
An effective tool to combat commercial crimes
Overview

• Why asset forfeiture
• Strategic objectives of AFU
• Successes
• Structure of AFU
• Chapter 6: Preservation and forfeiture orders
• Chapter 5: Restraint and confiscation orders
• Financial Investigations
• Discussions/ Questions
Purpose and Outcomes of AFU
Purpose of training

• This awareness training provides:
  – An overview of the provisions of the Prevention of Organised Crime Act 121 of 1998 (the POCA);
  – How the POCA may be used as an effective tool to combat commercial crimes;
  – How the POCA may be used to recover financial losses suffered by the victims of commercial crime.
Outcomes

• General awareness of asset forfeiture law and procedure
• Maximising the use of asset forfeiture by forensic investigators
• Enabling forensic investigators to correctly identify commercial crime cases that have asset forfeiture potential
Outcomes

• Provide forensic investigators with a basic knowledge of asset forfeiture investigations
• How to investigate cases with asset forfeiture potential
Why Asset Forfeiture
“In a time of extraordinary evil, are you doing anything extraordinary?”

- Martin Loyd Jones
Rationale for asset forfeiture

• A basic principle: No person should benefit from criminal activity

• The principle accords with common law principles:
  – Unjustified enrichment at the expense of others
  – No person should benefit from actions that the community regards as reprehensible

• Ie the Maxim: De bloedige hand neemt geen erfnis
International obligations

• SA’s International obligations:
  – UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988
  – UN Convention against Transnational Organised Crime 2000
Rationale for Asset Forfeiture

• The introduction to POCA and its preamble states the purpose of the legislation as follows:

  – To introduce measures to combat organised crime
  – To provide for the recovery of the proceeds of unlawful activity; for the civil forfeiture of criminal property that has been used to commit an offence, property that is the proceeds of unlawful activity or property that is owned or controlled by, or on behalf of an entity involved in terrorist and related activities
Rationale for Asset Forfeiture

– 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;
Rationale for Asset Forfeiture

– WHEREAS effective legislative measures are necessary to prevent and combat the financing of terrorist and related activities and to effect the preservation, seizure and forfeiture of property owned or controlled by, or on behalf of, an entity involved in terrorist and related activities;

– AND WHEREAS there is a need to devote such forfeited assets and proceeds to the combating of organised crime, money laundering and the financing of terrorist and related activities;
Judgements

• Cook Judgement: key purposes iro forfeiture orders:
  – removing incentives to commit crime;
  – deterring persons from using or allowing property to be used in crime;
  – eliminating or incapacitating some of the means by which crime is committed; and
  – advancing the ends of justice by depriving those involved in crime of property concerned therein
• Shaik judgement:
  – primary purpose of confiscation orders is not to punish offenders but to ensure that they do not enjoy the fruits of their crimes
  – Deterring criminals from committing crimes
  – Preventing criminals from committing crimes in the future as they would not have the financial means to do so
“We should embrace POCA as a friend to democracy, the rule of law and constitutionalism – and as indispensable in a world where the institutions of state are fragile, and the instruments of law sometimes struggle for their very survival against criminals who subvert them.”

- Cameron J in NDPP v Elran CC
Rationale for Asset Forfeiture (Summary)

• Making sure that crime does not pay
• Conventional methods of fighting crime are not adequate
• No person should benefit from crime
• Remove the means (instrumentalities) to commit crime
• To deter people from using property for crime
• To target the untouchables/kingpins of crime
Focus on Organised Crime

DAD, I'M CONSIDERING A CAREER IN ORGANISED CRIME.

GOVERNMENT OR PRIVATE SECTOR?
Corruption

You've come to fake I.D.s...
...go past pension scams...
...stop in at bribes....
...fake passports is third
doors down, you can't miss it.

It's worse than we thought!!
Money Laundering
Disorganised crime
Successes in implementation (until the end of March 2017)

• NPA set up AFU in 1999 to ensure that the law is properly implemented
• Has grown to more than 100 staff members
• Freezing orders in 4320 cases
• Forfeited/confiscated assets in approximately 4350 cases
• Maintained a success rate of 90% to 95%
• It has obtained over 500 judgements
Progress in implementation (until the end of March 2017)

- Value of freezing orders is R10,6 billion
- Value of forfeiture/confiscation orders is R4,6 billion
- Approximately R644 million deposited in a special account (CARA) to be used to fight crime
- About R2, 6 billion returned to victims
AFU within NPA
Current Unit Head

Adv Nomvula Mokhatla
Where does the AFU fit into the structure of NPA

NDPP
SK Abrahams

DNDPP
W Hofmeyr

Legal Affairs Division

DNDPP
S Ramaithe

Administration & OWP

ADNDPP
T Majokweni

National Prosecuting Services

DNDPP
N Mokhatla

ASDPP
M Molelle

Asset Forfeiture Unit
Regional office structure

- Internal Investigators
- Lawyers
- State Attorney representative
- Enforcement person
- Admin staff
AFU provisions in POCA
Legal means available to secure property and recover losses

- A civil judgment
- Sequestration/liquidation
- Sec 300 of CPA
- Anti-dissipation order (Mareva injunction)
  - Clear right
  - Well grounded apprehension of irreparable harm
  - Balance of convenience
  - Absence of other remedy
- POCA
POCA: Chapter 5

- Based on UK legal model - confiscation order after conviction
- But procedure is civil; not criminal burden of proof
- Based on UK Drugs Act and the Proceeds of Crime Act
- Chapter 5 – criminal forfeiture
  - In personam: person targeted
  - Conviction required
  - Derive a benefit from offence or related criminal
POCA: Chapter 6

• Based on the US model: It significantly broadened the ability of the State to confiscate criminal assets by introducing the concept of civil forfeiture of assets

• Confiscate purely through a civil action against the property - no need to obtain a criminal conviction against the owner first

• Chapter 6 – civil forfeiture
  – In rem: property targeted
  – No conviction required
# POCA: 2 Chapters

## CHAPTER 5
### CRIMINAL FORFEITURE

<table>
<thead>
<tr>
<th>Stage</th>
<th>1st stage</th>
<th>2nd stage</th>
<th>3rd stage</th>
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<td>Optional or required</td>
<td>Optional</td>
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<td>When applicable</td>
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### Name
- Restraint
- Confiscation
- Realisation

### Type
- Freezing
- Civil judgment
- Execution order

### Standard of proof
- Reasonable grounds to believe
- Balance of probability
- Balance of probability

## CHAPTER 6
### CIVIL FORFEITURE

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<th>Stage</th>
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### Name
- Preservation
- Forfeiture

### Type
- Freezing
- Final order

### Standard of proof
- Reasonable grounds to believe
- Balance of probability
Chapter 6: Civil Forfeiture

• This chapter concerns in essence the application for preservation and forfeiture orders.
• It relates to property that is directly/indirectly the proceeds of unlawful activities and/or an instrumentality of offence(s) listed in Schedule 1 to POCA (s38(2))
Ch 6 Proceedings

- Two stage process: preservation then forfeiture
- The purpose of preservation orders are to seize property, prevent its dissipation, diminishment in value, concealment, or destruction until such time as a forfeiture order is obtained
- Preservation – standard: reasonable grounds to believe the “property” is either instrumentality or proceeds
- Forfeiture: standard: balance of probabilities
Chapter 6: Preservation Order
Preservation order

Section 38 of POCA - Preservation of property orders

• The National Director 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 if there are reasonable grounds to believe that the property concerned
Preservation order

(1) is an instrumentality of an offence referred to in Schedule 1,
(2) is the proceeds of unlawful activities; or
(3) is property associated with terrorist and related activities
(1) Instrumentality of an offence

• Section 1:
  “any property which is concerned in the commission or suspected commission of an offence..., whether committed within the Republic or elsewhere.”

• Note the inclusion of “suspected commission of an offence”

• Offence listed on schedule 1

• Property concerned in an attempted crime is included
Instrumentality of an offence

• “Concerned in”? 
  – In some way facilitate the commission of the offence; 
  – Sufficiently close link between the property and its criminal use 
  – Not simply incidental, such as the venue for the crime 
  – Achieve the purposes of POCA 
  – Its nature or manner of utilisation
Examples: Instrumentality of an offence

- Cars or boats concerned in transporting of contraband (drugs, abalone, copper, stock etc.);
- House used to store abalone/rhino horns etc;
- Motor vehicle used to commit armed robbery ie CIT heist;
- Computers/electronic equipment used to conduct a Pyramid/Ponzi scheme
Civil Forfeiture - Instrumentalities

• Community irritants – brothels, gambling houses, shebeens and drug houses
• Factories or businesses concerned in the storing of illicit copper cables, illicit cigarettes etc.
Can money be an instrumentality?
(2) Civil Forfeiture – The Proceeds of Crime

• `proceeds’ is defined as `any property or part thereof or any service, advantage, benefit or reward which is derived, received or retained, directly or indirectly, in connection with or as a result of any unlawful activity carried on by any person, whether in the Republic or elsewhere'.
(2) Civil Forfeiture – Proceeds of Crime

Examples of offences:
• Fraud – 419 schemes
• Drugs
• Green crimes eg abalone, rhino horns
• Theft
• Corruption: Tender corruption
• Counterfeit offences
• Non-ferrous or precious metals
Civil Forfeiture – Proceeds of Crime

• Examples of proceeds of crime
  – A house/farm purchased with the proceeds of fraud/theft
  – The cash money received for selling rhino horns
  – A car purchased with the proceeds of corruption
  – A business purchased with the proceeds of illicit drug money

• All subsequent property representing the proceeds of crime remains tainted property
Chapter 6: Forfeiture Order
Forfeiture order

Section 48 of POCA - Application for forfeiture order

• If a preservation of property order is in force the National Director may apply to a High Court for an order forfeiting to the State all or any of the property that is subject to the preservation of property order if the Court finds on a balance of probabilities that the property concerned
Forfeiture order

– is an instrumentality of an offence referred to in Schedule 1,
– is the proceeds of unlawful activities; or
– is property associated with terrorist and related activities
Forfeiture order

Section 48 of POCA Application for forfeiture order

• The validity of a forfeiture order is not affected by the outcome of criminal proceedings.

Section 54 of POCA - Exclusion of interests in property

• So-called “innocent” owner defence
Chapter 5: Criminal Forfeiture

• This chapter permits a court which has convicted a person of an offence to make what is referred to as a confiscation order which has the effect of a civil judgment.

• Should the accused fail to pay the confiscation order, then his/her property is sold to pay the confiscation amount after a realisation order is obtained.

• It is like a sale in execution for the recovery of a debt.
Chapter 5: 1st Stage: Restraint Orders
Restraint order

• Section 26 of POCA - Restraint orders
• The National Director may by way of an ex parte application apply to a competent 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 to which the order relates.
Restraint order

• A High Court may issue a restraint order when
  – a prosecution for an offence has been instituted against the defendant concerned,
  – either a confiscation order has been made against that defendant or it appears to the court that there are reasonable grounds for believing that a confiscation order may be made against that defendant and
  – the proceedings against that defendant have not been concluded; or
Restraint Order Summary

• **Purpose of restraint order**: To freeze assets pending conviction and confiscation application
• **Standard of proof**: Reasonable grounds to believe
• **Requirements**: Need to show:
  – Prosecution/ to be charged
  – Confiscation order may be made
• **Procedure**: Conviction based
Chapter 5:
2\textsuperscript{nd} Stage: Confiscation Order
Confiscation Order

• Section 18 of POCA
• 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
  – that offence,
  – any other offence of which the defendant has been convicted at the same trial; and
  – Any criminal activity which the court finds to be sufficiently related to those offences
Confiscation Order

- 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 any amount it considers appropriate
Confiscation Order

• Requirements for making confiscation order
  – Conviction
  – Benefit from crime
  – Realisable property
Confiscation Order

• What is to be enquired about?
• Did the defendant benefit from crime?
• How much is the benefit (proceeds of unlawful activities)?
• What order should be made: upper or lower limit?
  – Upper: full amount of benefit
  – Lower: to value of realisable property
• What amount is appropriate?
  – possible factors to be considered
Confiscation Order

• When made: Application must be made after conviction and before sentence
Confiscation Order: Benefit

• Sec 12(3) - A person has benefited from unlawful activities if he or she has at any time.... received or retained any proceeds of unlawful activities.
Confiscation Order: Benefit

• Benefit:
  – from offence
  – From sufficiently related criminal activity
  – presumption of benefit (s22.1): unexplained wealth clause: property versus income analysis: to determine if the accused has sufficient legitimate income to justify interests in property. If not, presume to have benefited from crime
Confiscation Order: Value of Proceeds of unlawful activities

• '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, and includes any property representing property so derived (Sec 1 of POCA)
Confiscation Order: Realisable property

• Any property held by the defendant concerned and any property held by a person to whom that defendant has directly or indirectly made any affected gift.

• Realisable property:
  – Property of defendant
  – Property “held by” defendant
  – affected gifts made by defendant
  – lifting corporate veil/ marriages/ trusts
Confiscation Order: Other Considerations

• Not a punishment/not part of sentence (See Mitchell and Gardner)
Some advantages of Confiscation order

1) Value is gross benefit, ie anything that passed through hands - no deduction for expenses

2) Applies even if benefit has been “lost”, eg seized by the police. If the perpetrator has other property, the order can be executed against that property

3) Joint and several liability – can recover whole amount from those who have money

4) Can also recover gifts made within last 7
AFU Financial Investigations
Theory of Financial Investigation

“If you can effectively follow the money in any given organisation, you will be at the top or near the top of the organisation.”

Why?

- Money is evidence;
- Money is intelligence;
- Money is a liability; and
- Money is an investigative tool.
Define the concept

• Following the money in any criminal investigation with the view of ........
  – Proving the crime.....
  – Financial intelligence before and after arrest
  – Money Laundering
  – Asset Forfeiture
What are Financial Investigations

• For the purposes of asset forfeiture proceedings, a financial investigation is the use of financial information to:
  – Trace and locate assets
  – Determine ownership or interest in such assets
  – Determine if there is any equity in the property
  – Determine if the property is proceeds of crime
  – Determine if property is an instrumentality of unlawful activity
What are Financial Investigations

– Conduct a lifestyle analysis
– Challenge versions provided by suspects/ interested parties in relation to property and the source of funds used to purchase these, or the source of cash that is seized
What are Financial Investigations

- Normal investigation techniques eg observation, surveillance, deduction/analysis, interview and evidence collection all apply to a financial investigation in the asset forfeiture environment.
What is Financial Investigations?

• Financial investigations are not much different to criminal investigation in its approach and method.
• Using the same investigative skills, a Financial Investigator (FI’s) seeks to trace the finances of the criminal and to discover how much they made from their enterprises.
• The method used to link any activities, with the illegal proceeds of those activities.
What is the goal of Financial Investigation’s?

- Asset Forfeiture
- Money Laundering
- Financial Intelligence
- Assist in the Criminal Investigation
Financial Investigation Methodologies

- **Asset Forfeiture**
  - *Recovery* of the proceeds of crime - now monies recovered can be used by law enforcement to combat crime;
  - *Depriving* criminals from enjoying the proceeds of crime;
  - *Removing* instruments used for the commission of crime from public access;
  - *Reducing* the economic power and influence of organised crime by securing forfeiture of the proceeds of crime;
  - *Discouraging* property owners from allowing their properties to be used for criminal purposes; and
  - *Ensuring* that property that may be subject to forfeiture is preserved and not dissipated, hidden or transferred.
Financial Investigation Methodologies

- **Money Laundering:**
  - Investigate how money laundering took place
  - Proving all the elements of money laundering:
    - The proceeds of crime
    - Knowledge of tainted proceeds
    - Arrangement or transaction between accused
    - Concealment or avoidance of prosecution or confiscation.
Financial Investigation Methodologies

- **Financial Intelligence:**
  - Movements of the tainted money
  - ID the associates in the commercial crime
  - Spending Pattern of the accused/suspects
  - Assets of the accused/suspects
Types of Financial Investigations

(1) Basic Asset Search (BAS); and

(2) Detailed Asset Search (DAS)
Financial Investigations

BASIC ASSET SEARCH (BAS)

• A BAS is conducted in every case referred to the AFU
• A BAS will require the interrogation of available databases, as well as
• use information acquired from the victims of the offences, intelligence sources, surveillance, confidential sources and informers
Financial Investigations

BASIC ASSET SEARCH (BAS)

• A BAS consists of checking for any of the following that may be held by a suspect or person holding an interest in property on behalf of the suspect or who received an affected gift:
  – Vehicles (E-Natis search)
  – immovable property (Deeds Search)
  – directorships/ memberships in company/CC (CIPC search)
  – A BAS for each entity is also required
Financial Investigations

DETAILED ASSET SEARCH (DAS)

• A DAS will commence once a BAS is completed
• By virtue of its definition, a “Detailed Asset Search” is more complex than a BAS.
Financial Investigations

DETAILED ASSET SEARCH (DAS)

• The following terms would highlight the high level aspects of a DAS:
  – Locate evidence
  – Collect the evidence
  – Collate or organise the evidence
  – Interrogate the evidence
  – Analyse the evidence
  – Interpret the evidence and
  – Present the evidence
Financial Investigations

DETAILED ASSET SEARCH (DAS)

- At this stage, the following should be undertaken:
  - Drafting a financial affidavit for use in an AFU application and to form part of the criminal docket;
  - The affidavit should contain all the information of the BAS ie: E-Natis searches; Deeds office searches; Credit searches; CIPC searches
  - An analysis of the information:
– The affidavit should contain an analysis of the information:

• to trace assets

• to follow the proceeds of crime to establish where proceeds may be located and/or if payments were made to third parties who are holding the property on the suspect’s behalf and/or to identify whether or not affected gifts were made to identify further criminal activities eg related criminal activities
Sources of information

• Obtain identity number/ passport number of suspect
• Informers: to trace assets that may not be on a person’s name but concealed on other persons’ names who are unknown to investigators
• Credit Checks
• Gambling records
Sources of information

- Company searches
- Deeds Office in relation to immovable property
- Master of Deceased Estates iro of wills/executors (for service purposes)
- Master’s office iro tracing Trusts
- Bail affidavits: details of assets may be disclosed here as well as family members who may also be investigated as possibly holding assets
Sources of information that SAPS and AFU Investigators use

• Banks: bank account records/safety deposit boxes/ accounts held (SAPS must do Sect 205)
• Searching for additional dockets to prove related criminal activities/ criminal lifestyle/ trace other assets/ compare allegations of employment/ sources of income;
• Obtain full criminal profile – not only SAP 69’s
Sources of information: SAPS and AFU

- Dept of Home affairs: eg to check marital status/identify family members who may be investigated as holding assets such as children
- Dept of Transport (eNaTIS) to check for vehicles
- FIC: obtaining intelligence regarding details of accounts/ bank records/ suspicious transaction reports
Sources of information: SAPS and AFU

- SARS including Customs: to ascertain what income was declared and compare that to assets held in a lifestyle analysis or challenge versions given in respect of income and the source of funds used to purchase assets
- SA Insurance Crime Bureau for any insurance policies
- SABRIC: SA Banking Risk Identification Centre: for intelligence regarding accounts held
Sources of information: SAPS and AFU

- Obtain registration details of vehicles found on premises at time of search and arrest
- Obtain names and identity numbers of any persons including children, parents, wives, girlfriends/boyfriends and other friends found on the property at time of search and arrest
- Obtain documentation at premises that show possible assets eg invoices for repair of vehicles, insurance policy documents
- Dumpster Diving or garbage searches
Conclusion

• POCA has an important deterrent effect.
• It hits the crime bosses where it hurts most – in the pocket
• Many criminals see gaol as an occupational hazard, but expect their families to be comfortable while they are in prison, and that they will be well-off when they come out
• It removes their favourite playthings and their “pensions” and causes them real pain
• Where it is possible to convict syndicate heads, equally important that the businesses, properties, cars, bank accounts and other assets used by the organisation do not remain behind for the use by a new leadership

• Forfeited property must be used for law enforcement (CARA) and to compensate the victims of commercial crime
• Asset forfeiture is a vital part of the war against commercial and organised crime
• But most importantly, forfeiture is a vital weapon to take the profit out of crime
• This is especially important in economically motivated crime
• To deal effectively with these types of crime, it must become true that “crime does not pay”
The Way Forward

• Identify cases for referral to AFU

• If a criminal docket is already open:
  Request the SAPS investigation officer to refer the case with AFU potential to the AFU

• If no criminal case is open:
  Contact the AFU representatives in your region to start AFU process
Any Questions?