



# GOVERNMENT GAZETTE

## OF THE

# REPUBLIC OF NAMIBIA

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## Government Notice

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### OFFICE OF THE PRIME MINISTER

No. 289

2004

#### PROMULGATION OF ACT OF PARLIAMENT

The following Act which has been passed by the Parliament and signed by the President in terms of the Namibian Constitution is hereby published in terms of Article 56 of that Constitution.

No. 29 of 2004: Prevention of Organised Crime Act, 2004.

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## ACT

To introduce measures to combat organised crime, money laundering and criminal gang activities; to prohibit certain activities relating to racketeering activities; to provide for prohibition of money laundering and for an obligation to report certain information; to criminalise certain activities associated with gangs; to provide for the recovery of the proceeds of unlawful activities; to provide for the forfeiture of assets that have been used to commit an offence or assets that are the proceeds of unlawful activities; to provide for the establishment of a Criminal Assets Recovery Fund and a Criminal Assets Recovery Committee; to prohibit the smuggling of migrants and trafficking in persons; to amend the International Co-operation in Criminal Matters Act, 2000 (Act No. 9 of 2000), and to provide for incidental matters.

*(Signed by the President on 19 December 2004)*

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## CHAPTER 1 PRELIMINARY

### Definitions and interpretation

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

“anti-disposal order” means an order referred to in section 33;

“authorised member of police” or “member of the police” means any member of the Namibian Police Force referred to in section 2 of the Police Act, 1990 (Act No. 19 of 1990), who is assigned by the Inspector-General to act under this Act;

“Bank” means the Bank of Namibia established under the Bank of Namibia Act, 1997 (Act No. 15 of 1997);

“Committee” means the Criminal Assets Recovery Committee established in terms of section 77;

“confiscation order” means an order referred to in section 32;

“Convention” means the United Nations Convention against Transnational Organised Crime which was adopted on 15<sup>th</sup> November 2000 by the General Assembly of the United Nations (Resolution 55/25);

“criminal gang” includes, whether or not it has an identifiable name or identifying sign or symbol, any formal or informal ongoing organisation, association, or group of two or more persons -

- (a) which has as one of its aims the commission of one or more criminal offences; and
- (b) whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity;

“divisional court” means the court of a regional division established in terms of section 2(1) of the Magistrates Courts’ Act, 1944 (Act No. 32 of 1944);

“document” means any record of information, and includes -

- (a) anything on which there is writing;
- (b) anything on which there are marks, figures, symbols or perforations having a meaning for persons qualified to interpret them;
- (c) anything from which sounds, images or writings can be reproduced with or without the aid of anything else; or
- (d) a map, plan, drawing or photograph;

“enterprise” includes any individual, partnership, corporation, association, or other juristic person or legal entity, and any union or group of individuals associated in fact, although not a juristic person or legal entity;

“forfeiture order” means a forfeiture order referred to in section 61(1);

“Fund” means the Criminal Assets Recovery Fund established under section 74;

“High Court”, includes any judge of that court;

“instrumentality of an offence” means any property which is concerned in the commission or suspected commission of an offence at any time before or after the commencement of this Act, whether committed within Namibia or elsewhere;

“interest” includes any right;

“legal practitioner” means a legal practitioner as defined in section 1 of the Legal Practitioners Act 1995 (Act No. 15 of 1995);

“Minister” means the Minister responsible for justice;

“money laundering” means doing any act which constitutes an offence under sections 4 to 6;

“pattern of criminal gang activity” includes the commission of two or more criminal offences referred to in Schedule 1, but, at least one of those offences must have occurred after the commencement of this Act and the last of those offences occurred within three years after a prior offence and the offences were committed -

- (a) on separate occasions; or
- (b) on the same occasion,

by two or more persons who are members of, or belong to, the same criminal gang;

“pattern of racketeering activity” means the planned, ongoing, continuous or repeated participation or involvement in any offence referred to in Schedule 1 and includes at least two offences referred to in Schedule 1, of which one of the offences occurred after the commencement of this Act and the last offence occurred within 10 years (excluding any period of imprisonment) after the commission of such prior offence referred to in Schedule 1;

“prescribe” and its derivatives, means prescribe by regulations made under section 100;

“preservation of property order” means an order referred to in section 51;

“proceeds of unlawful activities” means any property or any service, advantage, benefit or reward that was derived, received or retained, directly or indirectly in Namibia or elsewhere, at any time before or after the commencement of this Act, in connection with or as a result of any unlawful activity carried on by any person, and includes any property representing property so derived and includes property which is mingled with property that is proceeds of unlawful activity;

“property” means money or any other movable, immovable, corporeal or incorporeal thing and includes any rights, privileges, claims and securities and any interest in the property and all proceeds from the property;

“restraint order” means an order referred to in section 25;

“smuggling of migrants” means the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person who is not -

- (a) a national or a permanent resident of Namibia; or
- (b) lawfully resident in Namibia;

into Namibia or enabling such a person to remain in Namibia without complying with the law of Namibia;

“staff member” means a staff member as defined in section 1 of the Public Service Act, 1995 (Act No. 13 of 1995);

“trafficking in persons” means the recruitment, transfer, harbouring or receipt of persons by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation and includes any attempt, participation or organising of any of these actions. Exploitation includes, at a minimum, the exploitation or the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs; and

“unlawful activity” means any conduct which constitutes an offence or which contravenes any law whether that conduct occurred before or after the commencement of this Act and whether that conduct occurred in Namibia or elsewhere as long as that conduct constitutes an offence in Namibia or contravenes any law of Namibia.

(2) For purposes of this Act a person has knowledge of a fact if -

(a) the person has actual knowledge of that fact; or

(b) the court is satisfied that -

(i) the person believes that there is a reasonable possibility of the existence of that fact; and

(ii) he or she fails to obtain information to confirm the existence of that fact.

(3) For the purposes of this Act a person ought reasonably to have known or suspected a fact if the conclusions that he or she ought to have reached are those which would have been reached by a reasonably diligent and vigilant person having both -

(a) the general knowledge, skill, training and experience that may reasonably be expected of a person in his or her position; and

(b) the general knowledge, skill, training and experience that he or she in fact has.

(4) Nothing in Chapters 5 or 6 is to be construed to limit prosecution under any other provision of the law.

(5) Nothing in this Act, or in any other law, is to be construed so as to exclude the application of any provision of Chapter 5 or 6 on account of the fact that -

(a) any offence or unlawful activity concerned occurred; or

(b) any proceeds of unlawful activities were derived, received or retained

before the commencement of this Act.

## **CHAPTER 2 OFFENCES RELATING TO RACKETEERING ACTIVITIES**

### **Offences**

2. (1) Any person who, within Namibia or elsewhere -

(a) receives or retains any property derived, directly or indirectly, from a pattern of racketeering activity;



- (b) knows or ought reasonably to have known that that property is so derived; and
- (c) uses or invests, directly or indirectly, any part of that property in the acquisition of any interest in, or the establishment or operation or activities of, any enterprise,

commits an offence.

- (2) Any person who, within Namibia or elsewhere -
  - (a) receives or retains any property, directly or indirectly, on behalf of any enterprise; and
  - (b) knows or ought reasonably to have known that that property derived or is derived from or through a pattern of racketeering activity,

commits an offence.

- (3) Any person who, within Namibia or elsewhere -
  - (a) uses or invests any property, directly or indirectly, on behalf of any enterprise or in the acquisition of any interest in, or the establishment or operation or activities of any enterprise; and
  - (b) knows or ought reasonably to have known that that property derived or is derived from or through a pattern of racketeering activity,

commits an offence.

(4) Any person who, within Namibia or elsewhere, acquires or maintains, directly or indirectly, any interest in or control of any enterprise through a pattern of racketeering activity commits an offence.

(5) Any person who, whilst managing or employed by or associated with any enterprise, within Namibia or elsewhere, conducts or participates in the conduct, directly or indirectly, of that enterprise's affairs through a pattern of racketeering activity commits an offence.

(6) Any person who, within Namibia or elsewhere, manages the operation or activities of an enterprise and who knows or ought reasonably to have known that any person, whilst employed by or associated with that enterprise, conducts or participates in the conduct, directly or indirectly, of that enterprise's affairs through a pattern of racketeering activity commits an offence.

(7) Any person who, within Namibia or elsewhere, conspires or attempts to violate subsections (1) to (6) commits an offence.

(8) The court may hear evidence, including evidence with regard to hearsay, similar facts or previous convictions, relating to offences contemplated in subsections (1) to (7) notwithstanding that that evidence might otherwise be inadmissible, provided that the evidence would not render a trial unfair.

(9) For the purposes of proving a previous conviction during a trial in respect of an offence contemplated in subsections (1) to (7) it is sufficient to prove the original record of judicial proceedings if a copy of that record, certified or purporting to be certified as a true copy -

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**PREVENTION OF ORGANISED CRIME ACT, 2004**

- (a) by the -
  - (i) registrar or clerk of the court or other staff member having the custody of the record of those judicial proceedings; or
  - (ii) deputy of that registrar, clerk of the court or other staff member, or
- (b) in the case where judicial proceedings are taken down in shorthand or by mechanical means, by the person who transcribed those proceedings,

is produced in evidence at the trial, and that copy is *prima facie* proof that any matter purporting to be recorded therein was correctly recorded.

(10) A person must not be charged with committing an offence contemplated in subsections (1) to (7) unless a prosecution has been authorised in writing by the Prosecutor-General.

**Penalties**

3. (1) Any person convicted of an offence referred to in section 2(1) to (7) is liable to a fine not exceeding N\$1 billion, or to imprisonment for a period not exceeding 100 years, or to both the fine and imprisonment.

(2) Notwithstanding any other law dealing with the penal jurisdiction of the divisional court, if a divisional court, after it has convicted an accused of an offence referred to in section 2(1) to (7), but before sentence is passed, is of the opinion that the offence in respect of which the accused has been convicted merits punishment -

- (a) in excess of the penal jurisdiction of the divisional court, but not exceeding a fine of N\$100 million or a period of 30 years imprisonment, the divisional court has jurisdiction to impose that penalty even though that penalty may exceed the penal jurisdiction of that court; or
- (b) exceeding a fine of N\$100 million or a period of 30 years imprisonment, the divisional court must stop the proceedings and commit the accused for sentence by the High Court.

(3) A sentence imposed in terms of this section is not subject to postponement or suspension in terms of section 322 of the Criminal Procedure Act, 2004 (Act No. 25 of 2004).

**CHAPTER 3  
OFFENCES RELATING TO MONEY LAUNDERING****Disguising unlawful origin of property**

4. Any person who knows or ought reasonably to have known that property is or forms part of proceeds of unlawful activities and -

- (a) enters into any agreement or engages in any arrangement or transaction with anyone in connection with that property, whether that agreement, arrangement or transaction is legally enforceable or not; or
- (b) performs any other act in connection with that property, whether it is performed independently or in concert with any other person,

and that agreement, arrangement, transaction or act has or is likely to have the effect -

- (i) of concealing or disguising the nature, origin, source, location, disposition or movement of the property or its ownership, or any interest which anyone may have in respect of that property; or
- (ii) of enabling or assisting any person who has committed or commits an offence, whether in Namibia or elsewhere -
  - (aa) to avoid prosecution; or
  - (bb) to remove or diminish any property acquired directly, or indirectly, as a result of the commission of an offence,

commits the offence of money laundering.

#### **Assisting another to benefit from proceeds of unlawful activities**

5. A person who knows or ought reasonably to have known that another person has obtained the proceeds of unlawful activities, and who enters into an agreement with anyone or engages in any arrangement or transaction whereby -

- (a) the retention or the control by or on behalf of that other person of the proceeds of unlawful activities is facilitated; or
- (b) the proceeds of unlawful activities are used to make funds available to that other person or to acquire property on his or her behalf or to benefit him or her in any other way,

commits the offence of money laundering.

#### **Acquisition, possession or use of proceeds of unlawful activities**

6. Any person who -
- (a) acquires;
  - (b) uses;
  - (c) has possession of; or
  - (d) brings into, or takes out of, Namibia,

property and who knows or ought reasonably to have known that it is or forms part of the proceeds of unlawful activities commits the offence of money laundering.

#### **Offences of corporations**

7. Where an offence under section 4, 5 or 6 is committed by a body of persons, whether corporate or incorporate, every person who, at the time of the commission of the offence acted in an official capacity for or on behalf of that body of persons, whether as a director, manager, secretary or other similar office, or was purporting to act in that capacity, commits that offence.

#### **Jurisdiction in respect of offences**

8. (1) Where an act which constitutes an offence under this Act is or was -
- (a) done by a national of Namibia within Namibia or elsewhere;

- (b) done by any person on a vehicle, ship or other seafaring vessel or aircraft traveling through Namibia, putting into port in Namibia or landing on a landing strip or airport in Namibia; or
- (c) done by any person outside Namibia and other acts forming part of the offence are done or are to be done in Namibia;
- (d) done by any person outside Namibia and the effects of the offence are felt in Namibia;

the person concerned may, regardless of anything in any law to the contrary, but subject to this Act, be tried and punished for that offence by any court which has jurisdiction over criminal offences in Namibia.

(2) For the purposes of subsection (1) an "act" includes any omission or circumstances or other course of conduct which constitutes the offence in question.

#### **Reporting of suspicion regarding proceeds of unlawful activities**

9. (1) Any person who carries on a business or is in charge of, or manages a business undertaking or who is employed by a business undertaking and who suspects or ought reasonably to have suspected that -

- (a) any property which comes into his or her possession or the possession of the business undertaking is, or forms part of, the proceeds of unlawful activities;
- (b) a transaction to which he or she or the business undertaking is a party will facilitate the transfer of the proceeds of unlawful activities; or
- (c) a transaction to which he or she or the business undertaking is a party and which is discontinued -
  - (i) may have brought the proceeds of unlawful activities into the possession of the person or business undertaking; or
  - (ii) may have facilitated the transfer of the proceeds of unlawful activities, had the transaction been concluded,

must report his or her suspicion and provide all available information concerning the grounds on which it rests, without unreasonable delay to the Bank and must take all reasonable steps to discharge that obligation.

(2) Documents directly relevant to the suspicion and the grounds on which the suspicion rests must be included with the report under subsection (1).

(3) On receipt of a report made under subsection (1), the Bank may, in writing, require the person making the report to provide it or an official identified in the request with -

- (a) further particulars of any matter concerning the suspicion to which the report relates and the grounds on which it rests; and
- (b) copies of all available documents concerning those particulars or further particulars.

(4) When the reporter receives a request under subsection (3), he or she must furnish the person who made the request with the requested particulars or further particulars and copies of documents to the extent that those particulars or documents are available to him or her within a reasonable time.

(5) Subject to subsection (6), no obligation as to secrecy and no other restriction on the disclosure of information as to the affairs or business of another, whether imposed by any law, the common law or any agreement, affects any obligation imposed under this section to report or disclose information or to permit access to any registers, records or other documents.

(6) Subsection (5) does not apply if the obligation of secrecy or other restriction is based on the common law right to professional privilege between a legal practitioner and his or her client in respect of information communicated to the legal practitioner so as to enable the legal practitioner to -

- (a) provide advice to the client;
- (b) defend the client; or
- (c) render other legal assistance to the client,

in connection with an offence under any law in respect of which -

- (i) the client is charged;
- (ii) the client has been arrested or summoned to appear in court; or
- (iii) in respect of which an investigation with a view to institute criminal proceedings is being conducted against the client.

(7) No liability based on a breach of an obligation as to secrecy or any restriction on the disclosure of information, whether imposed by any law, the common law or any agreement, arises from a disclosure of any information in good faith and in compliance with any obligation imposed by this section.

(8) A person who is a party to a transaction in respect of which he or she forms a suspicion which in his or her opinion should be reported under subsection (1), may continue with that transaction and must ensure that all records relating to that transaction are kept and that all reasonable steps are taken to discharge the obligation under this section.

(9) Any person who fails to comply with an obligation contemplated in this section commits an offence.

### **Defence**

**10.** If a person is charged with negligently committing an offence under section 2(1) or (2), or section 4, 5 or 6, that person may raise as a defence the fact that he or she had reported a suspicion in terms of section 9.

### **Penalties**

**11.** (1) Any person convicted of an offence contemplated in section 4, 5 or 6 is liable to a fine not exceeding N\$100 million, or to imprisonment for a period not exceeding 30 years.

(2) Any person convicted of an offence contemplated in section 9(9) is liable to a fine not exceeding N\$300 000, or to imprisonment for a period not exceeding 15 years.

**CHAPTER 4**  
**OFFENCES RELATING TO CRIMINAL GANG ACTIVITIES**

**PART 1**  
**CRIMINAL GANG OFFENCES**

**Gang related offences**

**12.** (1) Any person who participates in or is a member of a criminal gang and who -

- (a) aids and abets any criminal activity committed for the benefit of, at the direction of, or in association with any criminal gang;
- (b) threatens to commit, bring about or perform any act of violence or any criminal activity by a criminal gang or with the assistance of a criminal gang; or
- (c) threatens any specific person or persons in general, with retaliation in any manner or by any means whatsoever, in response to any act or alleged act of violence,

commits an offence.

(2) Any person who -

- (a) performs any act which is aimed at causing, bringing about, promoting or contributing towards a pattern of criminal gang activity;
- (b) incites, instigates, commands, aids, advises, encourages or procures any other person to commit, bring about, perform or participate in a pattern of criminal gang activity; or
- (c) causes, encourages, recruits, incites, instigates, commands, aids or advises another person to join a criminal gang,

commits an offence.

**Penalties**

**13.** (1) Any person convicted of an offence under -

- (a) section 12(1) or 12(2)(a), is liable to a fine not exceeding N\$500 000 or to imprisonment for a period not exceeding six years, but, if the offence was committed under the circumstances referred to in subsection (2), is liable to a fine not exceeding N\$800 000 or to imprisonment for a period not exceeding eight years; and
- (b) section 12(2)(b) or (c), is liable to a fine not exceeding N\$250 000 or to imprisonment for a period not exceeding three years, but, if the offence was committed under the circumstances referred to in subsection (2), is liable to a fine not exceeding N\$400 000 or to imprisonment for a period not exceeding five years.

(2) If any of the offences contemplated in section 12 is committed on the premises or grounds of, or within 500 metres of a school, or any other educational institution, during hours in which the facility is open for classes or school related programmes or when minors are using the facility, that fact must be regarded as an aggravating factor for sentencing purposes.

(3) If a court, after having convicted an accused of any offence, including an offence contemplated in this Act, finds that the accused was a member of a criminal gang at the time of the commission of the offence, that finding must be regarded as an aggravating factor for sentencing purposes.

#### **Interpretation of member of criminal gang**

14. In considering whether a person is a member of a criminal gang for the purposes of this Act, the court may have regard to all relevant factors, including the following factors, namely that, that person -

- (a) admits to criminal gang membership;
- (b) is identified as a member of a criminal gang by his or her parent, guardian or relative;
- (c) resides in or frequents a particular gang's area and adopts their style of dress, their use of hand signs, language or their tattoos, and associates with known members of a criminal gang;
- (d) has been arrested more than once in the company of identified members of a criminal gang for offences which are consistent with usual criminal gang activities;
- (e) is identified as a member of a criminal gang by physical evidence such as photographs or other documentation.

## **PART 2 OTHER OFFENCES**

#### **Trafficking in persons**

15. Any person who participates in or who aids and abets the trafficking in persons, as contemplated in Annex II of the Convention, in Namibia or across the border to and from foreign countries commits an offence and is liable to a fine not exceeding N\$1 000 000 or to imprisonment for a period not exceeding 50 years.

#### **Smuggling of migrants**

16. Any person who participates in or who aids and abets the smuggling of migrants, as contemplated in Annex III of the Convention, by land, air or sea, in order to obtain, directly or indirectly, a financial or other material benefit, commits an offence and is liable to a fine not exceeding N\$500 000 or to imprisonment for a period not exceeding 25 years.

## **CHAPTER 5 CONFISCATION OF BENEFITS OF CRIME**

### **PART 1 APPLICATION OF CHAPTER**

#### **Definitions and interpretation of Chapter**

17. (1) In this Chapter, unless the context indicates otherwise -  
"affected gift" means a gift referred to in section 22;

"defendant" means a person against whom a prosecution for an offence has been instituted, irrespective of whether he or she has been convicted or not, and includes a person referred to in section 24(1)(b);

"encumbrance" in relation to property, includes any interest, mortgage, charge, right, or claim in respect of the property;

"fixed date" in relation to a defendant -

- (a) if a warrant for the arrest of the defendant has been issued, means the date of issue of that warrant;
- (b) if the defendant has been arrested without a warrant of arrest having been issued, means the date on which the defendant first appeared in court after the arrest; or
- (c) if the defendant has been summoned to appear in court on a criminal charge, means the court date indicated in the summons;

"realisable property" means property referred to in section 20.

(2) In this Chapter, except where it is inconsistent with the context or clearly inappropriate, any reference -

- (a) to a person who holds property must be construed as a reference to a person who has any interest in the property, and -
  - (i) if the estate of that person has been sequestrated, also to the trustee of his or her insolvent estate; or
  - (ii) if that person is a company or other juristic person which is being wound up, also to the liquidator of that company or juristic person;
- (b) to a person who transfers property to any other person must be construed as a reference to a person who transfers or grants to any other person any interest in the property;
- (c) to anything received in connection with an offence must be construed as a reference also to anything received both in that connection and in some other connection.

(3) For the purposes of this Chapter, a person has benefited from the commission of an offence or related criminal activity if he or she has at any time, whether before or after the commencement of this Act, received or retained any proceeds of an offence or related criminal activity, whether or not that person is still in possession of those proceeds of an offence or related criminal activity subsequent to having received or retained those proceeds.

#### **Proceedings are civil, not criminal**

18. (1) For the purposes of this Chapter, proceedings on application for a confiscation order, a restraint order or an anti-disposal order are civil proceedings, and are not criminal proceedings.

(2) The rules of evidence applicable in civil proceedings apply to proceedings under this Chapter, but, any evidence that would be admissible in criminal proceedings is admissible in proceedings under this Chapter.



(3) No evidence, which is inadmissible in criminal proceedings pursuant to a rule of evidence applicable only in those proceedings, is for that reason alone inadmissible in proceedings under this Chapter.

(4) No rule of construction applicable only in criminal proceedings applies to proceedings under this Chapter.

(5) Any question of fact to be decided by a court in any proceedings in respect of an enquiry in terms of section 32(1) into any benefit which a defendant may have derived from an offence or related criminal activity, or arising from that enquiry, must be decided on a balance of probabilities.

#### **Confiscation proceedings not affected by forfeiture**

19. A restraint order, preservation of property order or confiscation order may be granted against a person in spite of the fact that separate proceedings in terms of this Chapter or Chapter 6 have been instituted in respect of that person or any property in which that person may have an interest.

#### **Realisable property**

20. (1) Subject to subsection (2), the following property is realisable in terms of this Chapter, namely -

- (a) any property held by the defendant concerned;
- (b) any property held by a person to whom that defendant has directly or indirectly made any affected gift; or
- (c) the instrumentality of an offence attributable to the defendant.

(2) Property is not realisable property if -

- (a) a forfeiture order; or
- (b) a declaration of forfeiture in terms of any other law,

has taken effect in respect of that property.

#### **Value of property**

21. (1) For the purposes of this Chapter, the value of property, other than money, in relation to any person holding the property is -

- (a) where any other person holds an interest in the property -
  - (i) the market value of the property, less
  - (ii) the amount required to discharge any encumbrance on the property; and
- (b) where no other person holds an interest in the property, the market value of the property.

(2) Notwithstanding subsection (1), any reference in this Chapter to the value at a particular time of a payment or reward, must be construed as a reference to -

- (a) the value of the payment or reward at the time when the recipient received it, as adjusted to take into account subsequent fluctuations in the value of money; or
  - (b) where subsection (3) applies, the value mentioned in that subsection, whichever is the greater value.
- (3) If at the particular time referred to in subsection (2) the recipient holds -
- (a) the property, other than cash, which he or she received, the value concerned is the value of the property at the particular time; or
  - (b) property which directly or indirectly represents in his or her hands the property which he or she received, the value concerned is the value of the property, in so far as it represents the property which he or she received, at the relevant time.

**Affected gifts**

22. (1) Any gift -
- (a) made by a defendant not more than seven years before the fixed date; or
  - (b) made by a defendant at any time, if it was a gift -
    - (i) of property received by that defendant in connection with the commission of an offence or related criminal activity carried out by him or her or any other person; or
    - (ii) of property which directly or indirectly represented in that defendant's hands property received by him or her in connection with the commission of an offence or related criminal activity,

is, whether that gift was made before or after the commencement of this Act, an affected gift.

(2) If, in the circumstances referred to in subsection (1), a defendant received consideration for any property which he or she had transferred to any other person, that defendant is deemed, unless the contrary is proved, to have made a gift if he or she had transferred the property concerned directly or indirectly for a consideration the value of which is significantly less than the value of the property transferred by the defendant.

(3) In the case where a defendant is deemed to have made a gift as referred to in subsection (2), the gift which the defendant is deemed to have made is the share in the property transferred by the defendant which is equal to the difference between the value of that property as a whole and the consideration received by the defendant in return.

(4) The value of an affected gift at the time of the realisation of the property concerned is -

- (a) the value of the affected gift at the time when the recipient received it, as adjusted to take into account any subsequent fluctuations in the value of money; or
- (b) where subsection (5) applies, the value mentioned in that subsection, whichever is the greater value.

(5) If property, other than cash, is given as an affected gift, the value of that gift at the time of the realisation of the property concerned is -

- (a) the value of the property at that time; or
- (b) the value at that time of the property which directly or indirectly represents, in the hands of the recipient, the property he or she received as an affected gift.

#### **Conclusion of proceedings against defendant**

23. For the purposes of this Chapter, the proceedings contemplated in terms of this Chapter against a defendant are concluded -

- (a) when the defendant is acquitted of an offence;
- (b) when the court convicting the defendant of an offence, subject to section 32(3), sentences the defendant without making a confiscation order against him or her;
- (c) when the conviction in respect of an offence is set aside on review or appeal;
- (d) when the defendant satisfies the confiscation order made against him or her; or
- (e) where section 47 applies, when the defendant satisfies the confiscation order made against him or her by paying the amount substituted in terms of section 47(4).

## **PART 2 RESTRAINT ORDERS**

#### **Cases in which restraint orders may be made**

24. (1) The High Court may exercise the powers conferred on it by section 25(1) -

- (a) when -
  - (i) a prosecution for an offence has been instituted against the defendant concerned;
  - (ii) either a confiscation order has been made against that defendant or it appears to the court that there are reasonable grounds for believing that a confiscation order may be made against that defendant; and
  - (iii) the proceedings against that defendant have not been concluded; or
- (b) when -
  - (i) the court is satisfied that a person is to be charged with an offence; and
  - (ii) it appears to the court that there are reasonable grounds for believing that a confiscation order may be made against that person.

(2) Where the High Court has made a restraint order under subsection (1)(b), the court must rescind the restraint order if the relevant person is not charged within such period as the court may consider reasonable.

**Restraint orders**

25. (1) The Prosecutor-General may apply to the High Court for a restraint order prohibiting any person, subject to such conditions and exceptions as may be specified in the order, from dealing in any manner with any property to which the order relates.

(2) If the High Court when considering an application made in terms of subsection (1), is satisfied that the facts referred to in section 24(1) appear on the face of it from the application, it must make, without requiring that notice of the application be given to any other person or the adduction of any further evidence from any other person, an order having immediate effect -

- (a) in respect of realisable property which may be specified in the restraint order and which is held by the person against whom the restraint order is being made;
- (b) in respect of all realisable property held by the person against whom the restraint order is being made, whether it is specified in the restraint order or not;
- (c) in respect of all property which, if it is transferred to the person against whom the restraint order is being made after the making of the restraint order, would be realisable property.

(3) When the High Court makes a restraint order under subsection (2) it -

- (a) may include in that order any ancillary orders that the court considers appropriate for the proper, fair and effective execution of the order; and
- (b) may at the same time include an order authorising the seizure of all movable property concerned by a member of the police.

(4) A restraint order must provide for notice to be given to persons affected by the order and the Minister must prescribe the manner in which the notice will be served on the affected persons.

(5) Property seized under subsection (3) must be dealt with in accordance with the directions of the High Court.

(6) A restraint order made under subsection (2) expires when the proceedings against the defendant are concluded.

(7) When making a restraint order the High Court may also make any further order in respect of the discovery of any facts, including facts relating to property over which the defendant may have effective control, and the location of that property, as the court may consider necessary or expedient with a view to achieving the objects of the restraint order.

**Provision for expenses from restrained property**

26. (1) Without derogating from the generality of the powers conferred by section 25(1), the High Court, when it has made a restraint order may, on application by a person against whom the order is made, make provision as the court may think fit for the payment from the property of that person which is subject to the restraint order -

- (a) of reasonable living expenses for that person and any person whom he or she is legally liable to support or maintain; and

- (b) of reasonable legal expenses for that person in connection with any proceedings instituted against him or her in terms of this Chapter or any criminal proceedings to which those proceedings may relate.

(2) A court must not make provision for the payment of any expenses under subsection (1) unless the court is satisfied that -

- (a) the person applying for the payment of those expenses, and every other person whom he or she is legally liable to support or maintain, has disclosed under oath or affirmation all their interests in the property from which such a provision is to be made and has submitted to that court a sworn and full statement of all their assets and liabilities; and
- (b) neither the person applying for the payment of those expenses nor any other person whom he or she is legally liable to support or maintain, can meet the expenses concerned out of their unrestrained property.

#### **Variation or rescission of orders**

27. (1) The High Court may vary or rescind a restraint order or an order made under section 33(2) if it is satisfied that -

- (a) the order concerned -
  - (i) will deprive the person against whom it was made of the means to provide for his or her reasonable living expenses; and
  - (ii) will cause undue hardship for the person against whom it was made which outweighs the risk that the property concerned may be destroyed, lost, damaged, concealed or transferred; or
- (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.

(2) When the court orders the variation or rescission of an order authorising the seizure of property in terms of subsection (1)(a), the court must make any other order which it considers appropriate for the proper, fair and effective execution of the restraint order concerned.

(3) The High Court may rescind a restraint order or an order made under section 33(2) if -

- (a) it was erroneously sought or erroneously made in the absence of the person applying for its rescission; or
- (b) it was made as a result of a mistake that is common to both the Prosecutor-General and the person against whom it was made.

(4) Only the -

- (a) Prosecutor-General; or
- (b) person against whom the order was made on notice to the Prosecutor-General.

may apply for an order under subsection (1) or subsection (3).

(5) A restraint order or an order made under section 33(2) may not be varied or rescinded on any grounds other than those provided for in this section.

**Seizure of property subject to restraint order**

28. (1) In order to prevent any realisable property from being disposed of or removed before a restraint order can be made, any member of the police may seize that property if he or she has reasonable grounds to believe that that property will be so disposed of or removed.

(2) Property seized under subsection (1) must be dealt with in accordance with the directions of the High Court when a restraint order is subsequently made.

**Appointment of *curator bonis* in respect of property subject to restraint order**

29. (1) Where the High Court has made a restraint order, the court may at any time -

- (a) appoint a *curator bonis* to do, subject to the directions of the court, any one or more of the following on behalf of the person against whom the restraint order has been made, namely -
  - (i) to perform any particular act in respect of any of or all the property to which the restraint order relates;
  - (ii) to take care of the property;
  - (iii) to administer the property; and
  - (iv) where the property is a business or undertaking, to carry on, with due regard to any law which may be applicable, the business or undertaking;
- (b) order any person against whom the restraint order has been made to surrender immediately, or within such period as the court may determine, any property in respect of which a *curator bonis* has been appointed under paragraph (a) into the custody of that *curator bonis*;
- (c) subject to the directions of the court, authorise the *curator bonis* to recover from the property in respect of which he or she was appointed, any expenses associated with the performance of his or her functions referred to in paragraph (a); and
- (d) subject to the directions of the court, authorise the *curator bonis* to realise any property in respect of which he or she was appointed -
  - (i) in order to recover an expense referred to in paragraph (c); or
  - (ii) if the court is satisfied that -
    - (aa) the property is subject to waste or substantial loss of value; or
    - (bb) the cost performance of the functions referred to in paragraph (a) in respect of that property would exceed the value thereof.

(2) Any person affected by an order contemplated in subsection (1) may at any time apply -

- (a) for the variation or rescission of the order; or
- (b) for the variation of the terms of the appointment of the *curator bonis* concerned; or

- (c) for the discharge of the *curator bonis*.
- (3) The High Court after having made an order under this section -
  - (a) may at any time -
    - (i) vary or rescind the order;
    - (ii) vary the terms of the appointment of the *curator bonis* concerned; or
    - (iii) discharge that *curator bonis*;
  - (b) must rescind the order and discharge the *curator bonis* concerned if the relevant restraint order is rescinded;
  - (c) must make an order relating to the fees and expenditure of the *curator bonis* as it deems fit, including an order for the payment of the fees of the *curator bonis* -
    - (i) from the confiscated proceeds if a confiscation order is made; or
    - (ii) by the State if no confiscation order is made.

**Endorsement of title deed in respect of immovable property subject to restraint order**

**30.** (1) The High Court when making a restraint order in respect of immovable property may at any time, with a view to ensuring the payment to the State -

- (a) where a confiscation order has not been made, of an amount equal to the most recent value of the immovable property; or
- (b) where a confiscation order has been made, of an amount not exceeding the amount payable under the confiscation order,

order the registrar of deeds to endorse any one or more of the restrictions contemplated in subsection (2) on the title deed of the immovable property.

(2) If the owner of immovable property has not made the payment referred to in subsection (1) to the State, an order contemplated in subsection (1) may be made imposing the following restrictions, namely -

- (a) that the immovable property must not, without the approval of the High Court, be mortgaged or otherwise encumbered;
- (b) that the immovable property must not, without the approval of the High Court, be attached or sold in execution; and
- (c) that the immovable property must not, without the approval of the High Court -
  - (i) vest in the Master of the High Court or trustee concerned, as the case may be, when the estate of the owner of that immovable property is sequestrated; or
  - (ii) where the owner of that immovable property is a company or other corporate body that is being wound up, form part of the assets of that company or juristic person.

- (3) In order to give effect to subsection (1), the registrar of deeds must -
- (a) make the necessary entries in his or her registers and the necessary endorsement on the office copy of the title deed, and that restriction becomes effective against all persons except, in the case of a restriction contemplated in subsection (2)(b), against any person in whose favour a mortgage bond or other charge was registered against the title deed of immovable property prior to the endorsement of the restriction on the title deed of the immovable property, but that restriction lapses on the transfer of ownership of the immovable property concerned;
- (b) when the original of the title deed is produced to him or her, make the necessary endorsement on the deed.
- (4) Unless the High Court directs otherwise, the custody of immovable property on the title deed of which a restriction was endorsed vests, as from the date on which -
- (a) the estate of the owner of the immovable property is sequestrated; or
- (b) where the owner of the immovable property is a company or other juristic person, that company or juristic person is being wound up,

in the person in whom the custody would have vested if that restriction were not so endorsed.

(5) Where the High Court has granted its approval in respect of a restriction contemplated in subsection (2)(c) and endorsed on the title deed of immovable property, the immovable property is deemed -

- (a) if the estate of the owner of the immovable property was sequestrated, to have vested in the Master of the High Court or trustee concerned, as the case may be, as if that restriction was not so endorsed; or
- (b) if the owner of the immovable property is a company or other juristic person which is being wound up, to have formed part of the assets of that company or juristic person as if that restriction was not so endorsed.
- (6) Any person affected by an order made under subsection (1) may at any time apply for the rescission of the order.

(7) If the High Court has made an order under subsection (1) -

- (a) it may at any time rescind the order; and
- (b) it must rescind the order if the relevant restraint order is rescinded or the amount payment of which is ensured by the order has with the approval of the court been paid into court.

(8) If an order is rescinded as contemplated in subsection (7), the High Court must direct the registrar of deeds to cancel any restriction endorsed by virtue of that order on the title deed of immovable property, and the registrar of deeds must give effect to that direction.

#### **Variation and rescission of certain orders suspended by appeal**

**31.** The noting of an appeal against a decision to vary or rescind any order referred to in sections 27(1) and 27(3) suspends that variation or rescission pending the outcome of the appeal.



### PART 3 CONFISCATION ORDERS

#### Confiscation orders

32. (1) Whenever a defendant is convicted of an offence the court convicting the defendant may, on the application of the public prosecutor, enquire into any benefit which the defendant may have derived from -

- (a) that offence;
- (b) any other offence of which the defendant has been convicted at the same trial; or
- (c) any criminal activity which the court finds to be sufficiently related to the offences, referred to in paragraph (a) or (b).

(2) If the court holding an enquiry in terms of subsection (1) finds that the defendant has derived a benefit as contemplated in that subsection, the court may, notwithstanding anything to the contrary in any law or any punishment which it may impose in respect of the offence of which the defendant was convicted, make a confiscation order against the defendant for the payment to the State of any amount it considers appropriate.

(3) The court making an order under subsection (2) may include in that order any further orders it may deem fit to ensure the effectiveness and fairness of that order, including orders as to compensation arising from an agreement between the public prosecutor and a person who has suffered damages to or loss of property or injury as a result of an offence or related criminal activity referred to in subsection (1) which was committed by the defendant.

(4) When a court makes an order for compensation under subsection (3), the court may also authorise a *curator bonis* appointed under section 29(1) to realise a sufficient amount of realisable property in order to satisfy the order for compensation.

(5) When a court considers the making of a confiscation order under subsection (2), the court must not have any regard to the fact that an award or order for compensation in terms of section 326 or 327 of the Criminal Procedure Act, 2004 (Act No. 25 of 2004) has been made, or may be made, in respect of an offence referred to in subsection (1).

(6) The amount that a court may order the defendant to pay to the State under subsection (2) -

- (a) may be realised from -
  - (i) the defendant's property which is subject to a restraint order; or
  - (ii) any other realisable property of the defendant, and
- (b) must not exceed the value of the defendant's proceeds of the offences or related criminal activities referred to in that subsection, as determined by the court in accordance with this Chapter.

(7) A court convicting a defendant may, when passing sentence, indicate that it will hold an enquiry contemplated in subsection (1) at a later stage if -

- (a) it is satisfied that that enquiry will unreasonably delay the proceedings in sentencing the accused; or

- (b) the public prosecutor applies to the court to first sentence the accused and the court is satisfied that it is reasonable and justifiable to do so in the circumstances.

(8) If the judge or judicial officer who convicted the defendant is absent or for any other reason not available, any judge or judicial officer of the same court may consider an application referred to in subsection (1) and hold an enquiry referred to in that subsection and he or she may in those proceedings take any steps which the judge or judicial officer who is absent or not available could lawfully have taken.

(9) An application referred to in subsection (1) must not be made without the written authority of the Prosecutor-General, but the Prosecutor-General may, if he or she deems it appropriate, give that authority after an application has been made but before the court makes the confiscation order.

- (10) A court before which proceedings under this section are pending may -
  - (a) in considering an application under subsection (1) -
    - (i) refer to the evidence and proceedings at the trial;
    - (ii) hear any further oral evidence or receive any other evidence which the court deems fit; and
    - (iii) direct the public prosecutor to tender to the court a statement referred to in section 35(1);
  - (b) subject to section 35(2), postpone those proceedings to any day on such conditions not inconsistent with the Criminal Procedure Act, 2004 (Act No. 25 of 2004), as the court may deem fit.

#### **Anti-disposal order by court**

33. (1) A public prosecutor, with the written authority of the Prosecutor-General, may apply to any court which has convicted a defendant for an order referred to in subsection (2).

(2) A court may make an anti-disposal order prohibiting any person, subject to such conditions and exceptions as may be specified in the order, from dealing in any manner with any property to which the order relates if -

- (a) that court has decided to conduct an enquiry in terms of section 32(1) into any benefit which a defendant may have derived from an offence or related criminal activity;
- (b) no restraint order is in force in respect of the defendant or any property in which the defendant holds an interest; and
- (c) the proceedings against the defendant have not been concluded.

(3) An order under subsection (2) may be made in respect of any realisable property specified in that order and which is held by the person against whom the order is being made.

- (4) A court making an order under subsection (2) may -
  - (a) make an order authorising the seizure of the property concerned by a member of the police who must thereafter deal with the property in accordance with the directions of that court; or

(b) direct that a staff member will, subject to the directions of that court, take care of the property concerned.

(5) An order made under subsection (2) expires when the proceedings against the defendant are concluded, unless the order is rescinded before the proceedings are concluded.

#### **Value of proceeds of offences and related criminal activities**

34. (1) Subject to subsection (2), the value of a defendant's proceeds of offences or related criminal activities is the sum of the values of the property, services, advantages, benefits or rewards received, possessed or derived by him or her at any time, whether before or after the commencement of this Act, in connection with the offence or related criminal activity carried on by him or her or any other person.

(2) In determining the value of a defendant's proceeds of offences or related criminal activities the court must -

(a) where it has made a forfeiture order or where a forfeiture order has previously been made in respect of property which is proved to the satisfaction of the court -

(i) to have been the property which the defendant received in connection with the offence or related criminal activity carried on by him or her or any other person; or

(ii) to have been property which directly or indirectly represented in the defendant's hands the property which he or she received in that connection,

leave that property out of account;

(b) where a confiscation order has previously been made against the defendant, leave out of account those proceeds of offences or related criminal activities which are proved to the satisfaction of the court to have been taken into account in determining the amount to be recovered under that confiscation order.

#### **Statements relating to proceeds of offences and related criminal activities**

35. (1) The public prosecutor may or, if so directed by the court, must tender to the court a statement in writing under oath or affirmation by him or her or any other person in connection with any matter which is being enquired into by the court under section 32(1), or which relates to the determination of the value of a defendant's proceeds of offences or related criminal activities.

(2) A copy of the statement referred to in subsection (1) must be served on the defendant at least 14 days before the date on which that statement is to be tendered to the court.

(3) The defendant may dispute the correctness of any allegation contained in a statement referred to in subsection (1), and if the defendant does so dispute the correctness of that allegation, he or she must state the grounds on which he or she relies.

(4) In so far as the defendant does not dispute the correctness of any allegation contained in a statement referred to in subsection (1), that allegation is deemed to be conclusive proof of the matter to which it relates.

**Evidence relating to proceeds of offences and related criminal activities**

36. (1) For the purposes of determining whether a defendant has derived a benefit in an enquiry under section 32(1), if it is found that the defendant did not at the fixed date, or since the beginning of a period of seven years before the fixed date, have legitimate sources of income sufficient to justify the interests in any property that the defendant holds, the court must accept this fact as *prima facie* evidence that those interests form part of that benefit.

(2) For the purposes of an enquiry under section 32(1), if it is found that a court had ordered the defendant to disclose any facts under section 32(3) and that the defendant had without sufficient cause failed to disclose those facts or had, after being so ordered, furnished false information, knowing that information to be false or not believing it to be true, the court must accept these facts as *prima facie* evidence that any property to which the information relates -

- (a) forms part of the defendant's benefit, in determining whether he or she has derived a benefit from an offence; or
- (b) is held by the defendant as an advantage, payment, service or reward in connection with the offences or related criminal activities referred to in section 32(1).

(3) For the purposes of determining the value of a defendant's proceeds of offences or related criminal activities in an enquiry under section 32(1) -

- (a) if the court finds that he or she has benefited from an offence and that -
  - (i) he or she held property at any time at, or since, his or her conviction; or
  - (ii) property was transferred to him or her at any time since the beginning of a period of seven years before the fixed date,

the court must accept these facts as *prima facie* evidence that the property was received by him or her at the earliest time at which he or she held it, as an advantage, payment, service or reward in connection with the offences or related criminal activities referred to in section 32(1);

- (b) if the court finds that he or she has benefited from an offence and that expenditure had been incurred by him or her since the beginning of the period contemplated in paragraph (a), the court must accept these facts as *prima facie* evidence that that expenditure was met out of the advantages, payments, services or rewards, including any property received by him or her in connection with the offences or related criminal activities referred to in section 32(1) committed by him or her.

(4) For the purpose of determining the value of any property in an enquiry under section 32(1), if the court finds that the defendant received property at any time as an advantage, payment, service or reward in connection with the offences or related criminal activities referred to in that subsection committed by him or her or by any other person the court must accept this fact as *prima facie* evidence that he or she received that property free of any other interest in that property.

(5) For the purpose of determining whether a defendant has derived a benefit, or of the value of the defendant's proceeds of offences or related criminal activities, if it is found in an enquiry that the defendant has effective or beneficial control over certain property the court -

- (a) must accept this fact as *prima facie* evidence that the defendant has acquired that property irrespective of whether or not the defendant has any legal or equitable interest in, or right, power or privilege over that property; and
- (b) may disregard -
  - (i) any shareholding, membership interest or directorship in, or the existence of, any company or close corporation that has a direct or indirect interest in that property;
  - (ii) the existence of any trust that has any relationship with that property; or
  - (iii) any relationship between any person with an interest in that property or in a company or close corporation referred to in subparagraph (i) or in a trust referred to in subparagraph (ii), and any other person.

**Effect of confiscation order**

37. (1) A confiscation order made -
- (a) by the court of a magisterial district has the effect of a civil judgment of that court;
  - (b) by a divisional court has the effect of a civil judgment of the court of the district in which the trial took place.
- (2) Where the High Court makes the confiscation order -
- (a) the confiscation order has the effect of a civil judgment of that court; or
  - (b) the presiding judge may direct the registrar of that court to forward a certified copy of the confiscation order to the clerk of the magistrate's court designated by the presiding judge, or if no such court is designated, to the clerk of the magistrate's court within the area of jurisdiction of which the offence concerned was committed, and, on receipt of the copy of the confiscation order, the clerk of the court concerned must register the confiscation order which will have the effect of a civil judgment of that magistrate's court.

**Payment of confiscation order**

38. When a defendant pays the amount ordered under section 32(2), that payment must be made -
- (a) to the clerk of the magistrate's court referred to in section 37(1) or 37(2)(b); or
  - (b) to the registrar of the High Court referred to in section 37(2)(a).

**Orders concerning payment of compensation**

39. (1) When a defendant has made a payment under section 38, any person who has suffered damage to, or loss of property, or injury as a result of an offence or related criminal activity referred to in section 32(1) which was committed by the defendant, may apply, within 30 days of that payment, for an order under subsection (3).
- (2) A court may make an order under subsection (3) if it is satisfied that -

- (a) the applicant referred to in subsection (1) -
  - (i) has suffered damage to, or loss of property, or injury as a result of an offence or related criminal activity referred to in section 32(1) 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 that order.

(3) A court to which an application is made in terms of subsection (1), may make any order it deems appropriate concerning the manner in which the amount paid to satisfy the confiscation order is to be applied in terms of section 40, including an order to direct the clerk or the registrar of the court where the payment under section 38 was made -

- (a) to make a payment out of that amount to the applicant referred to in subsection (1); or
- (b) to suspend the application of the amount paid in satisfaction of the confiscation order in terms of section 40 for a period which the court deems appropriate with a view to satisfying a claim out of that amount in respect of which the applicant referred to in subsection (1) -
  - (i) has instituted civil proceedings;
  - (ii) intends to institute civil proceedings within a reasonable time; or
  - (iii) has obtained a judgment against a defendant.

(4) A person intending to bring an application in terms of subsection (1) must give 14 days notice of that application to the Prosecutor-General.

(5) A person in whose favour an order has been made under subsection (3)(a) may within 60 days after the date on which the order was made, in writing, renounce the payment by lodging with the clerk or the registrar of the court in question a document of renunciation and, where applicable, by making a repayment of any moneys paid under subsection (3)(a).

(6) If the person concerned does not renounce a payment under subsection (5) within the period of 60 days, the defendant who made the payment in terms of section 38 ceases to be liable at the suit of the person concerned to any other civil proceedings in respect of the damage to, or loss of property, or injury for which the order was made.

(7) If the court has made an order under subsection (3)(b) the clerk or the registrar of the court in question must as soon as possible after -

- (a) the proceedings referred to in that subsection have been disposed of, or the judgment referred to in that subsection has been satisfied; or
- (b) the period determined under that subsection has expired,

whichever occurs first, apply the amount paid in satisfaction of the confiscation order in accordance with section 40.

**Application of amount paid in satisfaction of confiscation order**

40. The clerk or the registrar of the court where a payment has been made under section 38 must, subject to the overall control and supervision of the court, apply that amount on the defendant's behalf -

- (a) to pay any unpaid amount in terms of an award or order for compensation in terms of section 326 or 327 of the Criminal Procedure Act, 2004 (Act No. 25 of 2004) in force at the time when the payment under section 38 is made;
- (b) thereafter to pay the amounts which a court may have directed to be paid in connection with a confiscation order or the application of an amount paid to satisfy a confiscation order, including amounts -
  - (i) to pay the fees and expenditure of the *curator bonis*;
  - (ii) to be paid in terms of an order under section 32(2);
  - (iii) to be paid in terms of an order under section 39(3)(b); and
  - (iv) to satisfy a claim referred to in section 39(3)(b) in respect of which a judgment has been obtained;
- (c) thereafter to make such payments as the court may approve to recover disbursements by the Prosecutor-General in connection with proceedings in terms of this Act; and
- (d) thereafter to satisfy the confiscation order made against him or her.

**Procedure where person absconds or dies**

- 41 (1) If a court is satisfied -
- (a) that -
    - (i) a person had been charged with an offence;
    - (ii) a person had been convicted of any offence;
    - (iii) a restraint of property order had been made against a person; or
    - (iv) there is sufficient evidence for putting a person on trial for an offence;
  - (b) that a warrant for the arrest of the person referred to in paragraph (a) had been issued and that the attendance of that person in court could not be secured after all reasonable steps were taken to execute that warrant;
  - (c) that the proceedings against the person referred to in paragraph (a) cannot be resumed within a period of six months due to that person's continued absence; and
  - (d) that there are reasonable grounds to believe that a confiscation order would have been made against the person referred to in paragraph (a) were it not for his or her continued absence,

the court may, on the application by the Prosecutor-General, enquire into any benefit the person may have derived from that offence.

(2) Whenever a defendant who has been convicted of an offence dies before a confiscation order is made, the court may, on the application by the Prosecutor-General, 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.

(3) The executor of the estate of the deceased person referred to in subsection (1) is entitled to appear before the court and make representations for purposes of the enquiry referred to in that subsection.

(4) The court conducting an enquiry under this section may -

- (a) if the court finds that the person referred to in subsection (1) or (2) has so benefited, make a confiscation order and this Part does, with the necessary changes, apply to the making of that order;
- (b) if a *curator bonis* has not been appointed in respect of any of the property concerned, appoint a *curator bonis* in respect of realisable property; and
- (c) authorise the realisation of the property concerned in terms of Part 4 of this Chapter.

(5) A court must not exercise its powers under subsection (4)(a) and (c) unless it has afforded all persons having any interest in the property concerned an opportunity to make representations to it in connection with the making of those orders and the Minister must prescribe the manner in which those persons are to be informed of the proposed orders.

(6) A court conducting an inquiry under this section must not apply sections 35 and 36.

(7) If a person, excluding a person contemplated in subsection (1)(a)(ii), against whom a confiscation order had been made under subsection (4) is subsequently tried and -

- (a) convicted of one or other of the offences in respect of which the order had been made, the court convicting him or her may conduct an enquiry under section 32 and make an appropriate order;
- (b) acquitted of the offence in respect of which the order had been made, the court acquitting him or her may make an appropriate order.

#### **Order to remain in force pending appeal**

42. An order authorising the seizure of property, or another ancillary order which is in force at the time of any decision by the court in relation to the making of a confiscation order, remains in force pending the outcome of any appeal against the decision concerned.

### **PART 4 REALISATION OF PROPERTY**

#### **Realisation of property**

43. (1) The High Court may exercise the powers conferred upon it by subsection (2) when -

- (a) a confiscation order has been made against the defendant concerned;



- (b) that order is no longer subject to review or appeal; and
  - (c) the proceedings against a defendant have been concluded.
- (2) The High Court may, on the application of the Prosecutor-General -
- (a) if a *curator bonis* has not been appointed in respect of any of the property concerned, appoint a *curator bonis* in respect of realisable property;
  - (b) subject to subsection (3), authorise a *curator bonis* appointed under section 29(1)(a), section 55 or under paragraph (a) of this subsection, as the case may be, to realise any realisable property in such manner as that court may determine;
  - (c) order any person who holds realisable property to surrender that property immediately into the custody of a *curator bonis* appointed under section 29(1)(a), section 55 or under paragraph (a) of this subsection, as the case may be.

(3) The High Court must not exercise its powers under subsection (2)(b) unless it has afforded all persons known to have any interest in the property concerned an opportunity to make representations to it in connection with the realisation of that property and the Minister must prescribe the manner in which those persons are to be informed of the proposed realisation.

#### **Orders concerning realised property**

**44.** (1) Without limiting the generality of section 43(2)(b), any person who has suffered damage to, or loss of property, or injury as a result of an offence or related criminal activity referred to in section 32(1) which was committed by the defendant, may apply to the High Court for an order under subsection (3).

- (2) A court may make an order under subsection (3) if it is satisfied that -
- (a) the applicant referred to in subsection (1) -
    - (i) has suffered damage to or loss of property or injury as a result of an offence or related criminal activity referred to in section 32(1) 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.

(3) The High Court when considering an application in terms of subsection (1) may make any order it deems appropriate concerning the manner in which the proceeds of any realisable property, realised by virtue of section 43, is to be applied in terms of section 45, including an order to direct the *curator bonis* -

- (a) to make a payment out of those proceeds to the applicant referred to in subsection (1); or
- (b) to suspend the application of those proceeds in terms of section 45 for a period which the court deems appropriate, with a view to satisfying a claim out of those proceeds in respect of which that person -

- (i) has instituted civil proceedings;
- (ii) intends to institute civil proceedings within a reasonable time; or
- (iii) has obtained a judgment against the defendant.

(4) A person intending to bring an application in terms of subsection (1) must give 14 days notice of that application to the Prosecutor-General.

(5) Section 39(5), (6) and (7) applies with the necessary changes when a court makes an order under subsection (3).

#### **Application of certain sums of money**

**45.** (1) The *curator bonis* must apply the proceeds of any realisable property, realised by virtue of section 43 on the defendant's behalf -

- (a) to pay any unpaid amount in terms of an award or order for compensation in terms of section 326 or 327 of the Criminal Procedure Act, 2004 (Act No. 25 of 2004) in force at the time when the property is realised by virtue of section 43;
- (b) thereafter to pay the amounts which a court may have directed to be paid out of those sums of money, including amounts -
  - (i) to pay the fees and expenditure of the *curator bonis*;
  - (ii) to be paid in terms of an order under section 32(2);
  - (iii) to be paid in terms of an order under section 44(3)(a); and
  - (iv) to satisfy a claim referred to in section 44(3)(b);
- (c) thereafter to make such payments as the court may approve to recover disbursements by the Prosecutor-General in connection with proceedings in terms of the Act; and
- (d) thereafter to satisfy the confiscation order made against him or her.

(2) If sums of money remain in the hands of the *curator bonis* after the amounts payable in terms of subsection (1) has been paid in full, the *curator bonis* must distribute those sums of money -

- (a) among the persons who held realisable property which has been realised by virtue of section 43; and
- (b) in the proportions,

as the court may direct, after affording those persons an opportunity to make representations to it in connection with the distribution of those sums of money.

#### **Exercise of powers by High Court and *curator bonis***

**46.** (1) The powers conferred on the High Court by sections 25 to 30, 43 and 45, or on a *curator bonis* appointed under this Act, must -

- (a) subject to paragraphs (b) and (c), be exercised with a view to making available the current value of realisable property for satisfying any confiscation order made or that might be made against the defendant;

- (b) in the case of realisable property held by a person to whom that defendant has directly or indirectly made an affected gift, be exercised with a view to realising not more than the current value of that gift;
  - (c) be exercised with a view to allowing any person other than that defendant or the recipient of an affected gift to retain or recover the current value of any property held by him or her.
- (2) Subsection (1) must not be construed as prohibiting the High Court from making any additional order in respect of a debt owed to the State.

#### **Variation of confiscation orders**

**47** (1) If the High Court is satisfied that the realisable property is inadequate for the payment of the balance of the amount to be recovered under a confiscation order against the defendant concerned, that court may, on the application of that defendant, issue a certificate to that effect stating the reasons for the court being so satisfied.

- (2) For the purposes of subsection (1) the High Court may -
- (a) in the case of realisable property held -
    - (i) by a person whose estate has been sequestrated, take into account the extent to which proceeds of property in that estate may be distributed among the creditors; or
    - (ii) by a company or other juristic person that is being wound up, take into account the extent to which the assets of that company or juristic person may be distributed among the creditors;
  - (b) leave out of account any inadequacy in the realisable property that is in the opinion of that court wholly or partly attributable to anything done by the defendant for the purpose of preserving any property held by a person to whom the defendant had directly or indirectly made an affected gift from the risk of any realisation in terms of this Act.
- (3) If a certificate referred to in subsection (1) has been issued, the defendant may apply to the court that made the confiscation order against him or her for the reduction of the amount to be recovered under that confiscation order.

(4) The court referred to in subsection (3) or, if the judge or judicial officer concerned is not available, any judge or judicial officer of that court may substitute for the amount to be recovered under that confiscation order a lesser amount which the court considers just in the circumstances of the case.

#### **Effect of sequestration of estates on realisable property**

**48.** (1) When the estate of a person who holds realisable property is sequestrated -

- (a) the property for the time being subject to a restraint order made before the date of sequestration does not; or
- (b) the proceeds of any realisable property realised by virtue of section 43 and for the time being in the hands of a *curator bonis* appointed under this Act do not,

vest in the Master of the High Court or trustee concerned, as the case may be.

(2) When the estate of a defendant who has directly or indirectly made an affected gift to any other person is sequestrated -

- (a) a court must not set aside the disposition of that gift under section 29, 30 or 31 of the Insolvency Act, 1936 (Act No. 24 of 1936) -
  - (i) if a prosecution for an offence has been instituted against the defendant and the proceedings against him or her have not been concluded; or
  - (ii) if the property of that other person is subject to a restraint order;
- (b) any court that sets aside any disposition contemplated in paragraph (a) after the conclusion of the proceedings against the defendant, must take into account any realisation of the property of that other person in terms of this Act.

(3) Where the estate of an insolvent has been sequestrated, the powers conferred on the High Court by section 25 to 31 and 46(2) or on a *curator bonis* appointed under this Chapter, must not be exercised -

- (a) in respect of any property that forms part of that estate; or
- (b) in respect of any property that the trustee concerned is entitled to claim from the insolvent under section 23 of the Insolvency Act, 1936.

(4) Nothing in the Insolvency Act, 1936, is to be construed as prohibiting the High Court or *curator bonis* appointed under this Act from exercising any power contemplated in subsection (3) in respect of any property or proceeds mentioned in subsection (1).

#### **Effect of winding up of companies or other juristic persons on realisable property**

**49.** (1) When a competent court has made an order for the winding up of a company or other juristic person that holds realisable property or a resolution for the voluntary winding up of any company or juristic person has been registered in terms of any applicable law -

- (a) property for the time being subject to a restraint order made before the relevant time does not; and
- (b) proceeds of any realisable property realised by virtue of section 43 and for the time being in the hands of a *curator bonis* appointed under this Act do not,

form part of the assets of that company or juristic person.

(2) Where an order mentioned in subsection (1) has been made in respect of a company or other juristic person, or a resolution mentioned in that subsection has been registered in respect of that company or juristic person, the powers conferred on the High Court by sections 25 to 31 and 46(2), or on a *curator bonis* appointed under this Act, must not be exercised in respect of any property that forms part of the assets of that company or juristic person.

(3) Nothing in the Companies Act, 2004 (Act No. of 2004), or any other law relating to juristic persons in general or any particular juristic person, is to be construed as prohibiting the High Court or a *curator bonis* appointed under this Act from exercising any power contemplated in subsection (2) in respect of any property or proceeds mentioned in subsection (1).

- (4) For the purposes of subsection (1), "the relevant time" means -
- (a) where an order for the winding up of the company or juristic person, as the case may be, has been made, the time of the presentation to the court of the application for the winding up; or
  - (b) where no such order has been made, the time of the registration of the resolution authorising the voluntary winding up of the company or juristic person, as the case may be.
- (5) Section 48(2) does, with the necessary changes, apply to a company or juristic person which has directly or indirectly made an affected gift.

**CHAPTER 6**  
**FORFEITURE OF PROPERTY AND RELATED MATTERS**  
**PART 1**  
**INTRODUCTION**

**Proceedings are civil, not criminal**

**50.** (1) For the purposes of this Chapter all proceedings under this Chapter are civil proceedings and not criminal proceedings.

(2) The rules of evidence applicable in civil proceedings apply to proceedings under this Chapter, but any evidence which would be admissible in criminal proceedings, is admissible in proceedings under this Chapter.

(3) No evidence which is inadmissible in criminal proceedings pursuant to a rule of evidence applicable only in those proceedings, is for that reason alone inadmissible in proceedings under this Chapter.

(4) No rule of construction applicable only in criminal proceedings applies to proceedings under this Chapter.

**PART 2**  
**PRESERVATION OF PROPERTY**

**Preservation of property orders**

**51.** (1) The Prosecutor-General may apply to the High Court for a preservation of property order prohibiting any person, subject to such conditions and exceptions as may be specified in the order, from dealing in any manner with any property.

(2) The High court must make an order referred to in subsection (1) without requiring that notice of the application be given to any other person or the adduction of any further evidence from any other person if the application is supported by an affidavit indicating that the deponent has sufficient information that the property concerned is -

- (a) an instrumentality of an offence referred to in Schedule 1; or
- (b) the proceeds of unlawful activities.

and the court is satisfied that that information shows on the face of it that there are reasonable grounds for that belief.

(3) When the High Court makes a preservation of property order it must at the same time make an order authorising the seizure of the property concerned by a member of the police, and any other ancillary orders that the court considers appropriate for the proper, fair and effective execution of the order.

(4) Property seized under subsection (3) must be dealt with in accordance with the directions of the High Court.

#### **Notice of preservation of property order**

**52.** (1) If the High Court makes a preservation of property order, the Prosecutor-General must, as soon as practicable after the making of the order -

- (a) give notice of the order to all persons known to the Prosecutor-General to have an interest in the property which is subject to the order; and
- (b) publish a notice of the order in the *Gazette*.

(2) A notice under subsection (1)(a) must be served in the manner in which a summons whereby civil proceedings in the High Court are commenced, is served or in any manner prescribed by the Minister.

(3) Any person who has an interest in the property which is subject to the preservation of property order may give written notice of his or her intention to oppose the making of a forfeiture order or apply, in writing, for an order excluding his or her interest in the property concerned from the operation of the preservation of property order.

(4) A notice under subsection (3) must be delivered to the Prosecutor-General within, in the case of -

- (a) a person on whom a notice has been served under subsection (1)(a), 21 days after the service; or
- (b) any other person, 21 days after the date on which a notice under subsection (1)(b) was published in the *Gazette*.

(5) A notice under subsection (3) must contain full particulars of the chosen address for the delivery of documents concerning further proceedings under this Chapter and must be accompanied by an affidavit stating -

- (a) full particulars of the identity of the person giving notice;
- (b) the nature and the extent of his or her interest in the property concerned;
- (c) whether he or she intends to -
  - (i) oppose the making of the order; or
  - (ii) apply for an order -
    - (aa) excluding his or her interest in that property from the operation of the order; or
    - (bb) varying the operation of the order in respect of that property;
- (d) whether he or she admits or denies that the property concerned is an instrumentality of an offence or the proceeds of unlawful activities; and
- (e) the -
  - (i) facts on which he or she intends to rely on in opposing the making of a forfeiture order or applying for an order referred to in subparagraph (c)(ii); and

- (ii) basis on which he or she admits or denies that the property concerned is an instrumentality of an offence or the proceeds of unlawful activities.

(6) A person who does not give notice in terms of subsection (3), accompanied by an affidavit in terms of subsection (5), within the period referred to in subsection (4) is not entitled -

- (a) to receive, from the Prosecutor-General, notice of an application for a forfeiture order in terms of section 59(2); or
- (b) subject to section 60, to participate in proceedings concerning an application for a forfeiture order.

#### **Duration of preservation of property order**

**53.** (1) A preservation of property order expires 120 days after the date on which notice of the making of the order is published in the *Gazette* unless -

- (a) there is application in terms of section 59(2) for a forfeiture order pending before the High Court in respect of the property which is subject to the preservation of property order;
- (b) there is an unfulfilled forfeiture order in force in relation to the property which is subject to the preservation of property order; or
- (c) the order is rescinded before the expiry of that period.

(2) Subject to section 66, in the case referred to in subsection (1)(a), the preservation of property order expires when the hearing of the application for a forfeiture order is concluded without the making of a forfeiture order.

(3) In the case referred to in subsection (1)(b) the preservation of property order expires when the forfeiture order is fulfilled in terms of section 68.

#### **Seizure of property subject to preservation of property order**

**54.** (1) In order to prevent property subject to a preservation of property order from being disposed of or removed contrary to that order, any member of the police may seize that property if he or she has reasonable grounds to believe that that property will be so disposed of or removed.

(2) Property seized under subsection (1) must be dealt with in accordance with the directions of the High Court.

#### **Appointment of *curator bonis* in respect of property subject to preservation of property order**

**55.** (1) Where the High Court has made a preservation of property order, it must, if it deems it appropriate, at the time of the making of the order or at a later date -

- (a) appoint a *curator bonis* to do, subject to the directions of the High Court, any one or more of the following on behalf of the person against whom the preservation of property order has been made, namely -
  - (i) to assume control over the property;
  - (ii) to take care of the property;

- (iii) to administer the property and to do any act necessary for that purpose; and
  - (iv) where the property is a business or undertaking, to carry on, with due regard to any law which may be applicable, the business or undertaking; and
- (b) order any person holding property subject to the preservation of property order to surrender forthwith, or within such period as the court may determine, that property into the custody of the *curator bonis*.

**Endorsement of title deed in respect of immovable property subject to preservation of property order**

**56.** (1) When the High Court has made a preservation of property order it may at any time, with a view to ensuring the effective execution of a subsequent order, order the registrar of deeds to endorse any one or more of the restrictions referred to in subsection (2) on the title deed of the immovable property.

(2) An order under subsection (1) may be made imposing the following restrictions, namely -

- (a) that the immovable property must not, without the approval of the High Court, be mortgaged or otherwise encumbered;
- (b) that the immovable property must not, without the approval of the High Court, be attached or sold in execution; and
- (c) that the immovable property must not, without the approval of the High Court -
  - (i) vest in the Master of the High Court or trustee concerned, as the case may be, when the estate of the owner of that immovable property is sequestrated; or
  - (ii) where the owner of the immovable property is a company or other juristic person which is being wound up, form part of the assets of that company or other juristic person.

(3) In order to give effect to subsection (1), the registrar of deeds must -

- (a) make the necessary entries in his or her registers and the necessary endorsement on the office copy of the title deed, and that restriction becomes effective against all persons except, in the case of a restriction contemplated in subsection (2)(b), against any person in whose favour a mortgage bond or other charge was registered against the title deed of immovable property prior to the endorsement of the restriction on the title deed of the immovable property, but that restriction lapses on the transfer of ownership of the immovable property concerned;
- (b) when the original of the title deed is produced to him or her, make the necessary endorsement on the deed.

(4) Unless the High Court directs otherwise, the custody of immovable property on the title deed of which a restriction contemplated in subsection (2)(c) was endorsed, vests as from the date on which -

- (a) the estate of the owner of the immovable property is sequestrated; or



- (b) where the owner of the immovable property is a company or other juristic person, that company or juristic person is being wound up,

in the person in whom custody would have vested if that restriction were not so endorsed.

(5) Where the High Court has granted its approval in respect of a restriction contemplated in subsection (2)(c) and endorsed on the title deed of immovable property, the immovable property is deemed -

- (a) if the estate of the owner of the immovable property was sequestrated, to have vested in the Master of the High Court or trustee concerned, as the case may be, as if that restriction was not so endorsed; or
- (b) if the owner of the immovable property is a company or other juristic person which is being wound up, to have formed part of the assets of that company or juristic person as if that restriction was not so endorsed.

(6) Any person affected by an order contemplated in subsection (1) may at any time apply for the rescission of the order.

#### **Provision for expenses**

**57.** (1) The High Court may, on application by a person holding an interest in property which is subject to a preservation of property order, make provision as the court may think fit for the payment from that property in which he or she holds an interest -

- (a) of reasonable living expenses for that person and any person whom he or she is legally liable to support or maintain; and
- (b) of reasonable legal expenses for that person in connection with any proceedings instituted against him or her in terms of this Chapter.

(2) The High Court must not make provision for any expenses under subsection (1) unless it is satisfied that -

- (a) neither the applicant referred to in subsection (1) nor any other person whom he or she is legally liable to support or maintain can meet the expenses concerned out of his or her property which is not subject to the preservation of property order; and
- (b) the applicant referred to in subsection (1) as well as every other person whom he or she is legally liable to support or maintain has disclosed under oath or affirmation all their interests in the property and has submitted to the court a sworn and full statement of all their assets and liabilities.

#### **Variation and rescission of orders**

**58.** (1) When the High Court has made a preservation of property order it may vary or rescind the order if it is satisfied that -

- (a) the order concerned -
  - (i) will deprive the applicant of the means to provide for his or her reasonable living expenses and cause undue hardship for the applicant; and

(ii) that the hardship that the applicant will suffer as a result of the order outweighs the risk that the property concerned may be destroyed, lost, damaged, concealed or transferred; or

(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.

(2) When a court orders the variation or rescission of an order authorising the seizure of property under subsection (1)(a) the court must make such other order as it considers appropriate for the proper, fair and affective execution of the preservation of property order concerned.

(3) When the court has made a preservation of property order it may rescind that order if it was -

(a) erroneously sought or erroneously made in the absence of the person applying for its rescission; or

(b) made as a result of a common mistake of both the Prosecutor-General and the person affected by that order.

(4) Only the -

(a) Prosecutor-General; or

(b) person affected by a property preservation order who has given notice in terms of section 52(3) accompanied by an affidavit in terms of section 52 (5).

may apply for an order under subsection (1) or subsection (3).

(5) Any person referred to in subsection (4) (b) intending to apply for an order under subsection (1) or (3) must, in the prescribed manner, give notice of that application to the Prosecutor-General.

(6) A preservation of property order may not be varied or rescinded on any grounds other than those provided for in this section.

(7) Any person affected by an order for the appointment of a *curator bonis* may at any time apply -

(a) for the variation or rescission of the order;

(b) for the variation of the terms of the appointment of the *curator bonis* concerned; or

(c) for the discharge of the *curator bonis*.

(8) Where the High Court has made an order for the appointment of a *curator bonis* it -

(a) may, if it is necessary in the interests of justice, at any time -

(i) vary or rescind the order;

(ii) vary the terms of the appointment of the *curator bonis* concerned; or

(iii) discharge the *curator bonis*;

- (b) must rescind the order and discharge the *curator bonis* concerned if the relevant preservation of property order is rescinded.
- (9) Any person affected by an order in respect of immovable property, made under section 56, may at any time apply for the rescission of the order.
- (10) Where the High Court has made an order in respect of immovable property it -
- (a) may, if it is satisfied that the operation of the order concerned will cause undue hardship for the applicant, which hardship outweighs the risk that the property concerned may be mortgaged or otherwise encumbered, attached or sold in execution or in any manner disposed of, at any time rescind the order; or
- (b) must rescind the order if the relevant preservation of property order is rescinded.
- (11) If an order in respect of immovable property is rescinded, the High Court must direct the registrar of deeds to cancel any restriction endorsed by virtue of that order on the title deed of immovable property, and the registrar of deeds must give effect to that direction.
- (12) The noting of an appeal against a decision to vary or rescind any order referred to in this section suspends that variation or rescission pending the outcome of the appeal.

### PART 3 FORFEITURE OF PROPERTY

#### Application for forfeiture order

**59.** (1) If a preservation of property order is in force the Prosecutor-General may apply to the High Court for an order forfeiting to the State all or any of the property that is subject to a preservation of property order.

(2) The Prosecutor-General must, in the prescribed manner, give 14 days notice of an application under subsection (1) to every person who gave notice in terms of section 52(3).

(3) A notice under subsection (2) must be delivered at the address indicated by the relevant person in terms of section 52(5).

(4) Any person who gave notice in terms of section 52(3) may -

(a) oppose the making of the order; or

(b) apply for an order-

(i) excluding his or her interest in that property from the operation of the order; or

(ii) varying the operation of the order in respect of that property.

(5) When application under subsection (1) is made the High Court may, on the application of any of the parties, direct that oral or other evidence be heard or presented on any issue that the court may direct, if the court is satisfied that a dispute of fact concerning that issue exists that cannot be determined without the aid of oral or other evidence.

**Failure to give notice**

**60.** (1) Any person who, for any reason, failed to give notice in terms of section 52(3), within the period specified in section 52(4) may, within 14 days of him or her becoming aware of the existence of a preservation of property order, apply to the High Court for condonation of that failure and leave to give a notice accompanied by the required information.

(2) An application in terms of subsection (1) may be made before or after the date on which an application for a forfeiture order is made under section 59(1), but must be made before judgment is given in respect of the application for a forfeiture order.

(3) The High Court may condone the failure and grant the leave as contemplated in subsection (1), if the court is satisfied on good cause shown that the applicant -

- (a) was unaware of the preservation of property order or that it was impossible for him or her to give notice in terms of section 52(3); and
- (b) has an interest in the property which is subject to the preservation of property order.

(4) When the High Court grants an applicant leave to give notice as referred to in subsection (3), the Court -

- (a) must make an appropriate order as to costs against the applicant; and
- (b) may make an appropriate order to regulate the further participation of the applicant in proceedings concerning an application for a forfeiture order.

(5) A notice given after leave has been obtained under this section must contain full particulars of the chosen address of the person who gives the notice for the delivery of documents concerning further proceedings under this Chapter and must be accompanied by the affidavit referred to in section 52(5).

**Making of forfeiture order**

**61.** (1) The High Court must, subject to section 63, make the forfeiture order applied for under section 59(1) if the court finds on a balance of probabilities that the property concerned -

- (a) is an instrumentality of an offence referred to in Schedule 1; or
- (b) is the proceeds of unlawful activities.

(2) The High Court may, when it makes a forfeiture order or at any time thereafter, make any ancillary orders that it considers appropriate, including orders for and with respect to facilitating the transfer to the State of property forfeited to the State under the order.

(3) The absence of a person whose interest in property may be affected by the forfeiture order does not prevent the High Court from making the order.

(4) Any person who has entered a notice in terms of section 52(3) and whose interest in the property concerned is affected by a forfeiture order made in his or her absence under subsection (3), may, within 20 days after he or she has acquired knowledge of that order, apply for variation or rescission of the order.

(5) On good cause shown in an application referred to in subsection (4), the High Court may vary or rescind the order made under that subsection or make some other appropriate order.

(6) The validity of an order under subsection (1) is not affected by the outcome of criminal proceedings, or of an investigation with a view to institute those proceedings, in respect of an offence with which the property concerned is in some way associated.

(7) The registrar of the High Court must publish a notice of the forfeiture order in the *Gazette* as soon as practicable after it is made.

(8) A forfeiture order under subsection (1) does not take effect -

(a) before the period allowed for an application under section 65 or an appeal under section 66 has expired; or

(b) before an application or appeal referred to in paragraph (a) has been disposed of.

#### **Notice that property is concerned in commission of offence**

**62.** (1) A judge in chambers or a magistrate may order that a notice referred to in subsection (3) be issued on a written application by the Prosecutor-General supported by an affidavit indicating that the deponent has sufficient information which shows on the face of it that the property referred to in the application is an instrumentality of an offence referred to in Schedule 1.

(2) The judge or magistrate must, subject to any conditions which are necessary to preserve the property, make an order referred to in subsection (1) if the judge or magistrate is satisfied that there is reason to suspect that the property concerned is an instrumentality of an offence referred to in Schedule 1.

(3) A notice referred to in subsection (1) must be directed to a person with an interest in, or control over, the property concerned and must inform that person that there is reason to suspect that the property is an instrumentality of an offence referred to in Schedule 1.

(4) When a judge or magistrate makes an order under subsection (1), the registrar or the clerk of the court concerned must issue a notice referred to in subsection (3) in the prescribed form to the person referred to in the order.

(5) The notice issued under subsection (4) must be served on the person concerned in the manner in which a summons whereby civil proceedings are commenced is served, or in the prescribed manner.

(6) A notice issued under this section has the same effect as a preservation of property order and, subject to necessary changes or modifications, the provisions of Part 2 of this Chapter apply to it.

#### **Exclusion of interests in property**

**63.** (1) The High Court may, on application -

(a) under section 59(4)(b); or

(b) by a person referred to in section 60(1),

and when it makes a forfeiture order, make an order excluding certain interests in property which is subject to the order, from the operation of the order.

(2) The High Court may make an order under subsection (1) in relation to the forfeiture of the proceeds of unlawful activities, if it finds on a balance of probabilities that the applicant for the order -

- (a) had acquired the interest concerned legally and for a consideration, the value of which is not significantly less than the value of that interest; and
- (b) where the applicant had acquired the interest concerned after the commencement of this Act, that he or she neither knew nor had reasonable grounds to suspect that the property in which the interest is held is the proceeds of unlawful activities.

(3) The High Court may make an order under subsection (1), in relation to the forfeiture of an instrumentality of an offence referred to in Schedule 1, if it finds on a balance of probabilities that the applicant for the order had acquired the interest concerned legally, and -

- (a) neither knew nor had reasonable grounds to suspect that the property in which the interest is held is an instrumentality of an offence referred to in Schedule 1; or
- (b) where the offence concerned had occurred before the commencement of this Act, the applicant has since the commencement of this Act taken all reasonable steps to prevent the use of the property concerned as an instrumentality of an offence referred to in Schedule 1.

(4) If an applicant for an order under subsection (1) adduces evidence to show that he or she did not know or did not have reasonable grounds to suspect that the property in which the interest is held, is an instrumentality of an offence referred to in Schedule 1, the State may submit a return of the service on the applicant of a notice issued under section 62(4) in rebuttal of that evidence in respect of the period since the date of the service.

(5) If the State submits a return of the service on the applicant of a notice issued under section 62(4) as contemplated in subsection (4), the applicant for an order under subsection (1) must, in addition to the facts referred to in subsection (3), also prove on a balance of probabilities that, since that service, he or she has taken all reasonable steps to prevent the further use of the property concerned as an instrumentality of an offence referred to in Schedule 1.

(6) The High Court when making an order for the exclusion of an interest in property under subsection (1) may, in the interest of the administration of justice or in the public interest, make that order on the conditions that the court deems appropriate including a condition requiring the person who applied for the exclusion to take all reasonable steps, within a period that the court may determine, to prevent the future use of the property as an instrumentality of an offence referred to in Schedule 1.

#### **Forfeiture order by default**

**64.** (1) On application by the Prosecutor-General for a forfeiture order by default, the High Court may, if it is satisfied that no person has given notice in terms of section 52(3), make any order that the court could have made under section 61(1) and (2).

(2) The High Court may, before making an order in terms of subsection (1), call on the Prosecutor-General to adduce any further evidence, either in writing or orally, in support of his or her application.

(3) Any person whose interest in the property concerned is affected by a forfeiture order or other order made under subsection (1) may, within 15 days after he or she has knowledge of the order, apply to the High Court for a rescission or variation of the order.

(4) On receipt of an application under subsection (3), the High Court may, on good cause shown, rescind or vary the default order and make any other order which is appropriate in the circumstances.

### **Protection of interests of third parties in forfeited property**

**65.** (1) Any person affected by a forfeiture order who was entitled to receive notice of the application for the order under section 59(2), but did not receive that notice, may, within 30 days after the notice of the making of the order is published in the *Gazette*, apply for an order excluding his or her interest in the property concerned from the operation of the order, or varying the operation of the order in respect of that property.

(2) The application referred to in subsection (1) must be accompanied by an affidavit setting out -

- (a) the nature and extent of the applicant's right, title or interest in the property concerned;
- (b) the time and circumstances of the applicant's acquisition of the right, title, or interest in the property;
- (c) any additional facts supporting the application; and
- (d) the relief sought.

(3) The hearing of the application must, to the extent practicable and consistent with the interests of justice, be held within 30 days of the filing of the application.

(4) The High Court may consolidate the hearing of the application with a hearing of any other application filed by a person under this section.

(5) At the hearing, the applicant may testify and present evidence and witnesses on his or her own behalf, and may cross-examine any witness who appears at the hearing.

(6) The Prosecutor-General or the *curator bonis* concerned, or a person authorised in writing by one of them, may present evidence and call witnesses in rebuttal and in defence of their claim to the property and may cross-examine a witness who appears at the hearing.

(7) In addition to the testimony and evidence presented at the hearing, the High Court may, on application by the Prosecutor-General or the *curator bonis* concerned, or a person authorised in writing by one of them, order that the testimony of any witness relating to the property forfeited, be taken by commission and that any document or other material not privileged be produced at the taking down of that testimony by commission.

(8) The High Court may make an order under subsection (1), in relation to the forfeiture of the proceeds of unlawful activities, if it finds on a balance of probabilities that the applicant for the order -

- (a) had acquired the interest concerned in good faith and for a consideration; and
- (b) where the applicant had acquired the interest concerned after the commencement of this Act, that he or she neither knew nor had reasonable grounds to suspect that the property in which the interest is held is the proceeds of unlawful activities.

(9) The High Court may make an order under subsection (1), in relation to the forfeiture of an instrumentality of an offence referred to in Schedule 1, if it finds on a balance of probabilities that the applicant for the order had acquired the interest concerned legally, and -

- (a) neither knew nor had reasonable grounds to suspect that the property in which the interest is held is an instrumentality of an offence referred to in Schedule 1; or
- (b) where the offence concerned had occurred before the commencement of this Act, the applicant has since the commencement of this Act taken all reasonable steps to prevent the use of the property concerned as an instrumentality of an offence referred to in Schedule 1.

(10) Where a person who testifies under this section -

- (a) fails to answer fully and to the best of his or her ability any question lawfully put to him or her; or
- (b) gives false evidence knowing that evidence to be false or not believing it to be true,

he or she commits an offence.

(11) Where a person who furnishes an affidavit under subsection (2) makes a false statement in the affidavit knowing that statement to be false or not believing it to be true, he or she commits an offence.

(12) A person convicted of an offence under this section is liable to a fine not exceeding N\$100 000 or to a period of imprisonment not exceeding five years or to both the fine and imprisonment.

### **Appeal against forfeiture order**

**66.** Any preservation of property order and any order authorising the seizure of the property concerned or ancillary order which is in force at the time of any decision regarding the making of a forfeiture order under section 61(1) remains in force pending the outcome of an appeal against the decision concerned.

### **Effect of forfeiture order**

**67.** (1) Where the High Court has made a forfeiture order and a *curator bonis* has not been appointed in respect of any of the property concerned, the High Court may appoint a *curator bonis* to perform any of the functions referred to in section 68 in respect of that property.

(2) On the date when a forfeiture order takes effect the property subject to the order is forfeited to the State and vests in the *curator bonis* on behalf of the State.

(3) When a forfeiture order takes effect the *curator bonis* must take possession of that property on behalf of the State from any person in whose possession it is found.



**Fulfillment of forfeiture order**

**68.** (1) The *curator bonis* must, subject to any order for the exclusion of interests in forfeited property under section 63(1) or 65(8) and in accordance with the directions of the Committee -

- (a) deposit any moneys forfeited under section 67(2) into the Fund;
- (b) deliver property forfeited under section 67(2) to the Fund; or
- (c) dispose of property forfeited under section 67(2) by sale or any other means and deposit the proceeds of the sale or disposition into the Fund.

(2) A person who has possession, or was entitled to possession, of forfeited property immediately before the forfeiture order took effect, or any person acting in concert with, or on behalf of that person, is not eligible to purchase forfeited property at any sale held by the *curator bonis*.

**PART 4**  
**GENERAL PROVISIONS RELATING TO PRESERVATION AND FORFEITURE OF PROPERTY**

**Offence may form the basis of multiple orders**

**69.** The fact that a preservation of property order or a forfeiture order has been made on the basis of an offence referred to in Schedule 1 in which a specific person has been involved, does not prevent the making of another or other preservation of property orders or forfeiture orders on the basis of the same offence.

**Forfeiture proceedings not affected by confiscation proceedings**

**70.** Proceedings in terms of this Chapter may be instituted in respect of property in spite of the fact that separate proceedings in terms of Chapter 5 have been instituted in respect of the same property or against a person with an interest in that property.

**Application of Chapter to deceased estates**

**71.** (1) Any notice authorised or required to be given to a person under this Chapter is, in the case of a deceased person, sufficiently given, if given to the executor of that person's estate.

(2) A reference in this Chapter to property of a person is, in the case of a person who is deceased, a reference to property that the person held immediately before his or her death.

- (3) An order may be applied for and made under this Chapter -
  - (a) in respect of property which forms part of a deceased estate; and
  - (b) on evidence adduced concerning the activities of a person who is deceased.

**Effect of death of joint owner of preserved property**

**72.** (1) If a person has an interest in property as joint owner of the property, the person's death after a preservation of property order is made in respect of the interest does not, while the order is in force, operate to vest the interest in the surviving joint owner or owners and the preservation of property order continues to apply to the interest as if the person had not died.

(2) A forfeiture or preservation of property order made in respect of an interest referred to in subsection (1) applies as if the order took effect in relation to the interest immediately before the person died.

(3) Subsection (1) does not apply to an interest in property if a preservation of property order ceases to apply to that interest without a forfeiture order being made in respect of that interest.

### **Expedition of applications**

**73.** (1) In any application instituted under this Chapter by the State, the Prosecutor-General may file with the registrar of the High Court a certificate stating that in his or her opinion the case is of general public importance.

(2) The registrar of the High Court must immediately furnish a copy of the certificate to the Judge President of the High Court.

(3) On receipt of the copy referred to in subsection (2), the Judge President must immediately designate a judge of the High Court to hear and determine the application.

## **CHAPTER 7 CRIMINAL ASSETS RECOVERY FUND**

### **Establishment of Criminal Assets Recovery Fund**

**74.** (1) There is, as contemplated in Article 125(3) of the Namibian Constitution, established a special fund to be known as the Criminal Assets Recovery Fund.

(2) For the purposes of the State Finance Act, 1991 (Act No. 31 of 1991), the Minister, after consultation with the Minister responsible for finance, must, by notice in the *Gazette*, designate a staff member or appoint a person to be the accounting officer of the Fund.

(3) The staff member or person referred to in subsection (2) is accountable to the Committee.

(4) The staff member designated or person appointed in terms of subsection (2) must, with the approval of the Auditor-General and pursuant to section 2(4)(a) of the State Finance Act, 1991 (Act No. 31 of 1991), open a bank account at a commercial bank and all money received on behalf of the Fund must be deposited into that account.

(5) The Committee is responsible for exercising control over the Fund and the bank account opened under subsection (4).

### **Finances of the Fund**

**75.** Notwithstanding anything to the contrary contained in any other law -

- (a) all moneys derived from the fulfillment of confiscation and forfeiture orders contemplated in Chapters 5 and 6;
- (b) all amounts paid in terms of cost orders made in favour of the Prosecutor-General in terms of section 94;
- (c) the balance of all moneys derived from the execution of foreign confiscation orders as defined in the International Co-operation in Criminal Matters Act, 2000 (Act No.9 of 2000), after payments have been made to requesting States in terms of that Act;

- (d) fines imposed by any court in terms of this Act;
- (e) money payable to the State in terms of section 32(2) of this Act;
- (f) any property or moneys appropriated by Parliament, or paid into, or allocated to, the Fund in terms of any other Act;
- (g) domestic and foreign grants to the Fund;
- (h) any property or amount of money lawfully received or acquired from any source; and
- (i) all property or moneys transferred to the Fund in terms of this Act,

must be paid into the Fund.

#### **Utilisation of Fund and accountability**

**76.** (1) The property and money allocated to, or standing to the credit of, the Fund may be utilised by Cabinet after considering the recommendations of the Committee, for -

- (a) the allocation of property and amounts of money from the Fund to specific law enforcement agencies;
- (b) the allocation of property and amounts of money from the Fund to any institution, organisation or fund contemplated in section 81(c) of this Act; and
- (c) the administration of the Fund.

(2) All amounts of money withdrawn, or property allocated, from the Fund under subsection (1), must be so withdrawn or allocated as prescribed.

(3) Whenever Cabinet allocates property or money under subsection (1) to a specific law enforcement agency or to an institution, organisation or fund contemplated in section 81(c), Cabinet must indicate the specific purpose for which that property or money is to be utilised.

(4) Property or money allocated under subsection (1) must not be utilised for any other purpose than that specified in terms of subsection (3).

(5) An allocation of property or money must not be made under subsection (1) to an institution, organisation or fund contemplated in section 81(c), unless an accounting officer for that institution, organisation or fund is appointed or designated for that institution, organisation or fund.

(6) An accounting officer appointed or designated under subsection (5) is charged with the responsibility of accounting for all money allocated under subsection (1), the acquisition, receipt, custody and disposal of all property so allocated and all payments made by him or her in respect of the purpose for which the allocation had been made.

(7) The Committee may, after consultation with the Minister responsible for finance and the Auditor-General, issue guidelines to accounting officers appointed or designated under subsection (5) in connection with the systems of book-keeping and accounting to be followed by them.

(8) Accounting by a law enforcement agency or institution, organisation or fund for property and money allocated to it from the Fund under subsection (1) must be done separately from accounting for money and property received from any other source.

(9) The Auditor-General must audit the books of accounts, accounting statements, financial statements and financial management of each law enforcement agency or institution, organisation or fund to which property or money had been allocated under subsection (1) in respect of that allocation, and section 25 of the State Finance Act, 1991 (Act No. 31 of 1991), applies in respect of that audit.

(10) The Auditor-General must submit a copy of the report on an audit under subsection (9) to the Committee.

## **CHAPTER 8 CRIMINAL ASSETS RECOVERY COMMITTEE**

### **Establishment of Committee**

77. (1) There is hereby established a Committee to be known as the Criminal Assets Recovery Committee.

(2) The Committee consists of -

- (a) the Minister, who is the chairperson of the Committee;
- (b) the Minister responsible for home affairs;
- (c) the Minister responsible for finance;
- (d) the Attorney-General; and
- (e) if necessary, one other person designated by the Minister.

(3) The members of the Committee may designate their Deputies to attend a meeting of the Committee in their place.

(4) The Committee must designate one of its members as deputy chairperson of the Committee, and when the chairperson is not available, the deputy chairperson must act as chairperson.

(5) The Permanent Secretary of the Ministry responsible for justice must make staff members available to perform the administrative functions of the Committee.

### **Conditions of service and other benefits of certain members of Committee**

78. A member of the Committee appointed in terms of section 77(2)(e) -

- (a) is entitled, unless that member is a staff member, to receive remuneration, allowances and other benefits;
- (b) will be designated on terms and conditions and for periods;

determined by the Committee.

### **Meetings of Committee**

79. (1) A meeting of the Committee must be held at a time and place determined by the chairperson.

(2) The procedure, including the manner in which decisions must be taken, to be followed at meetings of the Committee and the manner in which the Committee must conduct its affairs must be determined by the Committee, if the procedure has not been prescribed.

### **Objects of Committee**

**80.** The objects of the Committee are to -

- (a) advise Cabinet in connection with all aspects of confiscation or forfeiture of property to the State in terms of Chapters 5 and 6 and the transfer of confiscated or forfeited property to the Fund in terms of this Act or any other Act;
- (b) advise Cabinet in connection with the rendering of financial assistance to law enforcement agencies in order to combat organised crime, money laundering, criminal gang activities and crime in general; and
- (c) advise Cabinet in connection with the rendering of financial assistance to any other institution, organisation or fund established with the object to render assistance in any manner to witnesses, including protected witnesses, and victims of crime.

### **Functions and powers of Committee**

**81.** (1) The Committee may make -

- (a) recommendations to Cabinet with regard to the policy to be adopted concerning the confiscation, forfeiture and realisation of property and the transfer of that property to the Fund in terms of this Act or any other Act;
- (b) recommendations to Cabinet with regard to the allocation of property and moneys from the Fund to specific law enforcement agencies;
- (c) recommendations to Cabinet with regard to the allocation of property and moneys from the Fund to any institution, organisation or fund contemplated in section 80(c); and
- (d) recommendations to Cabinet regarding the allocation of moneys for the administration of the Fund.

(2) In order to fulfill the functions referred in subsection (1) the Committee may -

- (a) exercise any powers and perform any functions conferred or imposed on it by this Act, and any powers that are necessary or expedient for or incidental to the achievement of its objects;
- (b) co-opt any person to advise it on any specific matter.

### **Other matters to be prescribed**

**82.** All other matters in connection with the Committee or arising from this Act may be prescribed.

## CHAPTER 9 GENERAL PROVISIONS

### Investigations

**83.** (1) Whenever the Inspector-General of Police has reason to believe that any person may be in possession of information relevant to the commission or intended commission of an alleged offence in terms of this Act, or any person or enterprise may be in possession, custody or control of any documentary material relevant to that alleged offence, he or she may, prior to the institution of any civil or criminal proceeding, under written authority, direct a particular member of the police to investigate a specific offence.

(2) The member of the police authorised in terms of subsection (1), or any other authorised member of the police may -

- (a) exercise any power under any law relating to the investigation of crime and the obtaining of information in the course of an investigation, for the purpose of enabling the Prosecutor-General to institute and conduct proceedings in terms of Chapter 5 and 6 of this Act; and
- (b) serve any document for which service is required in terms of this Act.

### Property tracking orders

**84.** (1) The Prosecutor-General may, if satisfied that there are reasonable grounds for believing that a person is committing, has committed or is about to commit an offence referred to in Schedule 1, apply to any court for an order -

- (a) that any document relevant to -
  - (i) identifying, locating or quantifying any property; or
  - (ii) identifying or locating any document necessary for the transfer of any property,belonging to, or in possession or under the control of that person, be delivered forthwith to an authorised member of the police;
- (b) that a financial institution, as defined in the Namibia Financial Institutions Supervisory Authority Act, 2001 (Act No. 3 of 2001), immediately produce to an authorised member of the police all information obtained by the institution about any transaction conducted by or for that person with the institution during any period before or after the date of the order.

(2) Where a document is produced or made available to an authorised member of the police under this section, he or she may take extracts from it or make copies of it, and if it was ordered to be produced to him or her, he or she may retain it for as long as is necessary for the purposes of this Act.

(3) Where an authorised member of the police retains a document pursuant to an order issued under subsection (1), he or she must, on request by the person to whom the order was addressed -

- (a) give the person a certified copy of the document; or
- (b) permit the person to inspect, take extracts from or make copies of the document.

(4) Subject to subsection (5), a person is not excused from making available a document when ordered to do so under this section on the ground that making it available

might tend to incriminate him or her or make him or her liable to a penalty, or that it might be in breach of a legal obligation not to disclose the existence or contents of the document.

(5) Subsection (4) does not apply if the obligation of secrecy or other restriction is based on the common law right to professional privilege between a legal practitioner and his or her client in respect of information communicated to the legal practitioner so as to enable the legal practitioner to -

- (a) provide advice to the client;
- (b) defend the client; or
- (c) render other legal assistance to the client,

in connection with an offence under any law in respect of which -

- (i) the client is charged;
- (ii) the client has been arrested or summoned to appear in court; or
- (iii) in respect of which an investigation with a view to institute criminal proceedings is being conducted against the client.

(6) Any information, document or thing obtained as a direct or indirect consequence or the making available of the document under this section is not admissible in evidence against the person making it available in any criminal proceedings except for an offence under section 89.

#### **Warrant to search for and seize tainted property**

**85.** (1) For the purposes of this section and section 86 "tainted property" means -

- (a) the instrumentality of an offence referred to in Schedule 1; or
- (b) the proceeds of an offence referred to in Schedule 1.

(2) Any court which, on an application in writing made on oath or affirmation, is satisfied that there are reasonable grounds for believing that there is in or on any site, vehicle, vessel or aircraft any tainted property, may issue a search warrant in respect of that tainted property.

(3) An application for a warrant under subsection (2) may be made by the Prosecutor-General or by an authorised member of the police force.

(4) A court must not issue a warrant under subsection (2) unless the application contains, or the applicant otherwise supplies to the court, information which the court requires concerning the grounds on which the warrant is sought.

(5) A warrant may be issued under subsection (2) in relation to tainted property whether or not a person has been charged with the commission of the relevant offence, but where a charge has not been laid in respect of that offence at the time when the application for the warrant is made, the court must not issue a warrant unless it is satisfied that a charge will be laid in respect of the offence within 48 hours of the issue of the warrant.

- (6) Every warrant issued under subsection (2) must be in the prescribed form.

(7) A warrant issued under subsection (2) must be directed to a specific member of the police force, to a specific group of members of the police specified in the warrant, or generally to any member of the police force.

(8) A warrant issued under subsection (2) is subject to any conditions, if any, which the court may specify in the warrant.

#### **Powers conferred by warrant**

**86.** (1) Subject to any conditions specified in the warrant issued under section 85(2), every warrant issued under section 85 authorises the member of the police executing the warrant to -

- (a) enter and search the site, premises, building, vehicle, vessel, train or aircraft specified in the warrant at any time by day or night during the currency of the warrant;
- (b) use such assistants as may be reasonable in the circumstances for the purpose of the entry and search;
- (c) use such force as is reasonable in the circumstances for the purpose of effecting entry, and for breaking open anything in or on the place to be searched; and
- (d) search for and seize any property of the kind described in the warrant that the person executing the warrant believes on reasonable grounds to be tainted property.

(2) Every person called on to assist any member of the police executing a warrant issued under section 85 of this Act has the powers described in subsection (1)(c) and (d).

(3) If a member of the police, in the course of executing a warrant issued under section 85, finds any property that he or she believes, on reasonable grounds, to be -

- (a) tainted property in respect of an offence other than the offence specified in the warrant; or
- (b) tainted property in relation to any offence specified in the warrant, although not of a kind specified in the warrant,

the warrant is sufficient authority to seize that property if the member of the police believes on reasonable grounds that seizure is necessary to prevent loss, destruction or concealment of the property.

(4) This section, in so far as it authorises the interference with a person's right to privacy of his or her person and home as guaranteed by Article 13 of the Constitution, is enacted on the authority of that Article.

#### **Request for information**

**87.** (1) An authorised member of the police may request any person employed in or associated with an agency, office or ministry as defined in the Public Service Act, 1995 (Act No. 13 of 1995) or statutory body to furnish him or her free of charge and within a period specified in that request, with all information that may reasonably be required for any investigation in terms of this Act and that person must, notwithstanding anything to the contrary contained in any law which prohibits or precludes him or her -

- (a) from disclosing any information relating to the activities, affairs or business of any other person; or



- (b) from permitting any person to have access to any registers, records or other documents, or electronic data which have a bearing on those activities, affairs or business,

furnish the authorised member of the police with that information and permit the authorised member of the police to have access to any registers, records, documents, and electronic data, which may contain the information.

(2) If a person from whom an authorised member of the police has requested information in terms of subsection (1) fails to provide that information within the specified period, the Prosecutor-General may request a judge, divisional magistrate or magistrate to require the attendance of that person before that judge, divisional magistrate or magistrate, or any other judge, divisional magistrate or magistrate for examination by the Prosecutor-General.

(3) Subsection (1) must not be construed as prohibiting any Minister by whom or any other Ministerial or institutional authority by which, or under the control of whom or which, any law referred to in that subsection is administered, or any board, institution or body established by or under any such law, from making any practical and reasonable procedural arrangements with regard to the furnishing of the information or the granting of the access contemplated in that subsection and according to which the information or access must be furnished or granted or with regard to any reasonable safeguards which that Minister, authority, board, institution, body or person, subject to subsection (4), requires to maintain the confidentiality of the information, registers, records, documents or electronic data.

(4) A person must not, without the written permission of the Prosecutor-General, disclose to any other person any confidential information, registers, records, documents or electronic data which came to his or her knowledge in the performance of his or her functions in terms of this Act and relating to the activities, affairs or business of any other person, except -

- (a) for the purpose of performing his or her functions in terms of this Act;
  - (b) in the course of adducing evidence in any criminal proceedings or proceedings in terms of this Act; or
  - (c) when required to do so by an order of a court of law.
- (5) A person who -
- (a) without lawful or reasonable excuse, fails to appear before a judge, divisional magistrate or magistrate in terms of subsection (2) or refuses or fails to give the information referred to in that subsection; or
  - (b) contravenes subsection (4),

commits an offence and is liable on conviction, to a fine not exceeding N\$400 000 or to imprisonment for a period not exceeding 20 years.

### **Sharing of information**

**88.** Notwithstanding the Income Tax Act, 1981 (Act No. 24 of 1981), and with regard to any other secrecy provision in similar legislation, whenever any investigation is instituted in terms of this Act, including an investigation into any offence referred to in Schedule 1, and an investigation into the property, financial activities, affairs or business of any person, the Minister responsible for finance or any official designated by him or her for this purpose, must be notified of that investigation with a view to mutual co-operation and the sharing of information.

**Offences relating to misuse of information and other matters**

- 89.** (1) A person who knows or ought reasonably to have known -
- (a) that information has been disclosed under section 87 or 88; or
  - (b) that an investigation is being, or may be, conducted as a result of the disclosure referred to in paragraph (a),

and who directly or indirectly alerts, or brings information to the attention of another person which will or is likely to prejudice the investigation, commits an offence.

(2) A person who intentionally refuses or fails to comply with an order of court made in terms of this Act, commits an offence.

(3) A person who hinders a *curator bonis*, a member of the police or any other person in the exercise, performance or carrying out of his or her powers, functions or duties in terms of this Act, commits an offence.

- (4) Any person convicted of an offence contemplated in -
- (a) subsection (1) or (2), unless the offence is not one of a failure to comply with a confiscation order or a forfeiture order, is liable to a fine not exceeding N\$300 000, or to imprisonment for a period not exceeding 15 years;
  - (b) subsection (2), if the offence is one of a failure to comply with a confiscation order or a forfeiture order, is liable to a fine not exceeding N\$100 million, or to imprisonment for a period not exceeding 30 years; or
  - (c) subsection (3) is liable to a fine not exceeding N\$50 000, or to imprisonment for a period not exceeding three years.

(5) A conviction and sentence under subsection (4) for a failure to comply with a confiscation order or a forfeiture order does not discharge the order in respect of which a court had convicted or sentenced an offender.

**Rules of court**

**90.** (1) The Judge-President must make rules for the High Court regulating the proceedings contemplated in Chapter 5 and 6 and the Rules Board established by section 25 of the Magistrates' Courts Act, 1944 (Act No. 32 of 1944) must make rules for the magistrate's court regulating the proceedings or matters referred to in sections 32, 33, 62, 84, 85 and 87 of this Act.

**Procedure for certain applications**

**91.** (1) Every application under sections 25, 43, 51, 59 and 64 must be made in the prescribed manner.

(2) The Prosecutor-General may, in cases of urgency, apply to the High Court to dispense with any requirements prescribed for an application made under section 25 or 51.

(3) In an application in terms of subsection (2) the court may have regard to oral evidence and evidence with regard to hearsay provided that that evidence would not render the proceedings unfair.

- (4) In an application in terms of subsection (2) the court may -

- (a) direct the applicant to file complete papers or to adduce further evidence at a date and time specified by the court before deciding whether or not to make an order, including an order referred to in paragraph (b);
- (b) make a provisional order having immediate effect and may simultaneously grant a rule *nisi* calling on the person against whom the order is made to appear on a day mentioned in the rule and to show cause why the order should not be made final.

#### **Functions of *curator bonis***

**92.** (1) Immediately after a *curator bonis* is appointed in terms of this Act, the *curator bonis* must take into his or her custody all the property in respect of which he or she was appointed, as well as any document in the possession or custody or under the control of any person referred to in section 29(1)(b), 43(2)(c), 55(1)(b) or 67(3) if that document relates to the property.

(2) Except as otherwise provided in this Act, the Administration of Estates Act, 1965 (Act No. 66 of 1965), does, with the necessary changes, apply in respect of a *curator bonis* appointed in terms of this Act.

(3) The High Court may dispense with any requirement in terms of any law that applies to the appointment of a *curator bonis* or to the execution of any power or function by a *curator bonis*, including a requirement for a *curator bonis* to provide security.

#### **Staff member may take care of property**

**93.** Where a court may appoint a *curator bonis* in terms of this Act, the court may dispense with such an appointment and direct instead that a staff member will, subject to the directions of the court, take care of the property concerned.

#### **Costs**

**94.** (1) A court may make an order as to costs as it deems appropriate in favour of the Prosecutor-General in respect of any proceedings arising out of Chapter 5 or 6.

(2) Any amount paid in terms of an order referred to in subsection (1) must be deposited into the Fund.

#### **Taxation of costs**

**95.** (1) If the High Court makes provision for a person's reasonable legal expenses under section 26(1) or 57(1) -

- (a) the Prosecutor-General; or
- (b) the *curator bonis*,

may apply to the High Court for an order that the expenses be taxed in accordance with the prescribed rates.

(2) The *curator bonis* or the Prosecutor-General must give notice of an application under this section to the person concerned.

(3) The High Court must, on receipt of an application under this section, order that the expenses be taxed as provided in the order.

(4) After an application is made for an order under this section, the *curator bonis* need not, unless ordered by the court to do so, take any steps for the purpose of meeting the expenses provided for under section 26(1) or 57(1) unless and until -

- (a) an order under this section in relation to the expenses is complied with; or
- (b) the application, and any appeal arising out of it, are finally determined, or otherwise disposed of, other than by the making of such an order.

#### Maximum legal expenses

96. (1) A provision under section 26(1) or 57(1) for the meeting of legal expenses out of any property which is subject to a restraint order or a preservation of property order, must not exceed the prescribed maximum allowable costs for legal services to be met out of that property,

(2) This section limits the amount of the legal expenses which the High Court may provide under section 26(1) or 57(1) to be met out of property which is subject to a restraint order or preservation of property order and does not limit or otherwise affect any entitlement of a legal practitioner to any amount which exceeds any applicable maximum for a legal service.

#### Jurisdiction in respect of sentence

97. (1) A divisional magistrates court has jurisdiction to impose any penalty mentioned in section 11 and 87(5), even though that penalty may exceed the penal jurisdiction of that court.

(2) A district magistrates court has jurisdiction to impose any penalty mentioned in section 13, even though that penalty may exceed the penal jurisdiction of that court.

(3) A district or divisional magistrates court has jurisdiction to make any order referred to in section 32(2), even though the amount payable under that order may exceed the civil jurisdiction of a magistrate's court.

#### Hearings of court to be open to public

98. (1) Subject to this section, the hearings of the court contemplated in this Act, except for *ex parte* applications, must be open to the public.

- (2) If the court, in any proceedings before it, is satisfied that -
  - (a) it would be in the interest of justice; or
  - (b) there is a likelihood that harm may ensue to any person as a result of the proceedings being open,

it may direct that those proceedings be held behind closed doors and that the public must not be present at those proceedings or any part of them.

(3) An application for proceedings to be held behind closed doors may be brought by the Prosecutor-General, the *curator bonis* referred to in section 29 or 55 and any other person referred to in subsection (2)(b), and that application must be heard behind closed doors.

(4) The court may at any time review its decision with regard to the question whether or not the proceedings must be held behind closed doors.

(5) Where the court under subsection (2) on any grounds referred to in that subsection directs that the public must not be present at any proceedings or part of them, the court may -

- (a) direct that information relating to the proceedings, or any part of them, held behind closed doors, must not be made public in any manner;
- (b) direct that a person must not, in any manner, make public any information which may reveal the identity of any witness in the proceedings;
- (c) give any directions in respect of the record of proceedings which may be necessary to protect the identity of any witness,

but the court may authorise the publication of so much information as it considers would be just and equitable.

(6) Any person who discloses any information in contravention of subsection (5) commits an offence and is liable to a fine not exceeding N\$8 000, or to imprisonment for a period not exceeding two years.

#### **Fugitives precluded from participating in proceedings**

**99.** A person -

- (a) who has been summoned or warned to appear in court on a specific date or otherwise made aware that he or she has to appear in court on a specific date and failed to appear in court on that date; or
- (b) in respect of whom a warrant for his or her arrest has been issued and whose attendance in court cannot be secured in spite of all reasonable steps having been taken to execute the warrant,

must not participate in any proceedings under Chapter 5 or 6 for as long as he or she continues to fail to appear in court or that warrant for arrest remains in force and unexecuted.

#### **Regulations**

**100.** (1) The Minister may make regulations -

- (a) with regard to the fees referred to in section 29(3)(c) and 55(2);
- (b) with regard to the nature of the information contemplated in section 9 and the manner in which it is to be reported;
- (c) with regard to the form and manner in which any notice, summons or other legal process required to be prepared, executed or served under this Act is to be prepared, executed or served;
- (c) to prescribe from time to time the maximum allowable costs for legal services provided in connection with an application for a restraint order, a preservation of property order, confiscation order or a forfeiture order or the defending of a criminal charge which may be met out of property that is subject to a restraint order;
- (d) providing for any matter which is required or permitted to be or may be prescribed under any provision of this Act; and

(e) providing for any matter which he or she may consider necessary or expedient to prescribe or to regulate in order to achieve the objects of this Act.

(2) Any regulation made under this section, that may result in financial expenditure for the State must be made in consultation with the Minister responsible for finance.

(3) Any regulation made under this section may provide that any person who contravenes it or fails to comply with it, commits an offence and on conviction liable to a fine not exceeding NS60 000 or to imprisonment for a period not exceeding three years, or to both the fine and imprisonment.

#### **Limitation of liability**

**101.** Any person generally or specifically authorised to perform any function in terms of this Act, is not, in his or her personal capacity, liable for anything done or omitted to be done in good faith under this Act.

#### **Amendment of laws**

**102.** The International Co-operation in Criminal Matters Act, 2000 (Act No.9 of 2000), is amended to the extent set out in Schedule 2.

#### **Short title and commencement**

**103.** (1) This Act is called the Prevention of Organised Crime Act, 2004 (Act No. 29 of 2004) and it will come into operation on a date to be fixed by the Minister by notice in the *Gazette*.

(2) Different dates may be determined under subsection (1) in respect of different provisions of this Act.

(3) Any reference in any provision of this Act to the commencement of this Act must be construed as a reference to the date determined under subsection (2) in relation to that particular provision.

**SCHEDULE 1**  
**OFFENCES**

1. murder;
2. rape, including rape as contemplated in the Combating of Rape Act, 2000 (Act No. 8 of 2000);
3. kidnapping;
4. arson;
5. public violence;
6. robbery;
7. assault with intent to do grievous bodily harm;
8. indecent assault;
9. the statutory offence of -
  - (a) unlawful carnal intercourse with a child under a specified age;
  - (b) committing an immoral or indecent act with a child under a specified age;
  - (c) soliciting or enticing such child to the commission of an immoral or indecent act;
10. any offence under any legislation dealing with gambling, gaming or lotteries;
11. extortion;
12. child stealing;
13. breaking or entering any premises whether under the common law or a statutory provision, with intent to commit an offence;
14. malicious injury to property;
15. theft, whether under the common law or a statutory provision;
16. fraud;
17. forgery or uttering a forged document knowing it to have been forged;
18. offences relating to the coinage;
19. any offence relating to the dealing in or smuggling of ammunition, firearms, explosives or armament and the unlawful possession of such firearms, explosives or armament;
20. any offence in contravention of the Arms and Ammunition Act, 1996 (Act No. 7 of 1996);
21. dealing in, being in possession of or conveying endangered, scarce and protected game or plants or parts or remains thereof in contravention of a statute or provincial ordinance;

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22. any offence relating to exchange control;
23. any offence under any law relating to the illicit dealing in or possession of precious metals or precious stones;
24. defeating or obstructing the course of justice;
25. perjury;
26. subornation of perjury;
27. any offence referred to in this Act;
28. any offence which is punishable by imprisonment for a period of 12 months or more;
29. any offence under the Anti-Corruption Act, 2003 (Act No. 8 of 2003);
30. any conspiracy, incitement or attempt to commit any offence referred to in this Schedule.

**SCHEDULE 2****AMENDMENT OF INTERNATIONAL COOPERATION IN CRIMINAL MATTERS  
ACT, 2000****Amendment of section 1 of the International Co-operation in Criminal Matters  
Act, 2000 (Act No. 9 of 2000.)**

Section 1 of the International Co-operation in Criminal Matters is amended by -

- (a) the substitution for the definition of 'confiscation order' of the following definition:

"'confiscation order' means a confiscation or forfeiture order made under the Prevention of Organised Crime Act, 2004 (Act No. 29 of 2004)";

- (b) the substitution for the definition of 'restraint order' of the following definition:

"'restraint order' means a restraint order or preservation of property order made under the Prevention of Organised Crime Act, 2004 (Act No. 29 of 2004)."

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