims shall be in a form of a sworn affidavit which must be filed and served alternatively by way of *viva voce* evidence; and

(3) The AFU may give such victims the necessary assistance in this regard or such victims may secure their own legal assistance.

**APPLICABILITY OF POCA PROVISIONS**

14. The provisions of POCA shall apply to both organised crime and individual wrong doing.

**FORMS**

15. The AFU may prescribe such forms for the purposes of these regulations as it may think expedient.

**DELEGATION OF POWERS**

16. (1) The Minister may delegate to any person any power or function conferred upon the AFU by any provision of these regulations or assign to any such person a duty imposed thereunder to the AFU.

(2) The AFU shall not be divested of any power or function or duty delegated to any person under sub-regulation (1) and may at any time withdraw or amend any decision taken by any such person in the exercise or performance of the power or function or duty in question.
PENALTY

17. Every person who contravenes or fails to comply with any of these regulations, or contravenes or fails to comply with the terms of any notice or condition made or imposed hereunder, or who obstructs any person in the execution of any power or function assigned to him/her by or under these regulations, or who makes any incorrect statement in any declaration made for the purposes of these regulations (unless he/she proves that he/she did not know, and could not by the exercise of a reasonable degree of care have ascertained, that the statement was incorrect) or refuses or neglects to furnish any information which he/she is required to furnish under these regulations, shall be guilty of an offence and liable upon conviction to a fine not exceeding R10 000 or to imprisonment for a period not exceeding one year or to both such fine and such imprisonment.

TITLE

18. These regulations are called the Prevention of Organised Crime Regulations, 2008, and come into operations on 1 December 2008.
General Law Amendment Act

ACT

To provide for the search and recovery of bulk cash, which is proceeds of crime or is intended to be used in unlawful activities; and to provide for matters connected therewith.

1. Definitions — (1) In this Act, unless the context indicates otherwise —

"appointed person" means a person appointed by the Minister.

"cash" means notes; postal orders; cheques of any kind, including travellers' cheques; bankers' drafts; bearer bonds and bearer shares; and any kind of monetary instrument found at any place in the Republic of South Africa.

"judicial officer" means a justice of peace.

"minimum amount" means an amount of R20 000.00 or as from time to time prescribed by Parliament.

"Minister" means the Minister of the Department of Justice and Constitutional Development.

"proceeds of crime" means any payment or other reward received or held by any person or over which any person has effective control at any time in connection with or intended to be used for any criminal activity carried on by him/her or any other person.

"senior officer" means an officer of a senior rank.

"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.
2. **Searches**

2.1 If a customs officer or police person who is lawfully on any premises has reasonable grounds to suspect that there is on the premises cash -

(i) which is proceeds of crime or is intended by any person (the suspect) for use in unlawful activity; and

(ii) the amount of which is not less than the minimum amount, he/she may search for the cash there.

2.2 If a customs officer or police person has reasonable grounds for suspecting that the suspect is carrying cash -

(i) which is proceeds of crime or is intended by any person for use in unlawful activity; and

(ii) the amount of which is not less than the minimum amount, he/she may exercise the following powers:

2.3 He/she may, so far as he/she thinks it necessary or expedient, require the suspect to permit a search of:

(i) any property he/she has with him/her;

(ii) And a police person may detain the suspect for so long as it is necessary to exercise the powers conferred herein which are for the purpose of finding cash.

3. **Search Warrant**

3.1 The powers conferred in section 2 may be exercised only with an appropriate search warrant unless, in the circumstances, it is not practicable to obtain it before exercising such powers.

3.2 If such powers are exercised without a search warrant in a case where:

(i) no cash is seized; or

(ii) any cash so seized is not detained for more than two working days,

the customs official or police person who exercised such powers must give a written report to the appointed person.

3.3 The report must give full particulars of the circumstances which led him/her to believe that -

(i) such powers were exercisable; and

(ii) it was not practicable to obtain a search warrant.
4. Report on exercise of powers

4.1 As soon as possible after the end of each financial year, the appointed person must prepare a report for that year setting out in his/her opinion the circumstances and manner in which such powers are being exercised in cases where a report is required.

4.2 The appointed person may also make any recommendations he/she considers appropriate and send a copy of such a report to the Minister for publication and for Parliament.

5. Cash seizure

5.1 A customs officer or police person may seize any cash if he/she has reasonable grounds to suspect that it is:

(i) proceeds of crime; or
(ii) intended by the suspect for use in unlawful activity.

5.2 A customs officer or police person may also seize cash part of which he/she has reasonable grounds for suspecting to be:

(i) proceeds of crime; or
(ii) intended by any person for use in unlawful activity if it is not reasonably practicable to seize only that part.

5.3 This section does not authorise seizure of an amount if it or, as the case may be, the part of which his suspicion relates, is less than the minimum amount.

6. Detention of seized cash

6.1 While the customs officer or police person continues to have reasonable grounds for his/her suspicion, cash seized may be detained initially for a period of two working days.

6.2 The period for which the cash or any part of it may be detained may be extended by an order made by a magistrates’ court but such order shall not authorise the detention of any cash –

(i) beyond the end of the period of three months beginning with the date of such order,
(ii) in the case of any further order under this section, beyond the end of the period of two years beginning with the date of the first order

6.3 The first condition for an application for an extension is that there are reasonable grounds for suspecting that the cash is proceeds of crime and that either –
(i) its continued detention is justified while its derivation is further investigated or consideration is given to bringing (in the Republic or elsewhere) proceedings against any person for an offence with which the cash is connected; or

(ii) proceedings against any person for an offence with which the cash is connected have been started and have not been concluded.

6.4 The second condition is that there are reasonable grounds for suspecting the cash is intended to be used in unlawful activity and that either –

(i) its continued detention is justified while its intended use is further investigated or consideration is given to bringing (in the Republic or elsewhere) proceedings against any person for an offence with which the cash is connected; or

(ii) proceedings against any person for an offence with which the cash is connected have been started and have not been concluded.

6.5 An application for an extension may also be made in respect of any cash seized under subsection 5.2, and the court may make the order if it is satisfied that –

(i) the condition in subsection 6.3 or 6.4 is met in respect of part of the cash; and

(ii) it is not reasonably practicable to detain only that part.

6.6 An order under subsection 6.2 must provide for notice to be given to persons affected by it.

7. Interest

7.1 If cash is detained under section 6 for more than two working days, it is at the first opportunity to be paid into an interest – bearing account and held there; and the interest accruing on it is to be added to it on its forfeiture of release.

7.2 In the case of cash detained under section 6 which was seized under subsection 5.2, the customs officer or police person must, on paying it into the account, release the part of the cash to which the suspicion does not relate.

7.3 Subsection 7.1 does not apply if the cash or, as the case may be, the part to which the suspicion relates required as evidence of an offence or evidence in criminal proceedings.
8. **Release of detained cash**

This section applies while any cash is detained under section 6.

8.1 A magistrates’ court may direct the release of the whole or any part of the cash if the court is satisfied, on the application by the person from whom the cash was seized or from any person with interest therein, that the conditions in section 6 for the detention of the cash are no longer met in relation to the cash to be released.

8.2 A customs officer or police person may, after notifying the magistrates’ court under whose order the cash is being detained, release the whole or any part of it if it is satisfied the detention of the cash to be released is no longer justified.

9. **Short title and commencement**

This Act is called the Bulk Cash Seizure Act, 2009 and shall come into operation on a date fixed by the President by Proclamation in the *Gazette*. 
Bibliography

Books
Du Toit et al – Commentary on the Criminal Procedure Act (1987)
Schwikkard and Van der Merwe – Principles of evidence (2002) 2ed Juta

Journals
Barnet “Legal Fiction and Forfeiture: An Historical Analysis of the Civil Asset Forfeiture Reform Act” (2001) Duquesne University Law Review
Bell “The Confiscation, Forfeiture and Disruption of Terrorist Finances” Journal of Money Laundering Control – (2003) Vol. 7 No. 2 pages 105 to 125
Cassella “Forfeiture is reasonable, and it works” www.zmag.org accessed on 15th February 2007
Crawley “Civil Asset Forfeiture” – http://ogov.newswire.ca accessed on 24th January 2007


Jean – Francois T “Money Laundering and Terrorism Financing: An Overview”


Pretorius and Strydom “The Constitutionality of civil forfeiture” (1998) 13 SAPR/PL pages 385 to 422


Rider “Taking the profit out of crime” Money laundering control (1996)


Van der Walt “Civil Forfeiture of instrumentalities and proceeds of crime and the Constitutional Property Clause (2000)” 16 SAJHR pages 1 to 45


Reported Case Law

ABSA Bank Ltd v Fraser 2006 2 All SA 1 (SCA)

Director of Public Prosecutions: Cape of Good Hope v Bathgate 2000 2 SA 535 and 2000 1 SACR 105 (CPD)

Ex Parte NDPP 2005 2 SACR 198 (SECLD) and [2005] JOL 14742 (SE)

Levy v NDPP 2002 1 SACR 162 (WLD)

Mohamed NO v NDPP 2002 4 SA 366 (WLD)

Mohamed v NDPP 2003 1 SACR 286 (WLD)

Mohunram and Another v NDPP and Others 2007 6 BCLR 575 (C); 2007 4 SA 222 (C)

Naidoo and Others v NDPP 2003 4 All SA 380 (C)

NDPP v Alexander and Others 2001 2 SACR 1 (TPD)

NDPP v Basson 2002 1 SA 419 (SCA); 2002 2 All SA 255 (A)

NDPP v Braun and Another 2007 1 SACR 326 (C); and NDPP v Braun and Another 2007 1 SA 189 (C)

NDPP v Braun and Another (No 2) 2007 1 SACR 556 (C)

National Director of Public Prosecutions ("NDPP") v Carolus and Others 1999 2 SACR 27; and 1999 2 All SA 607 (C)

NDPP v Carolus and Others 2000 1 SA 1127 (SCA); 2000 1 All SA 301 (A) and 1999 2 SACR 607 (SCA)

NDPP v Cole and Others [2004] 3 All SA 745 (W)

NDPP v Engels 2005 3 SA 109 (C)

NDPP v Gerber and Another 2007 1 SACR 384 (W)

NDPP v Gouws 2005 2 SACR 193 (SECLD)

NDPP v Hlongwa; In Re NDPP v Nkosi and Others 2006 2 All SA 376 (SCA)

NDPP v Kyriacou 2002 2 SACR 67 (OPD)
NDPP v Kyriacou 2003 4 All SA 153 (SCA); 2004 1 SA 379 (SCA)

NDPP v Mcasa and Another 2000 1 SACR 263 (TkH) and 2000 4 B All Sa 31 (Tk)

NDPP v Meyer [1999] 4 All SA 263 (D)

NDPP and Another v Mohamed NO and Others 2002 4 SA 843 (CC); and 2002 9 BCLR 970

NDPP v Mohamed 2003 2 All SA 548 (C)

NDPP v Patterson and Another 2001 2 SACR 665 (CPD); and 2001 4 All SA 525 (C)

NDPP v Phillips and Others 2002 4 SA 60 WLD and 2002 2 SACR 542 (WLD)

NDPP v Peterson [2006] JOL 16739 (SE)

NDPP v Prophet 2003 6 SA 154 (CPD); and 2003 8 BLCR 906 (CPD)

NDPP v Rautenbach 2005 1 SACR 530 (SCA); 2005 1 All SA 412 (SCA); and 2005 4 SA 603 (SCA)

NDPP v Rebbuzzi 2002 2 SA 1 (SCA)

NDPP v Rebuzzi 2000 2 SA 869 (WLD); 2000 3 All SA 143 (W) and 2000 2 SACR 209 (WLD)

NDPP v RO Cook Properties 2002 4 All SA 692 (W)

NDPP v RO Cook Properties 2004 2 SACR 208 (SCA); 2004 2 All SA 491 and 2004 8 BCLR 844 (SCA)

NDPP v RO Cook Properties 2005 2 All SA 417 (W)

NDPP v Seevnarayan 2003 SA 178 (CPD) and 2003 1 SACR 260 (CPD)

NDPP v Swart 2005 2 SACR 186 (SCCLD)

NDPP v Tam and Others 2004 1 SACR 126 (WLD); 2004 2 SA 500 (W)

NDPP v Van Heerden and Others 2003 4 All SA 459 (C)

NDPP v Van Heerden 2004 2 SACR (CPD)

NDPP v Van Staden 2007 1 SACR 338 (SCA)
NDPP v Zhong [2005] JOL 14223 (W)

Phillips and Another v NDPP 2001 4 SA 849 (WLD) and 2002 1 BLCR 41 (WLD)

Phillips and Others v NDPP 2003 4 All SA 16 (SCA)

Phillips v NDPP 2003 6 SA 447 (SCA)

Prophet v NDPP 2006 2 SACR 525 (CC)

Prophet v NDPP 2007 2 BCLR 140 (CC)

S v Shaik and Others 2005 3 All SA 211 (D); 2007 1 SACR 142 (D)

S v Shaik and Others 2007 1 SA 240 (SCA); and 2007 1 SACR 247 (SCA)

Singh v NDPP [2000] JOL 20025 (SCA)

Transnet Ltd v Sechaba Photoscan (Pty) Ltd 2005 1 SA 299 (SCA)

Van Rensburg and Others v NDPP [2007] JOL 19500 (SCA)

**Unreported cases on asset forfeiture**


NDPP v Parker reportable judgment of the SCA 2005/01/12 Case no 624/2004

NDPP v Shaik reportable judgment of the SCA 2006/11/06 Case no 248/2006

S v Kgantsi unreportable judgment of the WLD 2007/09/19 Case no 296/2006

Armhruster and Another v The Minister and Others reportable judgment of the CC 2007/09/25 Case no CCT 59/2006

Shaik v S reportable judgment of the CC 2007/10/02 Case no CCT 86/2006

**Reports and unpublished papers**

De Koker “Organised Crime, racketeering, money laundering and criminal gang activities – Reflections on the terminology” – unpublished paper


Volmink “Does South African Asset Forfeiture Law Comply with the 40 FATF Recommendations?” – report by Pretoria Deputy Director of Public Prosecutions for AFU

Volmink “Court Rulings on the Seizure of vehicles belonging to drunk drivers in new York City: Implications for vehicle seizures in South Africa” – AFU memorandum dated 25th January 2005

Volmink “Transnet Ltd v Sechaba Photoscan (Pty) Ltd 2005 (1) SA 299 (SCA: The use of delictual remedies to recover profits lost due to corruption” – Commentary on the case for AFU


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