

REPUBLIC OF SOUTH AFRICA

PREVENTION OF ORGANISED CRIME SECOND AMENDMENT BILL

*(As amended by the Ad hoc Joint Committee on Prevention of Organised Crime Second
Amendment Bill) (The English text is the official text of the Bill)*

(MINISTER FOR JUSTICE AND CONSTITUTIONAL DEVELOPMENT)

[B 41B—99]

REPUBLIEK VAN SUID-AFRIKA

TWEEDE WYSIGINGSWETSONTWERP OP DIE VOORKOMING VAN GEORGANISEERDE MISDAAD

*(Soos gewysig deur die Ad hoc- Gesamentlike Komitee oor Tweede Wysigingswetsontwerp
op die Voorkoming van Georganiseerde Misdaad) (Die Afrikaanse teks is die amptelike
vertaling van die Wetsontwerp)*

(MINISTER VIR JUSTISIE EN STAATKUNDIGE ONTWIKKELING)

[w 41 B—99]

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GENERAL EXPLANATORY NOTE:

- [1 Words in bold type in square brackets indicate omissions from existing enactments.
- Words underlined with a solid line indicate insertions in existing enactments.
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BILL

To amend the Prevention of Organised Crime Act, 1998, so as to make it clear that the provisions of Chapters 3, 5 and 6 are applicable in respect of instrumentalities of offences and proceeds of unlawful activities where such offences or unlawful activities occurred before the commencement of the Act; to amend certain definitions; to further regulate the seizure of certain property and the making of orders ancillary to restraint orders and preservation of property orders; to further regulate appeals against certain orders; to further regulate the exclusion of interests in property; to further regulate transitional arrangements; and to provide for matters connected therewith.

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

Amendment of section 1 of Act 121 of 1998, as amended by section 3 of Act 24 of 1999

1. Section 1 of the Prevention of Organised Crime Act, 1998 (hereinafter referred to as the principal Act), is hereby amended—

(a) by the substitution for the definition of “instrumentality of an offence” in subsection (1) of the following definition:

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

(b) by the substitution for the definition of “proceeds of unlawful activities” in subsection (1) of the following definition:

“ ‘proceeds of unlawful activities’ means any property or any service, advantage, benefit or reward which was derived, received or retained, directly or indirectly, in the Republic or elsewhere, at any time before or after the commencement of this Act, in connection with or as a result of any unlawful activity carried on by any person. **[whether in the Republic or elsewhere, except for purposes of Chapter 5 where it means—**

(a) any unlawful activity carried on by any person; or

(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;”;

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- (c) by the insertion after the definition of 'property' of the following definition:
"'unlawful activity' means any conduct which contravenes any law whether such conduct occurred before or after the commencement of this Act and whether such conduct occurred in the Republic or elsewhere.'"; and
 (d) by the addition of the following subsection:

"(5) Nothing in this Act or in any other law, shall be construed so as to exclude the application of any provision of Chapter 5 or 6 on account of the fact that—
 (a) any offence or unlawful activity concerned occurred; or
 (b) any proceeds of unlawful activities were derived, received or retained.
before the commencement of this Act..."

Amendment of section 12 of Act 121 of 1998, as amended by section 14 of Act 24 of 1999

2. Section 12 of the principal Act is hereby amended by the substitution for subparagraph (i) of paragraph (a) of subsection (2) of the following subparagraph:

"(i) if the estate of such person has been sequestrated, also to the **[executor] trustee of his or her insolvent estate; or**".

Insertion of section 24A in Act 121 of 1998

3. The following section is hereby inserted after section 24 of the principal Act:

"Order to remain in force pending appeal"

24A. A restraint order and an order authorising the seizure of the property concerned or other ancillary order which is in force at the time of any decision by the court in relation to the making of a confiscation order, shall remain in force pending the outcome of any appeal against the decision concerned."

Amendment of section 26 of Act 121 of 1998, as amended by section 20 of Act 24 of 1999

4. Section 26 of the principal Act is hereby amended—

- (a) by the deletion of paragraph (b) of subsection (4);
 (b) by the deletion of subsection (5);
 (c) by the substitution for subsection (8) of the following subsection:

"(8) A High Court making a restraint order **[may when it makes the order or at any time thereafter,] shall at the same time make an order authorizing the seizure of all movable property concerned by a police official, and any other ancillary orders that the court considers appropriate for the proper, fair and effective execution of the order [, including an order authorizing the seizure of the property concerned by a police official].**"

(d) by the addition of the following subsections:

- "(10) A High Court which made a restraint order—
 (a) may on application by a person affected by that order vary or rescind the restraint order or an order authorizing the seizure of the property concerned or other ancillary order if it is satisfied—
 (i) that the operation of the order concerned will deprive the applicant of the means to provide for his or her reasonable living expenses and cause undue hardship for the applicant; and
 (ii) that the hardship that the applicant will suffer as a result of the

order outweighs the risk that the property concerned may be destroyed, lost, damaged, concealed or transferred; and
 (b) shall rescind the restraint order when the proceedings against the defendant concerned are concluded.

(11) When a court orders the rescission of an order authorizing the seizure of property in terms of subsection (10)(a) the court shall make such other order as it considers appropriate for the proper, fair and effective execution of the restraint order concerned.’.

Insertion of section 29A in Act 121 of 1998

5. The following section is hereby inserted after section 29 of the principal Act:

“Variation and rescission of certain orders suspended by appeal

29A. The noting of an appeal against a decision to vary or rescind any order referred to in sections 26(10), 28(3) and 29(7) shall suspend such a variation or rescission pending the outcome of the appeal.”.

Amendment of section 38 of Act 121 of 1998

6. Section 38 of the principal Act is hereby amended by the substitution for subsection (3) of the following subsection:

“(3) A High Court making a preservation of property order [~~may when it makes the order or at any time thereafter,~~] shall at the same time make an order authorizing the seizure of the property concerned by a police official, and any other ancillary orders that the court considers appropriate for the proper, fair and effective execution of the order [, including an order authorizing the seizure of the property concerned by a police official].’.

Amendment of section 42 of Act 121 of 1998

7. Section 42 of the principal Act is hereby amended by the substitution for the words preceding paragraph (a) of subsection (1) of the following words:

“Where a High Court has made a preservation of property order, the High Court [~~may~~] shall, if it deems it appropriate, at [any] the time of the making of the order or at a later time—.’.

Amendment of section 47 of Act 121 of 1998, as amended by section 25 of Act 24 of 1999

8. Section 47 of the principal Act is hereby amended—

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

“(1) [(a) **Any person affected by a preservation of property order may at any time apply for the variation or rescission of the order.**]

(b)] A High Court which made a preservation of property order—

[(i)](a) may [~~at any time~~] on application by a person affected by that order vary or rescind the preservation of property order or an order authorising the seizure of the property concerned or other ancillary order if it [deems it necessary in the interests of justice] is satisfied—

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

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

[(ii)](b) shall rescind the preservation of property order when the proceedings against the defendant concerned are concluded.’.;

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

“(1 A) When a court orders the rescission of an order authorizing the seizure of property under paragraph (a) of subsection (1) the court shall make such other order as it considers appropriate for the proper, fair and effective execution of the preservation of property order concerned.”; and

- (c) by the addition of the following subsection:

“(4) The noting of an appeal against a decision to vary or rescind any order referred to in this section shall suspend such a variation or rescission pending the outcome of the appeal.”.

Amendment of section 52 of Act 121 of 1998, as amended by section 29 of Act 24 of 1999

9. Section 52 of the principal Act is hereby amended by the substitution for subsection (2) of the following subsections:

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

- (a) had acquired the interest concerned legally and for a consideration, the value of which is not significantly less than the value of that interest; and

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

(2A) The High Court may make an order under subsection (1), in relation to the forfeiture of an instrumentality of an offence referred to in Schedule 1, if it finds on a balance of probabilities that the applicant for the order had acquired the interest concerned legally, and—

- (a) neither knew nor had reasonable grounds to suspect that the property in which the interest is held is an instrumentality of an offence referred to in Schedule 1; or

- (b) where the offence concerned had occurred before the commencement of this Act, the applicant has since the commencement of this Act taken all reasonable steps to prevent the use of the property concerned as an instrumentality of an offence referred to in Schedule 1.”.

Amendment of section 54 of Act 121 of 1998, as amended by section 31 of Act 24 of 1999

10. Section 54 of the principal Act is hereby amended by the substitution for subsection (8) of the following subsections:

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

- (a) had acquired the interest concerned legally and for a consideration, the value of which is not significantly less than the value of that interest; and

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

(8A) The High Court may make an order under subsection (1), in relation to the forfeiture of an instrumentality of an offence referred to in Schedule 1, if it finds on a balance of probabilities that the applicant for the order had acquired the, interest concerned legally, and—

- (a) neither knew nor had reasonable grounds to suspect that the property in which the interest is held is an instrumentality of art offence referred to in Schedule 1; or

- (b) where the offence concerned had occurred before the commencement of this Act, the applicant has since the commencement of this Act taken all reasonable steps to prevent the use of the property concerned as an instrumentality of an offence referred to in Schedule 1.”.

Substitution of section 55 of Act 121 of 1998

11. The following section is hereby substituted for section 55 of the principal Act:

“Appeal against forfeiture order

55. Any preservation of property order and any order authorizing the seizure of the property concerned or other ancillary order which is in force at the time of any decision regarding the making of a forfeiture order under section 50(1) shall remain in force pending the outcome of any appeal against the decision concerned

Amendment of section 80 of Act 121 of 1998, as amended by section 41 of Act 24 of 1999

12. Section 80 of the principal Act is hereby amended by the addition of the following subsection:

“(3) An in~estimation, or prosecution or other legal proceedings, in respect of conduct which would have constituted an offence under the Proceeds of Crime Act, 1996, and which occurred after the commencement of that Act but before the commencement of this Act, may be instituted and continued as if this Act had not been passed.”.

Amendment of Preamble to Act 121 of 1998

13. The Preamble to the principal Act is hereby amended by the substitution for the ninth paragraph thereof of the following paragraphs:

“AND WHEREAS no person convicted of an offence should benefit from the fruits of that or any related offence, whether such offence took place before or after the commencement of this Act, legislation is necessary to provide for a civil remedy for the restraint and seizure, and confiscation of property which forms the benefits derived from such offence;

AND WHEREAS [persons] no person should [not] benefit from the fruits of [organised crime and money laundering] unlawful activities, nor is any person entitled to use property for the commission of an offence, whether such activities or offence took place before or after the commencement of this Act, legislation is necessary to provide for a civil remedy for the preservation and seizure, and forfeiture of property which is derived from unlawful activities or is concerned in the commission or suspected commission of an offence;”.

Amendment of Index to Act 121 of 1998

14. The Index to the principal Act is hereby amended by the insertion, in Part 3, of the following items:

“24A. Order to remain in force pending an appeal
29A. Variation and rescission of certain orders suspended by appeal”.

Short title

15. This Act is called the Prevention of Organised Crime Second Amendment Act, 1999.

MEMORANDUM ON THE OBJECTS OF THE PREVENTION OF ORGANISED CRIME SECOND AMENDMENT BILL, 1999

1. in his opening address to Parliament on 25 June 1999, the President of the Republic announced *inter alia* that “(t)aking into account developments since its passage and to ensure that nobody benefits from the proceeds of crime, amendments to the Prevention of Organised Crime Act will be introduced... (Act 121 of 1998) This Act represents one of the Governments major initiatives in its fight against crime and a high premium is placed on the effective and meaningful application thereof.

2. Chapter 6 (“Civil Recovery of Property”) of the Act makes provision for the issuing of “preservation of property orders’ on application by the National Director of Public Prosecutions (section 38). This action is essentially a new civil remedy aimed at preventing a suspected criminal from disposing of property which he or she has used in the commission of an offence or has acquired through unlawful means. Chapter 5 (‘Proceeds of Unlawful Activities..’) of the Act makes provision for a similar measure namely a “restraint order’ (section 26) which is issued pending the confiscation of a convicted person’s proceeds of the relevant offence.

3. However, in two applications for preservation of property orders by the National Director of Public Prosecutions, the High Courts concerned held that the provisions of section 38 of the Act do not have retrospective application, meaning that a preservation of property order could not be issued in respect of property connected with an offence or unlawful activity which took place before the commencement of the Act.

4. In a subsequent judgment the High Court held that the provisions of Chapter 5 also could not be applied to property derived from unlawful activities which took place before the commencement of the Act.

5. From the outset the intention of the Legislature, has always been that property which represents the proceeds of crime or unlawful activities should be susceptible to a preservation of property order, irrespective of whether such offence or activities took place before or after the commencement of the Act. Although the possibility cannot be excluded that other High Courts or the Supreme Court of Appeal may interpret the provisions concerned differently, the matter is of such importance for the purpose of achieving the objectives of the Act that the most appropriate course of action will be to amend the Act so as to remove any doubt about the intention of the Legislature.

6.1 The Bill therefore aims to amend the Act to make it clear that the provisions of Chapters 3, 5 and 6 are equally applicable in respect of instrumentalities of offences and the proceeds of unlawful activities where such offences or activities occurred before the commencement of the Act.

6.2 The Bill further aims to amend the Act to regulate the seizure of certain property in order to ensure that its provisions are not frustrated by disposing of such property or diminishing its value.

6.3 The Bill aims to amend the Act to provide that preservation of property orders and restraint orders will remain in force pending the outcome of appeals against certain orders.

6.4 The Bill aims to amend the Act to strengthen the position of innocent persons whose interests in the property concerned may be affected while ensuring that its provisions are not frustrated by the disposition of such property by means of gifts or fraudulent transactions.

6.5 The Bill also aims to introduce a new transitional clause in the Act to provide for the prosecution of offences under the Proceeds of Crime Act, 1996, which occurred after the commencement of that Act but before the commencement of the Prevention of Organised Crime Act, 1998.

7. The State Law Advisers and the Department of Justice are of the opinion that this Bill must be dealt with in accordance with section 75 of the Constitution of the Republic of South Africa, 1996 (Act No. 108 of 1996), since it contains no provision to which the procedure set out in section 74 or 76 of the Constitution applies.

8. This Bill does not have any financial implications for the State.