

REPUBLIC OF SOUTH AFRICA

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**PREVENTION OF ORGANISED  
CRIME BILL**

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*(As introduced in the National Assembly)*

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(MINISTER OF JUSTICE)

[B 118—98]

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REPUBLIEK VAN SUID-AFRIKA

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**WETSONTWERP OP DIE  
VOORKOMING VAN  
GEORGANISEERDE MISDAAD**

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*(Soos ingedien in die Nasionale Vergadering)*

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(MINISTER VAN JUSTISIE)

[W 118—98]

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**AND WHEREAS** it is the right of every person to be protected from fear, intimidation and physical harm caused by the criminal activities of violent gangs and individuals;

**AND WHEREAS** organised crime and criminal gang activities, both individually and collectively, present a danger to public order and safety and economic stability, and has the potential to inflict social damage;

**AND WHEREAS** the South African common law and statutory law fail to deal effectively with organised crime and criminal gang activities, and also fail to keep pace with international measures aimed at dealing effectively with organised crime and criminal gang activities;

**AND BEARING IN MIND** that it is usually very difficult to prove the direct involvement of organised crime leaders in particular cases, because they do not perform the actual criminal activities themselves, it is necessary to criminalise the management of, and related conduct in connection with enterprises which are involved in illegal conduct and the forfeiture of any interest acquired through such conduct;

**AND WHEREAS** persons should not benefit from the fruits of organised crime, legislation is necessary for the freezing and forfeiture of property in respect of which a reasonable suspicion exists that such property is concerned in the commission or suspected commission of an offence which forms part of a pattern of illegal conduct or where such property is, or is part of, the proceeds of unlawful activities;

**AND WHEREAS** there is a need to devote such forfeited assets and proceeds to the combatting of organised crime;

**AND WHEREAS** the pervasive presence of criminal gangs in many communities is harmful to the well being of those communities, it is necessary to criminalise participation in or promotion of criminal gang activities;

**B** E IT THEREFORE ENACTED by the Parliament of the Republic of South Africa, as follows:—

## CHAPTER 1

### DEFINITIONS

#### Definitions

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

- (i) “authorised police officer” means any officer of the South African Police Service who is authorised by the National Director or the National Commissioner of Police to act under Chapter 3; (v)
- (ii) “board” means a board established in terms of section 35; (xvi) 10
- (iii) “criminal gang” means a formal or informal ongoing or temporary organisation, association, or group that has as one of its primary activities, the commission of criminal acts and that consists of three or more persons who have two or more members who individually or collectively engage in or have engaged in a pattern of criminal gang activity; (xvii) 15
- (iv) “criminal gang member” is a person who is a member of a criminal gang and in considering whether a person is a member of a gang the court may, when applicable, take into account two or more of the following factors, namely that such person—
  - (a) admits to criminal gang membership; 20
  - (b) is identified as a criminal gang member by a parent or guardian;
  - (c) is identified as a criminal gang member by a documented reliable informant;
  - (d) resides in or frequents a particular criminal gang’s area and adopts their style of dress, their use of hand signs, language or their tattoos, and 25 associates with known criminal gang members;

- (e) is identified as a criminal gang member by an informant of previously untested reliability and such identification is corroborated by independent information;
- (f) has been arrested more than once in the company of identified criminal gang members for offences which are consistent with usual criminal gang activity; 5
- (g) is identified as a criminal gang member by physical evidence such as photographs or other documentation; (xviii)
- (v) “Director”, means a Director of Public Prosecutions appointed under section 13(1) of the National Prosecuting Authority Act, 1998 (Act No. . . . of 1998); 10  
(ii)
- (vi) “Fund” means the Criminal Assets Recovery Fund established under section 34; (iv)
- (vii) “enterprise” means any trade, business, profession or other activity of a continuing nature, whether or not carried on for the purposes of deriving a profit and includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact, although not a legal entity; (x) 15
- (viii) “High Court”, includes for the purposes of Chapter 3 any judge thereof; (vi)
- (ix) “illegal conduct” means any act or threat involving an offence referred to in Schedule 1; (xii) 20
- (x) “interest” includes any right; (i)
- (xi) “Investigating Director” means a Director of Public Prosecutions appointed under section 13(1)(b) of the National Prosecuting Authority Act, 1998; (xi) 25
- (xii) “Minister” means the Minister of Justice; (viii) 25
- (xiii) “National Director” means the National Director of Public Prosecutions appointed in terms of section 179(1)(a) of the Constitution; (ix)
- (xiv) “pattern of illegal conduct” means at least two acts of illegal conduct, one of which occurred after the commencement of this Act and the last of which occurred within 10 years (excluding any period of imprisonment) after the commission of a prior act of illegal conduct; (xiv) 30
- (xv) “pattern of criminal gang activity” means the commission or attempted commission of, or conspiracy or solicitation to commit two or more common law or statutory offences contemplated in Schedule 2, by a criminal gang: Provided that at least one of those offences occurred after the date of commencement of Chapter 5 and the last of those offences occurred within three years after a prior offence and the offences are committed on separate occasions, or by two or more persons; (xv) 35
- (xvi) “proceeds of unlawful activities”, means any property or part thereof or any service, advantage, benefit or reward which was derived, received or retained directly or indirectly in connection with or as a result of— 40  
(a) any unlawful activity carried on by any person;  
(b) any act or omission outside the Republic which, if it had occurred in the Republic, would have constituted an unlawful activity, and includes any property representing property so derived; (xiii) 45
- (xvii) “property” means money or any other movable, immovable, corporeal or incorporeal thing and includes any interest therein and all proceeds thereof, rights, privileges, claims and securities; (iii)
- (xviii) “respondent” means a person against whom an application in terms of this Act has been instituted, irrespective of whether he or she has been convicted or not; (xviii) 50
- (xix) “restraining order” means an order referred to in section 6. (vii)

## CHAPTER 2

## OFFENCES, PENALTIES AND CRIMINAL FORFEITURE

## Offences

2. (1) Any person who—
- (a) (i) receives or retains any property derived, directly or indirectly, from a pattern of illegal conduct; 5
  - (ii) knows or ought reasonably to have known that such property is derived, directly or indirectly, from a pattern of illegal conduct; and
  - (iii) uses or invests, directly or indirectly, any part of such property or the proceeds of such property in acquisition of any interest in, or the establishment or operation of, any enterprise; 10
  - (b) through a pattern of illegal conduct, acquires or maintains, directly or indirectly, any interest in or control of any enterprise;
  - (c) whilst employed by or associated with any enterprise, conducts or participates, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of illegal conduct; 15
  - (d) manages the operation 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, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of illegal conduct; 20
  - (e) conspires to violate any of the provisions of paragraphs (b), (c) or (d), within the Republic or elsewhere, shall be guilty of an offence.
- (2) The court may hear evidence that may show that the accused is involved in a pattern of illegal conduct, notwithstanding that such evidence might otherwise be inadmissible, provided that such evidence would not render a trial unfair. 25
- (3) (a) A person shall only be charged of committing an offence contemplated in subsection (1) if authorised thereto in writing by the National Director or a person authorised thereto by him or her.
- (b) The National Director shall only authorise a prosecution referred to in paragraph (a) if in his or her opinion— 30
- (i) there is a reasonable suspicion that a crime has been committed; and
  - (ii) an organised crime has been committed.

## Criminal penalties

3. Any person convicted of an offence referred to in section 2(1) shall be liable to a fine not exceeding R10 million, or to imprisonment for a period not exceeding 30 years. 35

## Criminal forfeiture

4. (1) Any person convicted of an offence referred in section 2 shall forfeit to the State—
- (a) any interest the person has acquired or maintained in violation of section 2;
  - (b) any— 40
    - (i) interest in;
    - (ii) security of;
    - (iii) claim against; or
    - (iv) property or contractual right of any kind affording a source of influence over, 45
 any enterprise which the person has established, operated, controlled, conducted or participated in the conduct of, in contravention of section 2; and
  - (c) any proceeds of unlawful activity which the person derived from a pattern of illegal conduct.

(2) In imposing the sentence contemplated in section 3, the court shall order in addition to any other sentence imposed pursuant to section 3, that the accused person forfeit to the State all property described in subsection (1).

(3) In lieu of a fine otherwise authorised by section 3, a person who derives proceeds from an offence, may be fined not more than twice the gross profits or other proceeds. 5

(4) (a) All right, title and interest in property forfeited in terms of this section vest in the State upon the commission of the act giving rise to forfeiture under this section.

(b) Any such property that is subsequently transferred to a person other than the accused may be the subject of a special verdict of forfeiture and thereafter shall be ordered forfeited to the State, unless the transferee established in a hearing that he or she is a *bona fide* purchaser for value of such property who at the time of purchase was reasonably without cause to believe that the property was subject to forfeiture under this section. 10

### CHAPTER 3

#### RESTRAINT AND FORFEITURE OF ASSETS

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##### Notice of suspicion concerning property

5. (1) The National Director, a Director, or any public prosecutor authorised thereto in writing by the National Director or the Director concerned, may apply to a judge in chambers or a magistrate for an order notifying a person having an interest in or control over property that a reasonable suspicion exists that such property is concerned in the commission or suspected commission of an offence which forms part of a pattern of illegal conduct whether in the Republic or elsewhere. 20

(2) The judge or magistrate shall make an order referred to in subsection (1) if—

(a) the application is supported by an affidavit of an authorised police officer stating— 25

(i) that the said officer suspects that the property referred to in the affidavit is concerned in the commission or suspected commission of an offence which forms part of a pattern of illegal conduct, whether within the Republic or elsewhere; and

(ii) the facts on which that suspicion is based; and 30

(b) the judge or magistrate is satisfied that the suspicion reflected in the affidavit is reasonable.

(3) When a judge or magistrate makes an order under subsection (1) the registrar of the division of the High Court or clerk of the Magistrate's Court for the or district concerned shall issue a notice in the prescribed form to the person referred to in the order, informing him or her that a reasonable suspicion exists that property in which he or she has an interest or over which he or she has control, is concerned in the commission or suspected commission of an offence which forms part of a pattern of illegal conduct whether in the Republic or elsewhere. 35

(4) A notice issued under subsection (3) shall be served on the person concerned in the same manner in which a summons, issued to institute a civil action in a Magistrate's Court, may be served. 40

##### Restraining orders

6. (1) The National Director, a Director, or any public prosecutor authorised thereto in writing by the National Director or the Director concerned, may by way of an *ex parte* application apply to a High Court for an 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 in respect of which a reasonable suspicion exists that— 45

(a) such property is concerned in the commission or suspected commission of an offence which forms part of a pattern of illegal conduct; or 50

(b) such property is, or is part of, the proceeds of unlawful activities, whether within the Republic or elsewhere.

(2) The High Court shall make an order referred to in subsection (1) if—

- (a) the application is supported by an affidavit of an authorised police officer stating—
- (i) that the said officer suspects that the property referred to in the affidavit—
    - (aa) is concerned in the commission or suspected commission of an offence which forms part of a pattern of illegal conduct; or
    - (bb) is, or is part of, the proceeds of unlawful activities, whether within the Republic or elsewhere; and
  - (ii) the facts on which that suspicion is based; and
- (b) the court is satisfied that the suspicion reflected in the affidavit is reasonable.

**Ancillary orders** 10

7. (1) A High Court making a restraining order may, when it makes the order or at any time thereafter, make any ancillary orders that the High Court considers appropriate for the proper, fair and effective execution of the order and the High Court may, without limiting the generality of such an order, make an order—

- (a) for the examination under oath before the High Court of—
- (i) any person who has an interest in property that is subject to the restraining order; or
  - (ii) any other person concerning the nature and location of any property in which he or she has an interest or over which he or she has effective control;
- (b) directing a person who has, or has had, an interest in property that is subject to the restraining order or, if that person is or was a corporate body, a director of the corporate body specified by the High Court, to furnish to the National Director or a Director concerned, or any person authorised thereto by the National Director or the Director concerned, for this purpose, within a period specified in that order, an affidavit setting out such particulars of the property, or dealings with the property, in which he or she has or had an interest as the High Court deems appropriate.

(2) (a) When a High Court order the examination of a person under subsection (1)(a) and that person, after having been sworn or having made an affirmation—

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

he or she shall be guilty of an offence.

(b) When a High Court directs a person to furnish an affidavit under subsection (1)(b) and that person—

- (i) fails to furnish the affidavit to the person and within the period specified in the order; or
- (ii) after having been sworn or having made an affirmation makes a false statement in the affidavit knowing that statement to be false or not believing it to be true,

he or she shall be guilty of an offence.

(c) A person convicted of an offence under this section shall be liable to the penalty prescribed by law for perjury.

**Notice of restraining order**

8. If a High Court makes a restraining order, the National Director or Director concerned shall, as soon as practicable after the making of the order—

- (a) give notice of the order to any person affected by the order; and
- (b) publish a notice of the order in the *Gazette*.

**Duration of restraining orders**

9. A restraining order shall expire 90 days after the date on which notice of the making of the order is published in the *Gazette* unless—

- (a) there is an application for a forfeiture order pending before the High Court in respect of the property, subject to the restraining order;
- (b) there is an unsatisfied forfeiture order in force in relation to the property subject to the restraining order; or
- (c) the order is rescinded before the expiry of that period. 5

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

**10.** (1) In order to prevent property subject to a restraining order from being disposed of or removed contrary to that order, any police officer may seize any such property if he or she has reasonable grounds to believe that such property will be so disposed of or removed. 10

(2) Property seized under subsection (1) shall be dealt with in accordance with the directions of the High Court which made the relevant restraining order.

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

**11.** (1) Where a High Court has made a restraining order, the High Court may at any time— 15

- (a) appoint a *curator bonis* to do, subject to the directions of that Court, any one or more of the following on behalf of the person against whom the restraining order has been made, namely—
  - (i) to perform any particular act in respect of any of or all the property to which the restraining order relates; 20
  - (ii) to take care of the said property;
  - (iii) to administer the said property; and
  - (iv) where the said 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 holding property subject to the restraining order to surrender forthwith, or within such period as that Court may determine, any such property into the custody of the *curator bonis*. 25

(2) The High Court which made an order under subsection (1) may make such 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*— 30

- (a) from the forfeited proceeds if a forfeiture order is made; or
- (b) by the State if no forfeiture order is made.

### **Orders in respect of immovable property subject to restraining order**

**12.** (1) A High Court which has made a restraining order in respect of immovable property may at any time, with a view to ensuring the effective execution of a subsequent order, order the registrar of deeds concerned to endorse any one or more of the restrictions referred to in subsection (2) on the title deed of the immovable property. 35

(2) An order under subsection (1) may be made in respect of the following restrictions, namely—

- (a) that the immovable property shall not without the consent of the High Court be mortgaged or otherwise encumbered; 40
- (b) that the immovable property shall not without the consent of the High Court be attached or sold in execution; and
- (c) that the immovable property shall not without the consent 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 45
  - (ii) where the owner of that immovable property is a company or other corporate body which is being wound up, form part of the assets of such company or corporate body. 50

(3) In order to give effect to subsection (1), the registrar of deeds concerned shall—

- (a) make the necessary entries in his or her registers and the necessary endorsement on the office copy of the title deed, and thereupon any such restriction shall be 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 the immovable property prior to the endorsement of the restriction on the title deed of the immovable property, but shall lapse on the transfer of ownership of the immovable property concerned; 5
- (b) when the original of the title deed is produced to him or her, make the necessary endorsement thereon. 10
- (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 shall vest 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 corporate body, such company or corporate body is being wound up, 15
- in the person in whom the said custody would have vested if such a restriction were not so endorsed.
- (5) Where the High Court granted its consent in respect of a restriction contemplated in subsection (2)(c) and endorsed on the title deed of immovable property, the immovable property shall be deemed— 20
- (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 such a restriction were 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 such company or juristic person as if such a restriction were not so endorsed. 25
- (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** 30

- 13.** (1) A High Court granting a restraining order may make provision as it deems fit for—
- (a) reasonable living expenses of a person holding an interest in property subject to a restraining order and his or her family or household; and
- (b) reasonable legal expenses of such a person in connection with any proceedings instituted against him or her in terms of this Act or any other related criminal proceedings. 35
- (2) A High Court shall not make provision for any expenses under subsection (1) unless it is satisfied that—
- (a) the person cannot meet the expenses concerned out of his or her unrestrained property; 40
- (b) the property is acquired legally;
- (c) the person has disclosed under oath all his or her interests in the property and has submitted to that Court a sworn and full statement of all his or her assets and liabilities; and 45
- (d) the person has taken all reasonable steps to bring all of his or her interests in the property within the jurisdiction of that Court.

**Maximum legal expenses that can be met from restrained property**

- 14.** (1) Despite provision in a restraining order for the meeting of legal expenses out of any property to which the order applies, a legal expense is not to be met out of that property to the extent that the amount payable for any legal service concerned exceeds any prescribed maximum allowable cost for that service. 50
- (2) This section operates only to limit the amount of the legal expenses that a High Court may provide for under section 13 to be met out of property that is subject to a restraining order and does not limit or otherwise affect any entitlement of a legal 55

practitioner to be paid or to recover for a legal service any amount that exceeds any applicable maximum.

### **Taxation of legal expenses**

15. (1) If a High Court granting a restraining order makes provision for a person's reasonable legal expenses— 5
- (a) the National Director or a Director; or
  - (b) the *curator bonis*,
- may apply to the High Court for an order under this section.
- (2) The *curator bonis* or the National Director or the Director concerned, must give notice of an application under this section to the person concerned. 10
- (3) On an application under this section, the High Court must 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, except as ordered by the High Court, take any steps for the purpose of meeting the expenses as provided by the restraining order unless and until— 15
- (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, otherwise than by the making of such an order.

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

16. (1) (a) Any person affected by a restraining order may at any time apply for the variation or rescission of the order. 20
- (b) A High Court which made a restraining order—
- (i) may at any time vary or rescind the restraining order if it deems it necessary in the interests of justice; or
  - (ii) shall rescind the restraining order if the proceedings against the defendant in question are concluded. 25
- (2) (a) Any person affected by an order for the appointment of a *curator bonis* may at any time apply—
- (i) for the variation or rescission of the order;
  - (ii) for the variation of the terms of the appointment of the *curator bonis* concerned; or 30
  - (iii) for the discharge of the *curator bonis*.
- (b) A High Court which made an order for the appointment of a *curator bonis*—
- (i) may, if it deems it necessary in the interests of justice, at any time— 35
    - (aa) vary or rescind the order;
    - (bb) vary the terms of the appointment of the *curator bonis* concerned; or
    - (cc) discharge that *curator bonis*;
  - (ii) shall rescind the order and discharge the *curator bonis* concerned if the relevant restraining order is rescinded.
- (3) (a) Any person affected by an order in respect of immovable property may at any time apply for the rescission of the order. 40
- (b) A High Court which made an order in respect of immovable property—
- (i) may, if it deems it necessary in the interests of justice, at any time rescind the order; or
  - (ii) shall rescind the order if the relevant restraining order is rescinded. 45
- (c) If an order in respect of immovable property is rescinded, the High Court shall direct the registrar of deeds concerned to cancel any restriction endorsed by virtue of that order on the title deed of immovable property, and that registrar of deeds shall give effect to any such direction.

### **Application for forfeiture order** 50

17. (1) If a restraining order is in force the National Director, the Director concerned or any public prosecutor authorised thereto in writing by the National Director or Director concerned, may apply to a High Court for an order forfeiting to the State all or

any of the property that is subject to the restraining order when the forfeiture order takes effect.

(2) The National Director or Director concerned shall give 14 days notice of an application under subsection (1) to any person who may be affected by the order applied for.

(3) Any person who may be affected by the order applied for under subsection (1) may appear at the application—

(a) to oppose the making of the order; or

(b) to apply for an order excluding his or her interest in the property concerned from the operation of the order,

and adduce evidence at the hearing of the application.

### **Making of forfeiture order**

**18.** (1) The High Court shall, unless cogent reasons exist to the contrary, make an order applied for under section 17(1) if the Court finds on a balance of probabilities that the property in question—

(a) is concerned in the commission or suspected commission of an offence which forms part of a pattern of illegal conduct; or

(b) is, or is part of, the proceeds of unlawful activities, whether within the Republic or elsewhere.

(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 such an order.

(3) The absence of a person entitled to be given notice of an application for a forfeiture order does not prevent the High Court from making the order.

(4) The setting aside of a conviction for an offence which forms part of a pattern of illegal conduct does not affect the validity of an order under subsection (1) that was made before or after the conviction was set aside and was based on that offence.

(5) The Registrar of the Court making a forfeiture order must publish a notice of the making of the order in the *Gazette* as soon as practicable after the order is made.

(6) A forfeiture order shall not take effect—

(a) before the period allowed for an application under section 20 or an appeal under section 21 has expired; or

(b) before such an application or appeal has been disposed of.

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

**19.** (1) The High Court may, when it makes a forfeiture order or at any time thereafter, make an order excluding certain interests in property subject to the order from the operation thereof.

(2) The High Court may make an order under subsection (1) if it finds on a balance of probabilities that—

(a) the interest concerned was not acquired illegally; and

(b) the person holding that interest did not know or did not have reasonable grounds to suspect that the property in which the interest is held—

(i) is concerned in the commission or suspected commission of an offence which forms part of a pattern of illegal conduct; or

(ii) is, or is part of, the proceeds of unlawful activities, whether within the Republic or elsewhere.

(3) In an application for an order under subsection (1) the State may submit a return of the service on the applicant of a notice issued under section 5(3) as evidence that on a balance of probabilities the applicant knew or had reasonable grounds to suspect that at any time since the date of such service the property in which the interest is held had been concerned in the commission or suspected commission of an offence which forms part of a pattern of illegal conduct whether within the Republic or elsewhere.

(4) A High Court making an order for the exclusion of an interest in property under subsection (1) may, in the interest of the administration of justice or in the public interest, make that order upon the conditions that the Court deems appropriate including a condition requiring the person who applied for the exclusion to take all reasonable steps, within a period that the Court may determine, to prevent the future use of the property in illegal conduct. 5

(5) An order under subsection (1) may not be granted after the forfeiture order has taken effect.

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

20. (1) Any person affected by a forfeiture order who was entitled to receive notice of the application for the order under section 17(2), but did not receive such notice, may, within 30 days after the notice of the making thereof is published in the *Gazette*, apply for an order excluding his or her interest in the property concerned from the operation of the order. 10

(2) The application shall be accompanied by an affidavit setting forth— 15

(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 20

(d) the relief sought.

(3) The hearing of the application shall, 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. 25

(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 National Director, Director concerned or the *curator bonis* concerned, or a person authorised in writing thereto by them, may present evidence and witnesses in rebuttal and in defence of their claim to the property and may cross-examine a witness who appears at the hearing. 30

(7) In addition to the testimony and evidence presented at the hearing, the High Court may, upon application by the National Director, Director concerned or the *curator bonis* concerned, or a person authorised in writing thereto by them, order that the testimony of any witness relating to the property forfeited, be taken by commission and that any book, paper, document, record, recording, or other material not privileged be produced at the taking down of such testimony by commission. 35

(8) The High Court may upon an application under subsection (1), make an order excluding certain interests in property from the operation of a forfeiture order if it finds on a balance of probabilities that— 40

(a) the interest concerned was not acquired illegally; and

(b) the person holding that interest did not know or did not have reasonable grounds to suspect that the property in which the interest is held—

(i) is concerned in the commission or suspected commission of an offence which forms part of a pattern of illegal conduct; or 45

(ii) is, or is part of, the proceeds of unlawful activities,

whether committed within the Republic or elsewhere.

(9) (a) When a person who testifies under this section—

(i) fails to answer fully and to the best of his or her ability any question lawfully put to him or her; or 50

(ii) gives false evidence knowing that evidence to be false or not believing it to be true,

he or she shall be guilty of an offence.

(b) When 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 shall be guilty of an offence. 55

(c) A person convicted of an offence under this subsection shall be liable to the penalty prescribed by law for perjury.

### **Appeal against forfeiture order**

**21.** (1) Any person affected by a forfeiture order who appeared at the hearing of the application under section 19(3), may, within 30 days after notice of the making thereof is published in the *Gazette*, appeal against such order to the High Court having jurisdiction. 5

(2) On appeal such court may make such order in the matter as it deems fit.

### **Effect of forfeiture order**

**22.** (1) 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. 10

(2) Upon a forfeiture order taking effect the *curator bonis* may take possession of that property on behalf of the State from any person in possession, or entitled to possession, of the property.

### **Satisfaction of forfeiture order**

**23.** (1) The *curator bonis* must, subject to any order for the exclusion of interests in forfeited property under section 19(2)(a) or 20(8) dispose of property forfeited under section 19 by sale or any other means subject to the directions of the High Court. 15

(2) Any right or interest in forfeited property not exercisable by or transferable to the State, shall expire and shall not revert to the person who has possession, or was entitled to possession, of the property immediately before the forfeiture order took effect. 20

(3) No 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, shall be eligible to purchase forfeited property at any sale held by the *curator bonis*. 25

(4) The *curator bonis* shall deposit into the State Revenue Fund any proceeds of any sale or disposition of forfeited property and any moneys forfeited.

(5) The expenses incurred in connection with the forfeiture and the sale, including expenses of seizure, maintenance and custody of the property pending its disposition, advertising and court costs shall be defrayed out of moneys appropriated by Parliament for that purpose. 30

### **Pattern of illegal conduct may form the basis of multiple orders**

**24.** The fact that a restraining order or a forfeiture order has been made on the basis of a pattern of illegal conduct in which a specific person has been involved does not prevent the making of another or other restraining orders or forfeiture orders on the basis of the conduct. 35

### **Privilege**

**25.** (1) A person being examined as contemplated in section 7 or 20 is not excused from answering any question, or from producing any document or other thing, on the ground that— 40

(a) the answer or production might incriminate, or tend to incriminate, him or her or make him or her liable to a forfeiture;

(b) the production of a document would be in breach of an obligation or other restriction on the disclosure of information, whether imposed by any law, the common law or any agreement of the person not to disclose the existence or contents of the document; or 45

- (c) the answer or production would disclose information that is the subject of legal professional privilege, unless—
- (i) that disclosure relates to information communicated to a legal representative so as to enable such legal representative to provide advice, to defend or to render other legal assistance to a client in connection with an offence under any law, of which that client is charged, in respect of which he or she has been arrested or summoned to appear in the High Court or in respect of which an investigation with a view to instituting criminal proceedings is being conducted against him or her; and
  - (ii) that client does not consent to the disclosure or production.
- (2) A statement or disclosure made by a person in answer to a question put in the course of an examination under section 7 or 20, or any document or other thing obtained as a consequence of the statement or disclosure, is not admissible against that person in any civil or criminal proceedings except proceedings that comprise—
- (a) criminal proceedings where the person concerned stands trial on a charge referred to in section 7(2)(a) or (b) or 20(9) or in section 319(3) of the Criminal Procedure Act, 1955 (Act No. 56 of 1955);
  - (b) proceedings on an application under this Act;
  - (c) proceedings ancillary to an application under this Act;
  - (d) proceedings for enforcement of a confiscation order; or
  - (e) in the case of a document or other thing, civil proceedings for or in respect of a right or liability it confers or imposes.
- (3) A person directed by an order under section 7 to furnish a statement to the National Director, a Director, or any person authorised thereto by the National Director or Director concerned, for this purpose, is not excused from—
- (a) furnishing the statement; or
  - (b) setting out particulars in the statement,
- on the ground that the statement or particulars might incriminate, tend to incriminate, the person or make the person liable to a forfeiture or penalty.
- (4) If a person furnishes a statement to the National Director, the Director concerned or such an authorised person for such purpose, in accordance with an order made under section 7, the statement is not admissible against the person in any criminal proceedings except proceedings where the person concerned stands trial on a charge under section 7(2)(a) or (b) or in section 319(3) of the Criminal Procedure Act, 1955 (Act No. 56 of 1955).

### Access to information

- 26.** (1) Any person or institution shall, notwithstanding anything to the contrary contained in any law or contrary to any agreement, custom or practice, which prohibits or precludes him, her or it—
- (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 the said activities, affairs or business,
- disclose and furnish, or grant access to the National Director, an Investigating Director or a Director, or any person authorised by any of them for this purpose, all information which such Director or authorised person may consider necessary for any investigation in terms of this Act, and permit such Director or authorised person to have access to any registers, records, documents, and electronic data, which in the opinion of such Director or authorised person, may be relevant to such investigation: Provided that this subsection shall not apply when an obligation of secrecy or restriction is based on the common law right to professional privilege between an attorney and his or her client in respect of information communicated to the attorney so as to enable him or her to provide advice, to defend or to render other legal assistance to the client in connection with an offence under any law, of which the client is charged, in respect of which he or she has been arrested or summoned to appear in court or in respect of which an

investigation with a view to instituting criminal proceedings is being conducted against him or her.

(2) The provisions of subsection (1) shall not be construed as prohibiting any Minister by whom or any other departmental 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 such information or the granting of the access contemplated in that subsection and according to which the information or access shall be furnished or granted or with regard to any reasonable safeguards which any such Minister, authority, board, institution, body or person, subject to the provisions of subsection (4), requires to maintain the confidentiality of such information, registers, records, documents or electronic data.

(3) Any person or institution who or which, without just cause shown by him, her or it, refuses, fails or neglects to—

(a) disclose, furnish, produce or make available any information, registers, records, documents or electronic data or permit any access thereto;

(b) reply to or answer truly and fully to any questions put to him or her by any Director or authorised person referred to in subsection (1),

shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding two years.

(4) (a) No person shall without the permission of the National Director, Investigating Director or Director 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—

(i) for the purpose of performing his or her functions in terms of this Act;

(ii) in any criminal proceedings or proceedings in terms of this Act; or

(iii) when required to do so by an order of a court of law.

(b) Any person who contravenes paragraph (a) shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding two years.

### **Investigations**

27. Investigations into organised crime relating to offences in terms of this Act or any other offences referred to in Schedule 1 or 2, may be conducted in terms of the powers, duties and functions conferred or imposed on or assigned to an investigator in terms of the provisions of any other law: Provided that whenever the National Director, an Investigating Director or a Director has reason to believe that any person may be in possession of information relevant to the commission or intended commission of such alleged offences, or any person or enterprise may be in possession, custody or control of any documentary material relevant to such alleged offences, he or she may, prior to the institution of any civil or criminal proceeding, direct the institution of an investigation in terms of the provisions of Chapter 5 of the National Prosecuting Authority Act, 1998.

### **Sharing of information**

28. Whenever any investigation is instituted in terms of this Act, including an investigation into any offence referred to in Schedule 2, and an investigation into the property, financial activities, affairs or business of any person, the Commissioner of the South African Revenue Services or any official designated by him or her for this purpose, shall be notified of such investigation with a view to mutual co-operation and the sharing of information.

### **Application of Chapter to deceased persons**

29. (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 to the person's legal representative.

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

(3) An order may be applied for and made under this Chapter—

- (a) in respect of a person's property or interest in property even if the person is deceased; and
- (b) on the basis of the activities of a person who is deceased.

### **Effect of death of joint owner of restrained property**

**30.** (1) If a person has an interest in property as joint owner of the property, the person's death after a restraining 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 restraining order continues to apply to the interest as if the person had not died.

(2) A forfeiture order made in respect of that interest 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 restraining order ceases to apply to that interest without a forfeiture order being made in respect of that interest.

### **Expedition of actions**

**31.** (a) In any action instituted under this Chapter by the State, the National Director may file with the Registrar of the High Court concerned a certificate stating that in his or her opinion the case is of general public importance.

(b) A copy of that certificate shall be furnished immediately by such Registrar to the Judge President of the High Court concerned or in his or her absence to the Acting Judge President or the Deputy Judge President of that Court.

(c) Upon receipt of such copy, such Judge President, Acting Judge President or Deputy Judge President, as the case may be, shall designate immediately a judge of that Division of the High Court to hear and determine the action.

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

**32.** (1) (a) Subject to the provisions of this section, the hearings of the court contemplated in sections 7, 17 and 20 shall be open to the public.

(b) If the High Court, in any proceedings before it, is satisfied that—

- (i) it would be in the interest of justice; or
- (ii) there is a likelihood that harm may ensue to any person as a result of the proceedings being open,

it may direct that such proceedings be held behind closed doors and that the public or any category thereof shall not be present at such proceedings or any part thereof.

(c) An application for proceedings to be held behind closed doors may be brought by the National Director or the Director or a person authorised thereto by the National Director or the Director concerned, the *curator bonis* referred to in section 10(1) and any other person referred to in paragraph (b)(ii), and such application shall be heard behind closed doors.

(d) The High Court may at any time review its decision with regard to the question whether or not the proceedings shall be held behind closed doors.

(2) Where the High Court under subsection (1)(b) on any grounds referred to in that subsection directs that the public or any category thereof shall not be present at any proceedings or part thereof, the High Court may—

- (a) direct that no information relating to the proceedings, or any part thereof held behind closed doors, shall be made public in any manner;
- (b) direct that no person, in any manner, make public any information which may reveal the identity of any witness in the proceedings;

- (c) give such directions in respect of the record of proceedings as may be necessary to protect the identity of any witness:

Provided that the High Court may authorize the publication of so much information as it considers would be just and equitable.

- (3) Any person who discloses any information in contravention of subsection (2) shall be guilty of an offence and liable on conviction to a fine, or to imprisonment for a period not exceeding two years. 5

### **Protection of witnesses**

**33.** (1) When the High Court is satisfied that any person who testifies or who has been requested to testify on any matter dealt with by it, has reason to believe that his or her safety or the safety of any member of his or her family or household is being threatened by any person or any group or category of persons, whether known to him or her or not, who have— 10

- (a) caused or wish to cause him or her harm as a result of the evidence which he or she has given; 15  
 (b) attempted to prevent or wish to prevent him or her from giving evidence; or  
 (c) attempted to persuade or wish to persuade him or her to give evidence to a particular effect,

as the case may be, the High Court may, on the written application of any such person, direct that such person be dealt with in terms of the witness protection legislation applicable in respect of criminal cases. 20

- (2) Any person who in, or in connection with, an application referred to in subsection (1) wilfully furnishes information or makes a statement which is false or misleading, shall be guilty of an offence and liable on conviction to the punishment prescribed for the offence of perjury. 25

### **Procedure and rules of court**

**34.** (1) Subject to the provision of this Chapter, the provisions of the Supreme Court Act, 1959 (Act No. 59 of 1959), and the rules made under section 43 of that Act shall, with the necessary changes, apply in relation to proceedings in terms of this Chapter except in so far as those rules are inconsistent with procedures prescribed in this Chapter. 30

(2) (a) Notwithstanding anything to the contrary in any law relating to attachment to found or confirm jurisdiction, a High Court in the exercise of its powers in terms of this Chapter, may make an order for attachment of the property concerned although the claimant is not an *incola* either of the area of jurisdiction of that High Court or of the Republic. 35

(b) A High Court may make an order for the attachment of property not within the area of jurisdiction of the Court at the time of the application of the order, and such order may be carried into effect when the property comes within the area of jurisdiction of the Court. 40

## **CHAPTER 4**

### **CRIMINAL ASSETS RECOVERY FUND**

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

**35.** The Minister may, in consultation with the Minister of Finance, by notice in the *Government Gazette*, and after one year of the commencement of this Act, establish a fund to be known as the Criminal Assets Recovery Fund. 45

#### **Management of Fund**

**36.** (1) The Fund shall be managed by a board appointed by the Minister after consultation with the Minister of Finance.

- (2) The board shall be a juristic person. 50

(3) The board shall consist of not more than seven members, of whom at least two members shall be appointed on a full-time basis.

(4) (a) A full-time member of the board shall hold office for such period, but not exceeding five years, as the Minister may determine at the time of the appointment.

(b) Any other member of the board shall hold office for the period determined by the Minister at the time of the appointment.

(5) A member of the board whose period of office has expired, shall be eligible for 5  
reappointment.

(6) The Minister may terminate the period of office of any member if in his or her opinion there are good reasons for doing so.

(7) No resolution of the board or any action taken on the authority of the board shall be invalid by reason only of a vacancy on the board. 10

(8) The Minister shall, in consultation with the Minister of Finance, designate a full-time member of the board as chairperson of the board and another such member as deputy chairperson of the board.

(9) The quorum for any procedure at meetings of the board shall be as prescribed.

(10) A member who is not an officer of the public service shall be paid such 15  
remuneration and allowances from the Fund as the Minister may, with the concurrence of the Minister of Finance, determine.

### Objects of board

37. The objects of the board shall be—

(a) to manage the moneys paid into the Fund in terms of this Act; 20

(b) to render financial assistance to law enforcement agencies in order to combat organised crime and criminal gang activities in general;

(c) with due regard to the financial position of the Fund and the requirements of each case, to render such assistance as the board may deem fair and reasonable, to— 25

(i) the victims of any illegal conduct or criminal gang activities in respect of their medical treatment and rehabilitation;

(ii) such victims and their dependants who suffer financial hardship or financial distress caused directly or indirectly by any illegal conduct or criminal gang activity; 30

(iii) the victims and their dependants of any offences contemplated in the Proceeds of Crime Act, 1996;

(d) with due regard to the financial position of the Fund and the requirements of each case, to make money available to organisations which in the opinion of the board are capable of rendering assistance to persons with psychosocial 35  
problems and of rendering social relief of distress as the board may deem fair and reasonable to members of communities that in the opinion of the board are victims of organised crime and criminal gang activities.

### Committees of board

38. (1) The board may, in the prescribed manner and subject to the prescribed 40  
conditions and such further conditions as the board may determine, appoint, either among its own members or otherwise, such committees it deems necessary or expedient for the achievement of its objects or for the exercise or performance of its powers or functions.

(2) The board may delegate any of its powers or functions to any of its committees, 45  
but shall not be diverted of any power so delegated and may amend or withdraw any decision taken by such a committee by virtue of such delegation.

(3) The functions of a committee shall be determined by the board and the procedure at the meetings of a committee shall be as prescribed.

(4) If a board appoints a committee, it shall designate one of the members of such 50  
committee as the chairperson thereof.

### Powers and functions of board

39. (1) The board may exercise such powers and shall perform such functions as may be conferred or imposed upon it by this Chapter, and may exercise such powers as may be necessary or expedient for or incidental to the achievement of its objects. 55

(2) The board may—

(a) undertake such investigation into any matter relating to its objects as it may deem necessary;

- (b) purchase or otherwise acquire, hold, alienate or hypothecate any movable property and, with the consent of the Minister acting with the concurrence of the Minister of Finance, any immovable property;
- (c) hire or let movable or immovable property;
- (d) enter into any agreements relating to its objects on such terms and conditions as it may deem fit.

#### **Finances of the board**

- 40.** (1) The Fund shall consist of—
- (a) all moneys derived from the execution of confiscation orders contemplated in the Proceeds of Crime Act, 1996;
  - (b) the balance of all moneys derived from the execution of foreign confiscation orders as defined in the International Co-operation in Criminal Matters Act, 1996 (Act No. 75 of 1996), after payments have been made to requesting States in terms of that Act;
  - (c) the moneys transferred to it in terms of this Act;
  - (d) any moneys appropriate by Parliament for purposes of the Fund;
  - (e) domestic and foreign grants;
  - (f) any amount of money received or acquired from any other source.
- (2) The board shall apply the moneys of the Fund in respect of which it has been appointed and with which the Fund has been credited, to the achievement of its objects and to the defrayal of the costs in connection with the performance of its functions.
- (3) The board shall deposit all the moneys received by it in an account which it shall open with a banking institution, designated by the Minister in concurrence with the Minister of Finance, registered in terms of the Banks Act, 1990 (Act No. 94 of 1990).
- (4) The financial year of a fund shall terminate on 31 March in each year.
- (5) The board shall keep the prescribed accounts, records and registers of all its financial transactions, and shall furnish the Minister with the prescribed reports and financial statements.
- (6) The accounts, records, registers and financial statements of a board shall be audited by the Auditor-General.

#### **Performance of administrative work of board**

**41.** The administrative work, including the receipt and disbursement of money incidental to the performance of the functions or the exercise of the powers of the board or of any committee of the board shall be performed by officers in the public service designated by the Director-General: Justice and who shall be under his or her control.

### **CHAPTER 5**

#### **PREVENTION OF CRIMINAL GANG ACTIVITIES**

##### **Gang related offences**

- 42.** (1) Any person who—
- (a) wilfully promotes, furthers, contributes, assists or participates in any pattern of criminal gang activity;
  - (b) performs any act which is aimed at causing, bringing about, promoting or contributing towards such criminal activities of criminal gangs;
  - (c) conspires with any other person to commit, bring about or perform any act referred to in paragraph (a) or (b), or aids in the commission, bringing about or performance thereof;
  - (d) incites, instigates, commands, aids, advises, encourages or procures any other person to commit, bring about or perform such act; or
  - (e) intentionally causes, encourages, recruits, incites, instigates, commands, aids or advises another person to join a criminal gang that requires as a condition of membership, or continued membership, the commission of any offence,
- is guilty of an offence.

(2) Nothing in this section shall be construed to limit prosecution under any other provision of the law.

(3) No person shall be convicted of a contravention of subsection (1) based upon speech alone, except where it is shown that the speech itself threatened violence against a specific person, that the accused person had the apparent ability to carry out the threat, and that physical harm was eminently likely to occur. 5

#### **Penalties in respect of gang related offences**

43. (1) Any person convicted of an offence contemplated in—
- (a) section 42(a) or (b) shall be liable to a fine, or to imprisonment for a period not exceeding three years; 10
  - (b) section 42(c), (d) or (e), shall be liable to a fine, or to imprisonment for a period not exceeding two years.

(2) If the offence contemplated in section 42 is committed on the premises or grounds of, or within 300 metres of a public or private school during hours in which the facility is open for classes or school related programmes or when minors are using the facility, such circumstance may, when appropriate, be regarded as an aggravating factor. 15

#### **Membership of a criminal gang aggravating factor in respect of any offence**

44. If a court, after having convicted the accused of any offence, other than an offence contemplated in this Chapter, finds that the accused was a member of a criminal gang at the time of the commission of the offence, such factor may be regarded as an aggravating factor for sentencing purposes. 20

### **CHAPTER 6**

#### **GENERAL PROVISIONS**

##### **Jurisdiction of courts in respect of penalties**

45. (1) A regional court shall have jurisdiction to impose any penalty mentioned in section 3, even though that penalty may exceed the punitive jurisdiction of that court. 25
- (2) A magistrate's court shall have jurisdiction to impose any penalty mentioned in section 43, even though that penalty may exceed the punitive jurisdiction of that court.

##### **Regulations**

46. (1) The Minister may make regulations— 30
- (a) to prescribe from time to time the maximum allowable costs for legal services provided in connection with an application for a restraining order or forfeiture order or the defending of a criminal charge which may be met out of property that is subject to a restraining order;
  - (b) relating to any matter which is required to be or may be prescribed under any provision of this Act. 35

(2) Regulations under subsection (1)(a) may prescribe costs by applying, adopting or incorporating, with or without modification, the provisions of any act or any instrument made under an act or of any other publication, whether of the same or a different kind, as in force on a particular day or as in force for the time being. 40

##### **Liability**

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

##### **Amendment of laws** 45

48. (a) The Drugs and Drug Trafficking Act, 1992 (Act No. 140 of 1992), is hereby amended to the extent set out in Schedule 3.

(b) The Proceeds of Crime Act, 1996 (Act No. 76 of 1996), is hereby amended to the extent set out in Schedule 4.

(c) The International Co-operation in Criminal Matters Act, 1996 (Act No. 75 of 1996), is hereby amended to the extent set out in Schedule 5.

### Transitional arrangement

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**49.** As from the date determined in section 50(2), section 23 shall be amended by the substitution for section 23 of the following section:

#### “Satisfaction of forfeiture order

<p><b>23.</b> (1) The <i>curator bonis</i> must, subject to any order for the exclusion of interests in forfeited property under section 19(2)(a) or 20(8)—</p> <p>(a) dispose of property forfeited under section 19 by sale or any other means subject to the directions of the High Court; or</p> <p>(b) if so directed by the Board, transfer such property to the Fund.</p> <p>(2) Any right or interest in forfeited property not exercisable by or transferable to the State, shall expire and shall not revert to the person who has possession, or was entitled to possession, of the property immediately before the forfeiture order took effect.</p> <p>(3) No 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, shall be eligible to purchase forfeited property at any sale held by the <i>curator bonis</i>.</p> <p>(4) The proceeds of any sale or disposition of forfeited property and any moneys forfeited shall be used to pay all proper expenses for the forfeiture and the sale, including expenses of seizure, maintenance and custody of the property pending its disposition, advertising and court costs.</p> <p>(5) The <i>curator bonis</i> shall deposit into the Fund any proceeds of any sale or disposition of forfeited property and any moneys forfeited remaining after the payment of the expenses referred to in subsection (4).”</p>	<p>10</p> <p>15</p> <p>20</p> <p>25</p>
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### Short title and commencement

**50.** (1) This Act shall be called the Prevention of Organised Crime Act, 1998, and shall come into operation on a date fixed by the President in the *Gazette*. 30

(2) The provisions of Chapter 4 shall come into operation on a date determined by the Minister in consultation with the Minister of Finance.

**SCHEDULE 1****(Sections 1, 27 and 28)**

Any act or threat, within the Republic or elsewhere, involving—

murder;

rape;

kidnapping;

arson;

public violence;

robbery;

indecent assault;

corruption;

childstealing;

breaking or entering any premises whether under the common law or a statutory provision, with intent to commit an offence;

malicious injury to property;

theft, whether under the common law or a statutory provision;

receiving stolen property knowing it to be stolen;

fraud;

forgery or uttering a forged document knowing it to have been forged;

offences relating to the coinage;

any offence referred to in section 13(f) of the Drugs and Drug Trafficking Act, 1992 (Act No. 140 of 1992);

any offence relating to the dealing in or smuggling of ammunition, firearms, explosives or armament;

any offence relating to exchange control, extortion, forgery or uttering;

any offence under any law relating to the illicit dealing in or possession of precious metals or precious stones;

any conspiracy, incitement or attempt to commit any offence referred to in this Schedule;

contravention of an offence contemplated in the Intimidation Act, 1982 (Act No. 72 of 1982).

Any offence referred to in the Proceeds of Crime Act, 1996 (Act No. 76 of 1996).

**SCHEDULE 2****(Sections 1, 27 and 28)**

Treason.  
Sedition.  
Public violence.  
Murder.  
Culpable homicide.  
Rape.  
Indecent assault.  
Robbery.  
Kidnapping.  
Childstealing.  
Assault, when a dangerous wound is inflicted.  
Arson.  
Malicious injury to property.  
Breaking or entering any premises, whether under the common law or a statutory provision, with intent to commit an offence.  
Theft, whether under the common law or a statutory provision.  
Receiving stolen property knowing it to have been stolen.  
Fraud, forgery or uttering a forged document knowing it to have been forged.  
Offences relating to the coinage.  
Contravention of an offence contemplated in the Intimidation Act, 1982 (Act No. 72 of 1982).  
Contravention of section 54 of the Internal Security Act, 1982 (Act No. 74 of 1982).  
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.  
Contravention of a law of exchange control.  
Defeating or obstructing the course of justice.  
Any conspiracy, incitement or attempt to commit any offence referred to in this Schedule.

## SCHEDULE 3

## Amendment to Sections of the Drugs and Drug Trafficking Act, 1992

(Act No. 140 of 1992)

## (Section 47)

1. Amendment of section 1 by—
  - (a) the deletion of the definition of “convert”;
  - (b) the deletion of the definition of “defined crime”;
  - (c) the deletion of the definition of “economic offence”;
  - (d) the deletion of the definition of “financial institution”; and
  - (e) the deletion of the definition of “proceeds”.
2. The repeal of section 6.
3. The repeal of section 7.
4. The amendment of section 9 by the substitution for subsection (1) of the following subsection:

“(1) Any person may, notwithstanding anything to the contrary contained in any law which prohibits him or her—

  - (a) from disclosing any information relating to the affairs or business of any other person; or
  - (b) from permitting any person to have access to any registers, records or other documents which have a bearing on the said affairs or business, or to disclose to any attorney-general or designated officer such information as he or she may consider necessary for the prevention or combatting, whether in the Republic or elsewhere, of a drug offence [or an economic offence, or permit any designated officer to have access to any registers, records or other documents which may in his opinion have a bearing on the latter information.]”.
5. The amendment of section 10 by the deletion of subsection (2).

## SCHEDULE 4

## Amendments to Sections of the Proceeds of Crime Act, 1996

(Act No. 76 of 1996)

## (Section 47)

1. Amendment of section 1 by the substitution in subsection (1) for the definition of “proceeds” of the following definition:

“ ‘proceeds’, in relation to an offence under Chapter 5, means any property or part thereof which was derived, received or retained directly or indirectly in connection with or as a result of—

(a) the commission in the Republic of **[such]** an offence; or

(b) any act or commission outside the Republic which, if it had occurred in the Republic, would have constituted **[such]** an offence, and includes any property representing property so derived;”.

2. The substitution for section 2 of the following section:

**“Persons who have benefited from crime**

2. For the purposes of **[this Act]** Chapter 2, a person has benefited from crime if he or she has at any time, whether before or after the commencement of this Act, received any advantage, payment, service or **[other]** reward including any property or part thereof in connection with any criminal activity carried on by him or her or by any other person.”.

3. The substitution for section 3 of the following section:

**“Proceeds of crime**

3. For the purposes of **[this Act]** Chapter 2, any advantage, payment, service or **[other]** reward, including any property or part thereof, received or held by the defendant or over which the defendant has effective control at any time, whether before or after the commencement of this Act, in connection with any criminal activity carried on by him or her or any other person, shall be his or her proceeds of crime.”.

4. Amendment of section 8 by—

(a) the substitution for subsection (1) of the following subsection:

“(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) **[such]** that offence;

(b) any other offence of which the defendant has been convicted at the same trial; and

(c) any **[related]** criminal activity which the court finds to be sufficiently related to those offences,

and, if the court finds that the defendant has so benefited, the court may, in addition to any punishment which it may impose in respect of the offence, make an order against the defendant for the payment to the State of such amount as it may consider appropriate [, **which amount—**

(a) **shall not exceed the value of the defendant’s proceeds of such offence or any related criminal activity as determined by the court in accordance with the provisions of this Act; or**

(b) **if the court is satisfied that the amount which might be realised as contemplated in section 10(1) is less than the value referred to in paragraph (a), shall not exceed an amount which in the opinion of the court might be so realised,]**

and the court may make any further orders as it may deem fit to ensure the effectiveness and fairness of that order.”;

- (b) the insertion after subsection (1) of the following subsection:  
 “(1A) The amount which a court may order the defendant to pay to the State under subsection (1)—  
 (a) shall 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 the provisions of this Act; or  
 (b) if the court is satisfied that the amount which might be realised as contemplated in section 10(1) is less than the value referred to in paragraph (a), shall, not exceed an amount which in the opinion of the court might be so realised.”;
- (c) the insertion after subsection (2) of the following subsection:  
 “(2A) When considering the amount of a confiscation order in an enquiry under subsection (1) the court shall take into account—  
 (a) the penal effect, if any, of the confiscation order;  
 (b) the cumulative effect of the penalties imposed by the court; and  
 (c) the public interest in ensuring that the defendant does not derive any benefit from the offences or related criminal activities referred to in that subsection.”;
- (d) the substitution for paragraph (a) in subsection (5) of the following paragraph:  
 “(a) in **[order to make a confiscation order]** considering an application under subsection (1)—  
 (i) refer to the evidence and proceedings at the trial;  
 (ii) hear such further oral evidence as the court may deem fit;  
 (iii) direct the public prosecutor to tender to the court a statement referred to in section 11(1)(a); and  
 (iv) direct a defendant to tender to the court a statement referred to in subsection (3)(a) of that section;”.
5. The amendment of section 12 by—
- (a) the substitution for subsection (1) of the following subsection:  
 “(1) For the purposes of determining whether a defendant has derived a benefit in an enquiry under section 8(1) [and], 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, **[in determining whether the defendant has derived a benefit from an offence or related criminal activity, it shall be presumed, in the absence of evidence to the contrary,]** the court may accept this fact as prima facie evidence that such interests form part of such a benefit.”;
- (b) the substitution for subsection (2) of the following subsection:  
 “(2) For the purposes of an enquiry under section 8(1) **[and]**, if it is found that a court had ordered the defendant to disclose any facts under section 16(7) and that the defendant had without sufficient cause failed to disclose such facts or had, after being so ordered, furnished false information, knowing such information to be false or not believing it to be true, **[it shall be presumed, in the absence of evidence to the contrary, in determining]** the court may accept these facts as prima facie evidence that any property, or part thereof, to which the information relates—  
 (a) **[whether the defendant has derived a benefit from an offence, that any property to which the information relates,]** forms part of **[such a]** the defendant’s benefit, in determining whether he or she has derived a benefit from an offence; [and] or  
 (b) **[the value of his or her proceeds of crime, that any property to which the information relates,]** is held by the defendant as **[a]** an advantage, payment, service or reward in connection with the [offence or related criminal activity] offences or related criminal activities referred to in section 8(1).”;
- (c) the substitution for subsection (3) of the following subsection:  
 “(3) For the purposes of determining the value of a defendant’s proceeds of crime in an enquiry under section 8(1) [and, if it is found that a

defendant has benefited from an offence in determining the value of his or her proceeds of crime, it shall be presumed, in the absence of evidence to the contrary that]—

- (a) [any property] if the court finds that he or she has benefited from an offence and that—
- (i) [held by him or her at any time at, or since, his or her conviction] 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 may accept these facts as prima facie evidence that the property, or part thereof, was received by him or her at the earliest time at which he or she held it, as [a] an advantage, payment, service or reward in connection with the [offence or any related criminal activity committed by him or her] offences or related criminal activities referred to in section 8(1);
- (b) if the court finds that he or she has benefited from an offence and that [any] expenditure had been incurred by him or her since the beginning of the period contemplated in paragraph (a), the court may accept these facts as prima facie evidence that any such expenditure was met out of the advantages, payments, services or rewards, including any property or part thereof, received by him or her in connection with the [offence or any related criminal activity] offences or related criminal activities referred to in section 8(1) committed by him or her **]; and**
- (c) **for the purpose of determining the value of any property—**
- (i) **received by him or her at any time as a reward in connection with the offence or any related criminal activity committed by him or her or by any other person; or**
  - (ii) **presumed in terms of paragraph (a) to have been received by him or her as a reward in connection with the offence or any related criminal activity committed by him or her,**  
**he or she received that property free of any other interest therein].”, and**

(d) the insertion after subsection (3) of the following subsection:

“(4) For the purpose of determining the value of any property in an enquiry under section 8(1), if the court finds that the defendant received property, or part thereof, 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 may accept this fact as *prima facie* evidence that he or she received that property, or part thereof, free of any other interest therein.”.

6. The amendment of section 14 by—

(a) the substitution for subsection (1) of the following subsection:

- “(1) If a court is satisfied that—
- (a) (i) a person **[has absconded and]** had been charged with an offence;
  - (ii) a person had been convicted of any offence;
  - (iii) a restraint order had been made against a person, or
  - (iv) there is sufficient evidence for putting a person on trial for an offence;
- (b) a warrant for his or her arrest 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) the proceedings against him or her cannot be resumed within a period of **[six months] one year** due to his or her continued absence, **[and the court is satisfied that—**
- (a) **the person had been charged with an offence, that a restraint order had been made against him or her or that there would have been sufficient evidence for putting him**

**or her on trial for an offence were it not for his or her absence;]** and

- [(b)]** *(d)* 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 continued absence,  
the court may, on the application by the Attorney-General or any public prosecutor authorised thereto in writing by him or her, enquire into any benefit the person may have derived from that offence **[or any related criminal activity].**”;
- (b)* the insertion after subsection (1) of the following subsection:  
“(1A) *(a)* 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 Attorney-General or any public prosecutor authorised thereto in writing by him or her, 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.  
*(b)* The executor of the estate of the deceased shall be entitled to appear before the court and make representations for purposes of the enquiry referred to in paragraph *(a)*.”;
- (c)* the substitution for subsection (2) of the following subsection:  
“(2) The court conducting an enquiry **[contemplated in subsection (1)]** under this section may—  
*(a)* if the court finds that the person referred to in that subsection has so benefited, make a confiscation order and the provisions of this Chapter shall, with the necessary changes, apply to the making of such 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 Chapter 4.”, and
- (d)* the insertion after subsection (3) of the following subsections:  
“(4) A court conducting an enquiry under this section shall not—  
*(a)* exercise its power under section 11 to direct the public prosecutor or the defendant to tender any statements relating to the proceeds of crime or draw any conclusion from the failure of the prosecutor or the defendant to dispute or admit the correctness of any allegation contained in such a statement, and  
*(b)* apply any presumption under section 12.  
(5) If a person against whom a confiscation order had been made under subsection (2) 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 8 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.”.
7. The amendment of section 15 by the substitution for the words preceding paragraph *(a)* in subsection (1) of the following words:  
“A superior court may, when it is reasonably necessary to ensure the implementation of a confiscation order, exercise the powers conferred on it by section 16(1)—”.
8. The amendment of section 16 by—  
*(a)* the substitution for the words preceding paragraph *(a)* in subsection (2) of the following words:  
“A restraining order may, with due regard to the circumstances of each case and the effectiveness and fairness of an order; be made—”;

- (b) the substitution for subsection (6) of the following subsection:  
“(6) Without derogating from the generality of the powers conferred by subsection (1), a restraint order may make such provision as the superior court may think fit—  
(a) for the reasonable living expenses of a person against whom the restraint order is being made and his or her family or household; and  
(b) for the reasonable legal expenses of such person in connection with any proceedings instituted against him or her in terms of this Act or any criminal proceedings to which such proceedings may relate, if the court is satisfied that the person whose expenses must be provided for has disclosed under oath all his or her interests in property subject to a restraint order and that the person cannot meet the expenses concerned out of his or her unrestrained property.”, and
- (c) the insertion after subsection (7) of the following subsection:  
“(8) A statement or disclosure made by a person in compliance with an order under subsection (7), or any document or anything obtained as a consequence of the statement or disclosure, is not admissible against that person in any criminal proceedings except proceedings that comprise—  
(a) criminal proceedings where the person concerned stands trial on a charge under section 32(1), or in section 319(3) of the Criminal Procedure Act, 1955;  
(b) proceedings on an application under this Act;  
(c) proceedings ancillary to an application under this Act;  
(d) proceedings for enforcement of a confiscation order; or  
(e) in the case of a document or other thing, civil proceedings for or in respect of a right or liability it confers or imposes.”.

9. The amendment of section 20 by—

- (a) the substitution for subsection (3) of the following subsection:  
“(3) A superior court shall not exercise its powers under subsection (2)(b) unless it has afforded—  
(a) all persons having any interest in the property concerned;  
(b) all persons who are likely to be directly affected by the confiscation order; and  
(c) all persons who have suffered damage to or loss of property or injury as a result of an offence or related criminal activity referred to in section 8(1) which was committed by the defendant,  
an opportunity to make representations to it in connection with the realisation of that property.”, and
- (b) the insertion after subsection (3) of the following subsection:  
“(4) If the court is satisfied that a 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 8(1) which was committed by the defendant—  
(a)

- (a) enters into any agreement or engages in any arrangement or transaction with anyone in connection with that property, whether such agreement, arrangement or transaction is legally enforceable or not; or
- (b) performs any other act in connection with such property, whether it is performed independently or in concert with any other person, which has or is likely to have the effect—
  - (i) of concealing or disguising the nature, source, location, disposition or movement of the said property or its ownership or any interest which anyone may have in respect thereof; or
  - (ii) of enabling or assisting any person who has committed or commits an offence, whether in the Republic 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,

11. The substitution for section 29 of the following section:

**“Assisting another to benefit from proceeds of crime**

**29.** Any person who [**knowing, or having reasonable grounds to believe,**] knows or ought reasonably to have known that another person has obtained the proceeds of crime, enters into any agreement with anyone or engages in any arrangement whereby—

- (a) the retention or the control by or on behalf of the said other person of the proceeds of crime is facilitated; or
  - (b) the said proceeds of crime are used to make funds available to the said other person or to acquire property on his or her behalf or to benefit him or her in any other way,
- shall be guilty of an offence.”.

12. The substitution for section 30 of the following section:

**“Acquisition, possession or use of proceeds of crime**

**30.** Any person who acquires or uses or has possession of property [**knowing, or having reasonable grounds to believe,**] and who knows or ought reasonably to have known that it is or forms part of the proceeds of crime of another person, shall be guilty of an offence[, **unless such a person reports his or her suspicion or knowledge as contemplated in section 31**].”.

13. The amendment of section 31 by—

- (a) the substitution for subsection (1) of the following subsection:

“(1) Any person who carries on a business or is in charge of a business undertaking who [**has reason to suspect**] suspects or ought reasonably to have suspected that—

- (a) any property which comes into his or her possession or the possession of the said business undertaking is or forms part of the proceeds of crime, or
- (b) a transaction to which he or she or the business undertaking is a party, and which is discontinued, may have resulted, if concluded, in the proceeds of crime coming into the possession of the person or business undertaking, or may in some way have facilitated the transfer of the proceeds of crime,

**[shall be obliged to]** must report his or her suspicion and all available information concerning the grounds on which it rests, within a reasonable time to a person designated by the Minister and shall take all reasonable steps to discharge such obligation[: **Provided that nothing in this section shall be construed so as to infringe upon the common law right to professional privilege between an attorney and his or her client in respect of information communicated to the attorney so as to enable him or her to provide advice, to defend or to render other legal**

**assistance to the client in connection with an offence under any law, of which he or she is charged, in respect of which he or she has been arrested or summoned to appear in court or in respect of which an investigation with a view to instituting criminal proceedings is being conducted against him or her].”;**

- (b) the insertion after subsection (1) of the following subsections:

“(1A) A report in terms of subsection (1) shall be accompanied by copies of documentation directly relevant to that suspicion and the grounds on which it rests.

(1B) A person to whom a report may be made under subsection (1) may, in writing, require the person making the report to provide him or her or an officer identified in the request with—

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

(1C) When a person receives a request under subsection (1B) he or she shall furnish the person who made the request with the requested particulars or further particulars and copies of documents to the extent that such particulars or documents are available to him or her within a reasonable time.”;

- (c) the deletion of subsection (2);

- (d) the substitution for paragraph (a) of subsection (3) of the following paragraph:

“(a) 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, shall affect any obligation imposed **[by subsection (1)]** under this section to report or disclose information or to permit access to any registers, records or other documents unless that obligation of secrecy or restriction is based on the common law right to professional privilege between an attorney and his or her client in respect of information communicated to the attorney so as to enable him or her to provide advice, to defend or to render other legal assistance to the client in connection with an offence under any law, of which the client is charged, in respect of which he or she has been arrested or summoned to appear in court or in respect of which an investigation with a view to instituting criminal proceedings is being conducted against him or her.”; and

- (e) the insertion after subsection (3) of the following subsections:

“(4) 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.

(5) Any person who fails to comply with an obligation contemplated in this section shall be guilty of an offence.”.

14. The amendment of section 32 by the substitution for subsection (1) of the following subsection:

“(1) Any person who[, **knowing or having reasonable grounds to believe**] knows or ought reasonably to have known—

- (a) that information has been disclosed under the provisions of this Act; or  
 (b) that an investigation is being, or may be, conducted as a result of such a disclosure,

directly or indirectly alerts another or brings information to the attention of another which will or is likely to prejudice such an investigation, shall be guilty of an offence.”.

15. The insertion after section 32 of the following sections:

**“Culpability**

- 32A.** (1) 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.
- (2) For 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.

**Defence**

**32B.** It is a defence to a charge of an offence under sections 28, 29 and 30 if the accused had suspected the property concerned to be the proceeds of crime and reported that suspicion under section 31.”

**SCHEDULE 5**

**Amendment of the International Co-operation in Criminal Matters Act, 1996**

**(Act No. 75 of 1996)**

**(Section 47)**

1. The amendment of section 1 by—

(a) the substitution for the definition of “confiscation order” of the following definition:

“ ‘confiscation order’ means a confiscation order made under the Proceeds of Crime Act, 1996, and includes a forfeiture order made under the Prevention of Organised Crime Act, 1998;”.

(b) the substitution for the definition of “restraint order”, of the following definition:

“ ‘restraint order’ means a restraint order made under the Proceeds of Crime Act, 1996, and includes a restraining order made under the Prevention of Organised Crime Act, 1998;”.

## **MEMORANDUM ON THE OBJECTS OF THE PREVENTION OF ORGANISED CRIME BILL, 1998**

1. The Bill emanates from the recommendations and proposals of a Special Task Team appointed by the Minister of Justice to investigate the feasibility of certain legislative measures which would enable the law enforcement agencies to deal effectively with organised crime and criminal gang activities.

2.1 Organised crime and criminal gang activities, both individually and collectively present a danger to the public order and safety and economic stability in South Africa and have the potential to inflict even more social damage than is already the case.

2.2 Organised crime has internationally been identified as an international security threat and as a phenomenon which undermines the effectiveness of state structures and the ability of the State to govern effectively.

2.3 It is frequently difficult to prove the direct involvement by the leaders of organised groups in specific crimes. They do not perform the actual criminal activities themselves, and are well protected from being linked with any incriminating evidence. Internationally, criminal justice systems are being rapidly adopted and transformed in response to the challenge which organised crime poses. There has, for example, been a growing international focus on measures to deprive those involved in organised crime, of the proceeds of their crimes.

2.4 After a thorough comparative study of legislation internationally, including steps being taken by the United Nations and the European Union in relation to organised crime, the Task Team proposed that the South African Government proceed with the promotion of the Prevention of Organised Crime Bill.

### **3. CONTENTS OF BILL**

#### **3.1 Preamble**

The preamble draws attention to the rapid growth of organised crime and criminal gang activities. As a result, the rights of citizens are being infringed and the public order and safety, economic stability and international security are being endangered. Whereas the existing common law and statutory laws fail to deal effectively with organised crime and criminal gang activities, new measures are necessary to protect the public. Although some of these measures may be regarded as drastic, the Bill also contains various safeguards in order to ensure fair procedure and the constitutional viability of those provisions.

#### **3.2 Offences, penalties and criminal forfeiture**

3.2.1 Clause 2 creates certain offences in respect of property derived from a pattern of illegal conduct the acquisition, maintenance, control and management of and the participation in an enterprise through a pattern of illegal conduct. Clause 2 is largely based on the RICO legislation (Racketeering Influenced Corrupt Organisations Act) of the United States and creates, amongst others, the following specific offences:

- (a) **Clause 2(1)(a):** To prove this offence the State must prove—
- (i) that the accused received or retained property derived from a pattern of illegal conduct; and
  - (ii) that the accused knew or ought reasonably to have known that such property was derived from a pattern of illegal conduct; and
  - (iii) that the accused used or invested any part of such property or the proceeds thereof in acquisition of an interest in, or the establishment or operation of an enterprise.

- (b) **Clause 2(1)(b):** It is an offence for any person who through a pattern of illegal conduct, acquires or maintains any interest in or control of any enterprise.
- (c) **Clause 2(1)(c):** It is an offence for any person who, whilst employed by or associated with any enterprise, conducts or participates in the conduct of such enterprise's affairs through a pattern of illegal conduct
- (d) **Clause 2(1)(d):** This is a new offence not contained in the RICO legislation and envisages to get to the leaders of organised crime. In terms of clause 2(1)(d) it is an offence for any person who manages the operation 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 of such enterprise's affairs through a pattern of illegal conduct.

3.2.2 In terms of clause 2(3) a person may only be charged of committing one of the above-mentioned offences if the National Director of Public Prosecutions in writing authorised such prosecution.

3.2.3 In terms of clause 3 a person convicted of an offence in clause 2(1) may be fined up to R10 million or may be sentenced to imprisonment for a period not exceeding 30 years. A regional court has jurisdiction to impose such penalties even though that penalty may exceed the punitive jurisdiction of the regional court (clause 45(1)).

3.2.4 Clause 4 provides that any person convicted of an offence contemplated in section 2 shall forfeit to the State any interest the person has acquired or maintained in violation of section 2; any interest in, security of, claim against, or property or contractual right over any enterprise which that person has established, operated, controlled, conducted or participated in; and any proceeds of unlawful activity which the person derived from a pattern of illegal conduct.

3.2.5 To secure a conviction on a section 2 offence, the State must prove a "pattern of illegal conduct". In terms of clause 1 a "pattern of illegal conduct" is defined as at least two acts of illegal conduct, one of which occurred after the commencement of this Act and the last of which occurred within 10 years (excluding any period of imprisonment) after the commission of a prior act of illegal conduct. The expression "illegal conduct" refers to any act or threat involving a wide range of serious offences listed in Schedule 1.

### 3.3 Restraining and forfeiture orders

3.3.1 Clauses 5 to 16 deal, amongst others, with the notification, application and granting of restraining orders in respect of property concerned in the commission or suspected commission of an offence or property which is the proceeds of crime.

3.3.2 Clauses 17 to 23 on the other hand deal with the application and granting of forfeiture orders in respect of property which is subject to a restraining order.

3.3.3 The proposed provisions in respect of restraining and forfeiture orders are designed to dismantle criminal organisations to which criminal leaders belong and to get hold of the profits they made through their criminal activities. These provisions seek to remove the profit from organised crime by separating the racketeer from his or her dishonest gains.

3.3.4 The most important provisions regarding restraining and forfeiture orders are the following:

- (a) Clause 5(1) provides for an application to a judge in chambers or a magistrate for an order notifying a person having an interest in or control over property that a reasonable suspicion exists that such property is concerned in the commission or suspected commission of an offence which forms part of a pattern of illegal conduct whether in the Republic or elsewhere. In terms of clause 5(2) the judge or magistrate may make such an order of notification

after certain requirements where met, and clause 5(3) provides for the issuing of a notice to the person concerned regarding the content of the order.

- (b) Clause 6(1) provides that a National Director of Public Prosecutions or Director of Public Prosecutions (or a public prosecutor authorised thereto by them) may apply to the High Court for an order prohibiting any person, subject to specified conditions, from dealing in any manner with property in respect of which a reasonable suspicion exists that such property is concerned in the commission or suspected commission of an offence which forms part of a pattern of illegal conduct or that such property is, or is part of, the proceeds of unlawful activities. In terms of clause 6(2) the court may grant such an order if the application is supported by an affidavit of an authorised police officer stating the above-mentioned facts and if the court is satisfied that the suspicion reflected in the affidavit is reasonable.
- (c) Clause 7 makes provisions for the making of ancillary orders for example for the examination under oath before the High Court of any person who has an interest in property that is subject to the restraining order or any other person concerning the nature and location of any property in which he or she has an interest or over which he or she has effective control. The court may also request a person to furnish an affidavit in respect of such property setting out the particulars thereof.
- (d) Clauses 8, 9 and 10 respectively deal with the notice of a restraining order, the duration of restraining orders and the seizure of property subject to a restraining order.
- (e) Clause 11 provides for the appointment of a *curator bonis* to perform any particular act in respect of the property to which the restraining order relates; to take care of the said property; to administer the said property, etc.
- (f) In terms of clause 17(1), the National Director of Public Prosecutions or the Director of Public Prosecution concerned (or a public prosecutor authorised thereto by them) may apply to the High Court for an order forfeiting to the State all or any of the property that is subject to a restraining order. Any person who may be affected by the order may appeal against the making of the order or may apply for an order excluding his or her interest in the property concerned from the operation of the order (clause 17(3)). The Court shall make such an order if the Court finds on a balance of probabilities that the property in question is concerned in the commission or suspected commission of an offence which forms part of a pattern of illegal conduct or if the property is, or is part of, the proceeds of unlawful activities (clause 18(1)).
- (g) The Court making a forfeiture order may make an order excluding certain interests in property subject to the order from the operation thereof if—
  - (i) the interest concerned was not acquired illegally; and
  - (ii) the person holding that interest did not know or did not have reasonable grounds to suspect that the property in which the interest is held is concerned in the commission or suspected commission of an offence which forms part of a pattern of illegal conduct or is the proceeds of unlawful activities.
- (h) In terms of clause 21 any person affected by a forfeiture order may appeal against such order.
- (i) Clauses 29 and 30 deal with the application of Chapter 3 to deceased persons and the effect of the death of a joint owner of restrained property.
- (j) Clauses 25 to 34 deal with various matters relating to the proceedings in respect of restraining orders and forfeiture orders, for example to what extent a person may refuse to answer questions that may incriminate him or her (clause 25); to what extent a person must disclose and furnish information relating to the activities of certain persons (clause 26); that such hearings are open to the public unless the court directs otherwise (clause 32); that the court may direct that a witness be dealt with in terms of the witness protection

legislation applicable to criminal cases (clause 33); and the procedure and rules of court (clause 34).

### 3.4 The Establishment of the Criminal Assets Recovery Fund

Chapter 4 deals with the establishment, after a year of the commencement of the proposed Act, of the Criminal Assets Recovery Fund by the Minister of Justice in consultation with the Minister of Finance. It is proposed that the Fund will be managed by a board appointed by the Minister of Justice after consultation with the Minister of Finance. The objects of the board shall, *inter alia*, be to render financial assistance to law enforcement agencies in order to combat organised crime and criminal gang activities in general (clause 37(b)). Furthermore the board will also render assistance to victims and their dependants who suffer financial hardship or financial distress caused by illegal conduct (clause 37(c)). The Fund shall, *inter alia*, consist of moneys derived from the execution of confiscation orders contemplated in the Proceeds of Crime Act, 1996; moneys transferred to it in terms of this Bill; and any moneys appropriated by Parliament for purposes of the Fund (clause 40(1)).

### 3.5 Offences in respect of criminal gang activities

Chapter 5 deals with the creation of certain offences in respect of criminal gang activities (clause 42), and the penalties prescribed for a contravention of such offences. In clause 43 it is proposed that imprisonment up to three years may be imposed in respect of gang related offences and in terms of clause 44 a court, after having convicted an accused of any offence, may regard the fact that the accused was a member of a criminal gang at the time of the commission of the offence, as an aggravating factor for sentencing purposes.

3.6 Chapter 6 deals with general provisions such as—

- (a) the jurisdiction of the regional and magistrate's courts in respect of penalties prescribed in terms of the proposed Bill (clause 45);
- (b) the Minister's power to make regulations (clause 46);
- (c) amendments to the Drugs and Drug Trafficking Act, 1992, the Proceeds of Crime Act, 1996, and the International Co-operation in Criminal Matters Act, 1996, which are contained in Schedules 3, 4 and 5 respectively (clause 48).

## 4. OTHER DEPARTMENTS/BODIES CONSULTED

Those who participated in the activities of the Task Team which drafted the Bill were representatives from:

- The South African Police Service;
- The Secretariat for Safety and Security;
- Department of Justice;
- Department of Correctional Services;
- South African Revenue Services;
- South African Law Commission;
- Attorney-General of the Western Cape;
- Academics from six universities;
- Institute for Security Studies, Cape Town;
- Prof Philip Hymann, Harvard Law School, USA.

The Bill was also circulated to all other interested parties for their comments.

5. In the opinion of the Department of Justice and the State Law Advisers the Bill should be dealt with in terms of section 75 of the Constitution of the Republic of South Africa, 1996.

