

**Fifth Draft of Prevention of Organised Crime (03/11/98)**

**FIFTH DRAFT: 3/11/1998**

REPUBLIC OF SOUTH AFRICA

PREVENTION OF ORGANISED CRIME BILL

(As introduced in the National Assembly)

(MINISTER OF JUSTICE)

[B - 98]

**GENERAL EXPLANATORY NOTE:**

[ ] Words in bold type in square brackets indicate omissions from existing enactments.

       Words underlined with a solid line indicate insertions in existing enactments.

**BILL**

**To introduce extra-ordinary measures to combat organised crime, money laundering and criminal gang activities; to prohibit certain activities relating to racketeering activities; to provide for the prohibition of money laundering and for an obligation to report certain information; to criminalise certain activities associated with gangs; to provide for the recovery of the proceeds of crime; for the civil forfeiture of criminal assets that have been used to commit an offence or assets that are the proceeds of crime; to provide for the establishment of a Criminal Assets Recovery Account/Fund; to amend the Drugs and Drug Trafficking Act, 1992; to amend the International Co-operation in Criminal Matters Act, 1996 to repeal the Proceeds of Crime Act, 1996; to incorporate the provisions contained in the Proceeds of Crime Act, 1996; and to provide for matters connected therewith.**

**PREAMBLE**

**BEARING IN MIND** that the Bill of Rights in the Constitution of the Republic of South Africa, 1996 (Act No. 108 of 1996), enshrines the rights of all people in the Republic and affirms the democratic values of human dignity, equality and freedom;

**WHEREAS** the Constitution also provides that everyone has the right to freedom and security of the person, which includes the right to be free from all forms of violence from either public or private sources;

**RECOGNISING** that everyone has the right to freedom of association and freedom of movement;

**FURTHER RECOGNISING** that everyone is equal before the law and has the right to equal protection and benefit of the law, and has the right to have his or her dignity respected and protected;

**AND WHEREAS** the Constitution places a duty on the State to respect, protect, promote and fulfil the rights in the Bill of Rights;

**AND WHEREAS** there is a rapid growth of organised crime, money laundering and criminal gang activities nationally and internationally and since organised crime has internationally been identified as an international security threat;

**AND WHEREAS** organised crime, money laundering and criminal gang activities infringe on the rights of the people as enshrined in the Bill of Rights;

**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, money laundering 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, money laundering and criminal gang activities, and also fail to keep pace with international measures aimed at dealing effectively with organised crime, money laundering 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 and money laundering, 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 money laundering;

**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;

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

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**(Act No. 140 of 1992)**

**(Section 82)**

## **CHAPTER 1**

### **DEFINITIONS AND INTERPRETATION**

#### **Definitions and interpretation of Act**

1. (1) In this Act, unless the context otherwise indicates—
  - (i) "authorised police official" means any official of the South African Police

Service who is authorised by the National Director or the National Commissioner of Police to act under this Act; (v)

(ii) "Committee" means a committee established in terms of section 65; (xvi)

(iii) "criminal gang" means any formal or informal ongoing organisation, association, or group of three or more persons, which has as one of its activities the commission of one or more criminal offences, which has an identifiable name or identifying sign or symbol, and whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity;

(iv) "Fund"/"Account" means the Criminal Assets Recovery Account established under section 63; (iv)

#### **OPTION 1**

(v) "enterprise" includes any individual, partnership, corporation, association, or other juristic person or legal entity, and any union or group of individuals associated in fact, although not a juristic person or legal entity, which is engaged in, or the activities of which affect national or foreign commerce;

#### **OPTION 2**

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

#### **NOTE: To be revisited**

(vi) "High Court", includes for the purposes of Chapters 2, section 24 and 28 of Chapter 3 and Chapter 6 any judge thereof; (vi)

(vii) "instrumentality of an offence" means any property which is concerned in the commission or suspected commission of an offence, whether within the Republic or elsewhere;

(viii) "racketeering activity" means any **[act or threat]** conduct involving an offence referred to in Schedule 1; (xii)

#### **OPTION 1**

**[racketeering activity" means any act or threat involving an offence referred to in Schedule 1;]**

(ix) "interest" includes any right; (i)

(x) "Minister" means the Minister of Justice"; (viii)

(xi) "National Director" means the National Director of Public Prosecutions appointed in terms of section 179(1)(a) of the Constitution and for the purposes of—  
(a) sections 2(4), 51, 65(2) or 71 includes a Director of Public Prosecutions, an Investigating Director of Public Prosecutions and a Special Director of Public Prosecutions referred to section 1 of the National Prosecution Authority Act, 1998 (Act No. 32 of 1998), who is authorised thereto in writing by the National Director in a specific case or in general;

(b) all other relevant provisions of this Act, includes any functionary referred to in section 1 of the National Prosecuting Authority Act, 1998, which is under the control of the National Director and authorised thereto by the National Director in a specific case or in general;"

(xii) "pattern of criminal gang activity" means the commission, attempt to commit, or conspiring to commit two or more criminal offences referred to in Schedule 1:

Provided that at least one of those offences occurred after the date of



commencement of Chapter 4 and the last of those offences occurred within three years after a prior offence and the offences were committed—

(a) on separate occasions; or

(b) on the same occasion are members of, or belong to, the same criminal gang;

**OPTION 2**

(xiii) "pattern of racketeering activity" means the planned, ongoing, continuous or repeated participation or involvement in any offence referred to in Schedule 1 **[for purposes of financial gain]** and includes at least two **[such]** offences **[of racketeering activity not more than 10 years apart]** of which one of the offences occurred after the commencement of this Act and the last offence occurred 10 years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;

**Proposed by Chairperson**

**OPTION 2**

"pattern of racketeering activity" **[means]** requires at least two acts of racketeering activity involving an offence referred to in Schedule 1, of which one of the acts occurred after the commencement of this Act and the last of which occurred 10 years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;

(xiv) "preservation of property order" means an order referred to in section 38. (vii)

(xv) "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[—

**(a) except for the purposes of Chapter 5,]** any unlawful activity carried on by any person, whether in the Republic or elsewhere.;

**(b)] except** for purposes of Chapter 5[,—

**(i)] where it means—**

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

**(b) [(ii)]** 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)

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

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

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

**(b)** the court is satisfied that—

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

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

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

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

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

has.

(4) Nothing in Chapters 2, 3 and 4 shall be construed to limit prosecution under any other provision of the law.

## CHAPTER 2

### OFFENCES RELATING TO A PATTERN OF RACKETEERING ACTIVITIES

#### Offences

2. (1) Any person who—

- (a) (i) receives or retains any property derived, directly or indirectly; and
- (ii) knows or ought reasonably to have known that such property is derived, directly or indirectly, from a pattern of racketeering activity; and
- (iii) uses or invests, directly or indirectly, any part of such property in acquisition of any interest in, or the establishment or operation of, any enterprise;

#### **ALTERNATIVE TO PARAGRAPH (a)**

(a) receives or retains or who has received or retained any property derived, directly or indirectly, from a pattern of racketeering activity, who knows or ought reasonably to have known such property is or was so derived, and who uses or invests, directly or indirectly, any part of such property in acquisition of any interest in, or the establishment, operation or activities of any enterprise;

**[(c)](b)** **[n behalf of any enterprise]** receives or retains any property derived, directly or indirectly, **[from]** through a pattern of racketeering activity on behalf of any enterprise, and who knows or ought reasonably to have known that such property is **[so]** derived through a pattern of racketeering activity;

**[(d)](c)** **[on behalf of any enterprise,]** uses or invests, directly or indirectly, any part of property **[and who knows or ought reasonably to have known that such property or proceeds is derived, directly or indirectly, from]** through a pattern of racketeering activity on behalf of any enterprise or in acquisition of any interest in, or the establishment or operation of any enterprise and who knows or ought reasonably to have known that such property is derived through a pattern of racketeering activities;

**[(b)](d)** **[through a pattern of racketeering activity,]** acquires or maintains, directly or indirectly, any interest in or control of any enterprise through a pattern of racketeering activity;

(e) whilst managing or employed by or associated with any enterprise, conducts or participates in the conduct, *directly or indirectly*, of such enterprise's affairs through a pattern of racketeering activity;

(f) 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, directly or indirectly, of such enterprise's affairs through a pattern of racketeering activity;

(g) conspires or attempts to violate any of the provisions of paragraphs (a), (b), (c), (d), (e) or (f),

shall be guilty of an offence.

(2) The court may hear evidence, including evidence with regard to hearsay, similar facts or previous convictions, that may show that the accused is **[involved in**



a pattern of illegal conduct racketeering activity,] guilty of an offence contemplated in subsection (1), notwithstanding that such evidence might otherwise be inadmissible, provided that such evidence would not render a trial unfair or otherwise be detrimental to the administration of justice.

(3) For purposes of proving a previous conviction at criminal proceedings, it shall be sufficient to prove the original record of judicial proceedings if a copy of such record, certified or purporting to be certified by the registrar or clerk of the court or other official having the custody of the record of such judicial proceedings or by the deputy of such registrar, clerk or other official or, in the case where judicial proceedings are taken down in shorthand or by mechanical means, by the person who transcribed such proceedings, as a true copy of such record, is produced in evidence at such criminal proceedings, and such copy shall be *prima facie* proof that any matter purporting to be recorded thereon was correctly recorded.

(4) (a) A person shall only be charged with committing an offence contemplated in subsection (1) if such prosecution is authorised in writing by the National Director.

### **Criminal penalties**

3. (1) Any person convicted of an offence referred to in section 2(1) shall be liable to a fine not exceeding R1000 million, or to imprisonment for a period up to imprisonment for life.

(2) Notwithstanding any other law dealing with the penal jurisdiction of the regional court, if a regional court, after it has convicted an accused of an offence referred to in section 2(1) following on—

(a) a plea of guilty; or

(b) a plea of not guilty,

but before sentence, is of the opinion that the offence in respect of which the accused has been convicted merits punishment—

(i) in excess of the penal jurisdiction of the regional court but not exceeding a fine of R100million or a period of 30 years imprisonment, the regional court shall have jurisdiction to impose such penalty even though that penalty exceeds the punitive jurisdiction of that court; or

(ii) exceeding a period of 30 years imprisonment or merits imprisonment for life, the regional court shall stop the proceedings and commit the accused for sentence by a High Court having jurisdiction.

(3) If a regional court has committed an accused for sentence by a High Court in terms of subsection (2) the provisions of section 52 of the Criminal Law Amendment Act, 1997 (Act No. 105 of 1997), notwithstanding the provisions of section 53, shall apply with the necessary changes regarding the referral by the regional court to the High Court.

## **CHAPTER 3**

### **OFFENCES RELATING TO PROCEEDS OF CRIME**

#### **Money laundering**

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

(a) enters into any agreement or engages in any arrangement or transaction with anyone in connection with that property, whether 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,  
shall be guilty of an offence.

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

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

(a) the retention or the control by or on behalf of the said other person of the proceeds of unlawful activities is facilitated; or

(b) the said proceeds of unlawful activities 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.

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

6. Any person who—

(a) acquires;

(b) uses; or

(c) has possession of property and who knows or ought reasonably to have known that it is or forms part of the proceeds of unlawful activities of another person,  
shall be guilty of an offence.

#### **Failure to report suspicion regarding proceeds of crime**

7. (1) Any person who carries on a business or is in charge of a business undertaking who 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 unlawful activities;

(b) a transaction to which he or she or the business undertaking is a party will facilitate the transfer of the proceeds of unlawful activities, or

(c) a transaction to which he or she or the business undertaking is a party and

which is discontinued—

(i) may have brought the proceeds of unlawful activities into possession of the person or business undertaking; or

(ii) may have facilitated the transfer of the proceeds of crime, had that transaction been concluded,

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.

(2) 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.

(3) 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.

(4) When a person receives a request under subsection (3) 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.

(5) (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 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.

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

(6) 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.

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

**[(8) It is a defence to a charge under sections 4, 5 and 6 that the accused had reported a suspicion under section 7.]**



## Penalties

8. (1) Any person convicted of an offence contemplated in section 4, 5 or 6 shall be liable to a fine not exceeding R100 million, or to imprisonment for a period not exceeding 30 years.

(2) Any person convicted of an offence contemplated in section 7(7), shall be liable to a fine, or to imprisonment for a period not exceeding 15 years.

## CHAPTER 4

### OFFENCES RELATING TO CRIMINAL GANG ACTIVITIES

#### Gang related offences

9. (1) Any person who actively participates in or is a member of a criminal gang and who—

(a) wilfully aids and abets any criminal activity committed for the benefit of, at the direction of, or in association with any criminal gang;

(b) threatens to commit, bring about or perform any act of violence or to retaliate in any manner or by any means to any act or alleged act of violence in respect of any specific person or any person in general;

(c) threatens to commit, bring about or perform any criminal activity by a criminal gang or with the assistance of a criminal gang, is guilty of an offence.

(2) Any person who—

(a) performs any act which is aimed at causing, bringing about, promoting or contributing towards a pattern of criminal gang activities;

(b) incites, instigates, commands, aids, advises, encourages or procures any other person to commit, bring about, perform or participate in a pattern of criminal gang activity;

(c) intentionally causes, encourages, recruits, incites, instigates, commands, aids or advises another person to join a criminal gang, shall be guilty of any offence.

## Penalties

10. (1) Any person convicted of an offence contemplated in—

(a) section 9(1) shall be liable to a fine, or to imprisonment for a period not exceeding five years;

(b) section 9(2), shall be liable to a fine, or to imprisonment for a period not exceeding three years;

(c) section 9(1) and if the offence was committed under circumstances referred to in subsection (2) or (3) shall be liable to a fine, or to imprisonment for a period not exceeding seven years;

(d) section 9(2) and if the offence was committed under circumstances referred to in subsection (2) or (3) shall be liable to a fine or to imprisonment for a period not exceeding five years.

(2) If the offence contemplated in section 9 is committed on the premises or grounds of, or within 500 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 shall be regarded as an aggravating factor.

(3) If a court, after having convicted an 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 shall be regarded as an aggravating factor for sentencing purposes.

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

**11.** In considering whether a person is a member of a criminal gang for purposes of this Chapter the court may, have regard to the following factors, namely that such person—

(a) admits to criminal gang membership;

(b) is identified as a member of a criminal gang by a parent or guardian;

**[(c) is identified as a criminal gang member by a documented reliable informant;]**

**[(d)](c)** 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 associates with known members of a criminal gang;

**[(e)](d)** is identified as a member of a criminal gang by an informant of previously untested reliability and such identification is corroborated by independent information;

**[(f)](e)** has been arrested more than once in the company of identified members of a criminal gang for offences which are consistent with usual criminal gang activity;

**[(g)](f)** is identified as a member of a criminal gang by physical evidence such as photographs or other documentation.

## **CHAPTER 5**

### **PROCEEDS OF UNLAWFUL ACTIVITIES**

#### **PART 1**

#### **APPLICATION OF CHAPTER**

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

**12.** (1) In this Chapter, unless the context indicates otherwise—

(i) "affected gift" means any gift—

(a) made by the defendant concerned not more than seven years before the fixed date;

(b) made by the defendant concerned at any time, if it was a gift—

(i) of property received by that defendant in connection with an offence committed by him or her or any other person; or

(ii) of property, or any part thereof, which directly or indirectly represented in that defendant's hands property received by him or her in that connection, whether any such gift was made before or after the commencement of this Act;

(ii) "confiscation order" means an order referred to in section 12(1);

(iii) "defendant" means a person against whom a prosecution for an offence has been instituted, irrespective of whether he or she has been convicted or not, and

includes a person referred to in section 27(1)(b);

(iv) "fixed date", in relation to a defendant—

(a) if a prosecution for an offence has been instituted against the defendant, means the date on which such prosecution has been instituted;

(b) if a restraint order has been made against the defendant, means the date of such restraint order,

whichever is the earlier date;

(v) "realisable property" means property referred to in section 14;

(vi) "restraint order" means an order referred to in section 26(1);

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

(a) to a person who holds property shall be construed as a reference to a person who has any interest in the property, and—

(i) if the estate of such person has been sequestrated, also to the executor of his or her insolvent estate; or

(ii) if such person is a company or other juristic person which is being wound up, also to the liquidator thereof;

(b) to a person who transfers property to any other person shall be construed as a reference to a person who transfers or grants to any other person any interest in the property;

(c) to anything received in connection with an offence shall be construed as a reference also to anything received both in that connection and in some other connection.

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

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

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

(2) The rules of evidence applicable in civil proceedings apply to proceedings on application for a confiscation order or a restraint order.

(3) No rule of evidence applicable only in criminal proceedings shall apply to proceedings on application for a confiscation order or restraint order.

(4) No rule of construction applicable only in criminal proceedings shall apply to proceedings on application for a confiscation order or restraint order.

(5) Any question of fact to be decided by a court in any proceedings in respect of an application contemplated in this Chapter shall be decided on a balance of probabilities.

### **Realisable property**

14. (1) Subject to the provisions of subsection (2), the following property shall be realisable in terms of this Chapter, namely—



- (a) any property held by the defendant concerned; and
  - (b) any property held by a person to whom that defendant has directly or indirectly made any affected gift.
- (2) Property shall not be realisable property if a declaration of forfeiture is in force in respect thereof.

### **Value of property**

15. (1) For the purposes of this Chapter, the value of property, other than money, in relation to any person holding the property, shall be—
- (a) where any other person holds an interest in the property—
    - (i) the market value of the property; less
    - (ii) the amount required to discharge any encumbrance on the property; and
  - (b) where no other person holds an interest in the property, the market value of the property.
- (2) Notwithstanding the provisions of subsection (1), any reference in this Chapter to the value at a particular time of a payment or reward, shall be construed as a reference to—
- (a) the value of the payment or reward at the time when the recipient received it, as adjusted to take into account subsequent fluctuations in the value of money; or
  - (b) where subsection (3) applies, the value mentioned in that subsection, whichever is the greater value.
- (3) If at the particular time the recipient holds—
- (a) the property, other than cash, which he or she received, the value concerned shall be the value of the property at the particular time; or
  - (b) property, or any part thereof, which directly or indirectly represents in his or her hands the property which he or she received, the value concerned shall be the value of the property, in so far as it represents the property which he or she received, at the relevant time.

### **Gifts**

16. (1) For the purposes of this Chapter, a defendant shall be deemed to have made a gift if he or she has transferred any property to any other person directly or indirectly for a consideration the value of which is significantly less than the value of the consideration supplied by the defendant.
- (2) For the purposes of section 20(2) the gift which a defendant is deemed to have made shall consist of that share in the property transferred by the defendant which is equal to the difference between the value of that property as a whole and the consideration received by the defendant in return.

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

17. For the purposes of this Chapter, the proceedings contemplated in terms of this Chapter against a defendant shall be concluded when—
- (a) the defendant is acquitted or found not guilty of an offence;
  - (b) subject to section 18(2), the court convicting the defendant of an offence,

- sentences the defendant without making a confiscation order against him or her;
- (c) the conviction in respect of an offence is set aside on review or appeal; or
  - (d) the defendant satisfies the confiscation order made against him or her.

## **PART 2**

### **CONFISCATION ORDERS**

#### **Confiscation orders**

**18.** (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—  
that offence;

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

(c) any 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 any amount it considers appropriate and the court may make any further orders as it may deem fit to ensure the effectiveness and fairness of that order.

(2) 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 Chapter; or

(b) if the court is satisfied that the amount which might be realised as contemplated in section 20(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.

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

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

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

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

(5) No application referred to in subsection (1) shall be made without the written authority of the National Director.

(6) A court before which proceedings under this section are pending, may—

(a) in considering an application under subsection (1)—

(i) refer to the evidence and proceedings at the trial;

(ii) hear 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 21(1)(a); and
- (iv) direct a defendant to tender to the court a statement referred to in subsection (3)(a) of that section;
- (b) subject to subsection (1)(b) or (3)(b) of section 21, adjourn such proceedings to any day on such conditions not inconsistent with a provision of the Criminal Procedure Act, 1977 (Act No. 51 of 1977), as the court may deem fit.

### **Value of proceeds of unlawful activities**

**19.** (1) Subject to the provisions of subsection (2), the value of a defendant's proceeds of unlawful activities shall be the sum of the values of the payments or other rewards received by him or her at any time, whether before or after the commencement of this Act, in connection with the criminal activity carried on by him or her or any other person.

(2) In determining the value of a defendant's proceeds of unlawful activities the court shall—

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

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

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

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

### **Amounts which might be realised**

**20.** (1) For the purposes of section 18(1)(b) or 21(3)(a), the amount which might be realised at the time of the making of a confiscation order against a defendant shall be the amount equal to the sum of—

(a) the values at that time of all realisable property held by the defendant; and

(b) the values at that time of all affected gifts made by the defendant, less the sum of all obligations, if any, of the defendant having priority and which the court may recognise for this purpose.

(2) Notwithstanding the provisions of section 15(1) but subject to the provisions of section 16(2), the value of an affected gift at the time of the making of the relevant confiscation order shall be—

(a) the value of the affected gift at the time when the recipient received it, as adjusted to take into account subsequent fluctuations in the value of money; or

(b) where subsection (3) applies, the value mentioned in that subsection, whichever is the greater value.

(3) If at the time of the making of the relevant confiscation order the recipient



holds—

(a) the property, other than cash, which he or she received, the value concerned shall be the value of the property at that time; or

(b) the property which directly or indirectly represents in his or her hands the property which he or she received, the value concerned shall be the value of the property, in so far as it represents the property which he or she received, at the time.

(4) For the purposes of subsection (1), an obligation has priority at the time of the making of the relevant confiscation order—

(a) if it is an obligation of the defendant, where he or she has been convicted by a court of any offence—

(i) to pay a fine imposed before that time by the court; or

(ii) to pay any other amount under any resultant order made before that time by the court;

(b) if it is an obligation which—

(i) if the estate of the defendant had at that time been sequestered; or

(ii) where the defendant is a company or other juristic person, if such company or juristic person is at that time being wound up, would be payable in pursuance of any secured or preferent claim against the insolvent estate or against such company or juristic person, as the case may be.

(5) A court shall not determine the amounts which might be realised as contemplated in subsection (1) unless it has afforded all persons holding any interest in the property concerned an opportunity to make representations to it in connection with the realisation of that property.

### **Statements relating to proceeds of unlawful activities**

21. (1) (a) The public prosecutor may or, if so directed by the court, shall tender to the court a statement in writing under oath or affirmation by him or her or any other person in connection with any matter which is being enquired into by the court under section 18(1), or which relates to the determination of the value of a defendant's proceeds of unlawful activities.

(b) A copy of such statement shall be served on the defendant at least 14 days before the date on which that statement is to be tendered to the court.

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

(b) In so far as the defendant does not dispute the correctness of any allegation contained in such statement, that allegation shall be deemed to be conclusive proof of the matter to which it relates.

(3) (a) A defendant may or, if so directed by the court, shall tender to the court a statement in writing under oath or affirmation by him or her or by any other person in connection with any matter which relates to the determination of the amount which might be realised as contemplated in section 20(1).

(b) A copy of such statement shall be served on the public prosecutor at least 14 days before the date on which that statement is to be tendered to the court.

(4) (a) The public prosecutor may admit the correctness of any allegation

contained in a statement referred to in subsection (3)(a).

(b) In so far as the public prosecutor admits the correctness of any allegation contained in such statement, that allegation shall be deemed to be conclusive proof of the matter to which it relates.

### **Evidence relating to proceeds of unlawful activities**

**22.** (1) For the purposes of determining whether a defendant has derived a benefit in an enquiry under section 18(1), if it is found that the defendant did not at the fixed date, or since the beginning of a period of seven years before the fixed date, have legitimate sources of income sufficient to justify the interests in any property that the defendant holds, the court shall accept this fact as *prima facie* evidence that such interests form part of such a benefit.

(2) For the purposes of an enquiry under section 18(1), if it is found that a court had ordered the defendant to disclose any facts under section 26(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, the court shall accept these facts as *prima facie* evidence that any property to which the information relates—

(a) forms part of the defendant's benefit, in determining whether he or she has derived a benefit from an offence; or

(b) is held by the defendant as an advantage, payment, service or reward in connection with the offences or related criminal activities referred to in section 18(1).

(3) For the purposes of determining the value of a defendant's proceeds of unlawful activities in an enquiry under section 20(1)—

(a) if the court finds that he or she has benefited from an offence and that—

(i) he or she held property at any time at, or since, his or her conviction; or

(ii) property was transferred to him or her at any time since the beginning of a period of seven years before the fixed date, the court shall accept these facts as *prima facie* evidence that the property was received by him or her at the earliest time at which he or she held it, as an advantage, payment, service or reward in connection with the offences or related criminal activities referred to in section 18(1);

(b) if the court finds that he or she has benefited from an offence and that expenditure had been incurred by him or her since the beginning of the period contemplated in paragraph (a), the court shall accept these facts as *prima facie* evidence that any such expenditure was met out of the advantages, payments, services or rewards, including any property received by him or her in connection with the offences or related criminal activities referred to in section 18(1) committed by him or her.

(4) For the purpose of determining the value of any property in an enquiry under section 18(1), if the court finds that the defendant received property at any time as an advantage, payment, service or reward in connection with the offences or related criminal activities referred to in that subsection committed by him or her or by any other person the court shall accept this fact as *prima facie* evidence that he or she received that property free of any other interest therein.

### **Effect of confiscation orders**