

NO. 76 OF 1996: PROCEEDS OF CRIME ACT, 1996.

PRESIDENT'S OFFICE

No. 1876.
20 November 1996

NO. 76 OF 1996: PROCEEDS OF CRIME ACT, 1996.

It is hereby notified that the President has assented to the following Act which is hereby published for general information-

ACT

To provide for the recovery of the proceeds of crime; for the prohibition of money laundering; and for an obligation to report certain information; and to provide for matters connected therewith.

(English text signed by the President.)

(Assented to 6 November 1996)

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

CHAPTER 1

Application of Act

Definitions

1. (1) In this Act, 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; or

(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; (i)

(ii) "confiscation order" means an order referred to in section 8(1); (v)

(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

15(1) (b);

(xi)

(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; or

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

whichever is the earlier date; (x)

(v) "interest" includes any right; (ii)

(vi) "Minister" means the Minister of Justice; (vii)

(vii) "proceeds", in relation to an offence, means any property or part thereof which was derived directly or indirectly as a result of-

(a) the commission in the Republic of such offence; or

(b) any act or omission 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; (viii)

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

(ix) "realisable property" means property referred to in section 4; (ix)

(x) "restraint order" means an order referred to in section 16(1); (vi)

(xi) "superior court" means a provincial or local division of the Supreme Court of South Africa, and includes, for the purpose of sections 14 to 18, any judge thereof. (iv)

(2) In this Act, 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 sequestered, 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.

Persons who have benefited from crime

2. For the purposes of this Act, 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 payment or other reward in connection with any criminal activity carried on by him or her or by any other person.

Proceeds of crime

3. For the purposes of this Act, any payment or other reward 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.

Realisable property

4. (1) Subject to the provisions of subsection (2), the following property shall be realisable in terms of this Act, 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

5. (1) For the purposes of this Act, 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 Act 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

6. (1) For the purposes of this Act, a defendant shall be deemed to have made a gift if he or she has transfer-red 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 10(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

7. For the purposes of this Act, the proceedings contemplated in terms of this Act against a defendant shall be concluded when-

- (a) the defendant is acquitted or found not guilty of an offence;
- (b) subject to section 8(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.

CHAPTER 2

Confiscation orders

Confiscation orders

8. (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 such offence or any related criminal activity 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.

(2) 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.

(3) 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.

(4) No application referred to in subsection (1) shall be made without the written authority of the attorney-general concerned.

(5) A court before which proceedings under this section are pending, may-

(a) in order to make a confiscation order-

(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;

(b) subject to subsection (1) (b) or (3) (b) of section II, 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 crime

9. (1) Subject to the provisions of subsection (2), the value of a defendant's proceeds of crime 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 crime 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, or any part thereof, 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 crime 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

10. (1) For the purposes of section 8(1) (b) or 11(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 5(1) but subject to the provisions of section 6(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, 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 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 sequestrated; 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 crime

11. (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 8(1), or which relates to the

determination of the value of a defendant's proceeds of crime.

(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 10(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.

Presumptions relating to proceeds of crime

12. (1) For the purposes of 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, that such interests form part of such a benefit.

(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-

(a) whether the defendant has derived a benefit from an offence, that any property to which the information relates, forms part of such a benefit;

and

(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 payment or reward in connection with the offence or related criminal activity.

(3) For the purposes of 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-

(i) held by him or her at any time at, or since, his or her conviction;
or

(ii) transferred to him or her at any time since the beginning of a
period of seven years before the fixed date,

was received by him or her at the earliest time at which he or she held
it, as a payment or other reward in connection with the offence or any
related criminal activity committed by him or her;

(b) any expenditure incurred by him or her since the beginning of the
period

or
contemplated in paragraph (a) was met out of payments received by him
her in connection with the offence or any related criminal activity
committed by him or her; and

(c) for the purpose of determining the value of any property-

her
(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
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.

Effect of confiscation orders

13. (1) A confiscation order made-

(a) by a magistrate's court, other than a regional court, shall have the
effect of a civil judgment of that court;

(b) by a regional court shall have the effect of a civil judgment of the
magistrate's court of the district in which the relevant trial took
place.

(2) Where a superior court makes a confiscation order-

that
(a) the confiscation order shall have the effect of a civil judgment of
court; or

(b) the presiding judge may direct the registrar of that court to forward a
certified copy of the confiscation order to the clerk of the
magistrate's court designated by the presiding judge or, if no such
court is designated, to the clerk of the magistrate's court within the
area of jurisdiction of which the offence concerned was committed, and,
on receipt of the said copy of the confiscation order the clerk of the
magistrate's court concerned shall register the confiscation order
whereupon it shall have the effect of a civil judgment of that
magistrate's court.

Procedure where person absconds

14. (1) If a person has absconded and the proceedings against him or her

cannot be resumed within a period of six months 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) there are reasonable grounds to believe that a confiscation order would have been made against him or her,

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.

(2) The court conducting an enquiry contemplated in subsection (1) may-

- so
- (a) if the court finds that the person referred to in that subsection has 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.

(3) A court shall not exercise its powers under subsection (2) (a) and (c) unless it has afforded all persons having any interest in the property concerned an opportunity to make representations to it in connection with the making of such orders.

CHAPTER 3

Restraint orders

Cases in which restraint orders may be made

15. (1) A superior court may exercise the powers conferred upon it by section 16(1)-

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

person.

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

Restraint orders

16. (1) The attorney-general concerned, or any public prosecutor authorised thereto in writing by him or her, or the Director of the Office for Serious Economic Offences or any person authorised thereto in writing by him or her may by way of an ex parte application apply to a competent superior 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.

(2) A restraint order may be made-

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

(3) (a) A court to which an application is made in terms of subsection (1) may make a provisional restraint order having immediate effect and may simultaneously grant a rule nisi calling upon the defendant upon a day mentioned in the rule to appear and to show cause why the restraint order should not be made final.

(b) If the defendant has been absent during a period of 21 days from his or her usual place of residence and of his or her business (if any) within the Republic, the court may direct that it shall be sufficient service of that rule if a copy thereof is affixed to or near the outer door of the buildings where the court sits and published in the Gazette, or may direct some other mode of service.

(c) Upon the application for the defendant, the court may anticipate the return day for the purpose of discharging the provisional restraint order if 24 hours' notice of such application has been given to the applicant contemplated in subsection (1).

(4) (a) A restraint order shall provide for notice to be given to persons affected by the order.

(b) Any person affected by a restraint order may at any time apply for the variation or rescission of the order.

(5) If it deems it necessary in the interests of justice, the superior court which made a restraint order-

- (a) may at any time vary or rescind the restraint order; or
- (b) shall rescind the restraint order if the proceedings against the defendant in question are concluded.

(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.

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

Seizure of property subject to restraint order

17. (1) In order to prevent any realisable property from being disposed of or removed contrary to a restraint 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.

(2) Property seized under subsection (1) shall be dealt with in accordance with the directions of the superior court which made the relevant restraint order.

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

18. (1) Where a superior court has made a restraint order, that court may at any time-

- (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 restraint order has been made, namely-
 - (i) to perform any particular act in respect of any of or all the property to which the restraint order relates;
 - (ii) to take care of the 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 the person against whom the restraint order has been made to surrender forthwith, or within such period as that court may determine, any property in respect of which a curator bonis has been appointed under paragraph (a), into the custody of that curator bonis.

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

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

(3) The superior court which made an order contemplated in subsection (1) (b)-

(a) may at any time-

(i) vary or rescind the order; or

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

(b) shall rescind the order and discharge the curator bonis concerned if the relevant restraint order is rescinded;

(c) 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-

(i) from the confiscated proceeds if a confiscation order is made; or

(ii) by the State if no confiscation order is made.

Orders in respect of immovable property subject to restraint order

19. (1) A superior court which has made a restraint order in respect of immovable property may at any time, with a view to ensuring the payment to the State-

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

(b) where a confiscation order has been made, of an amount not exceeding the amount payable under the confiscation order,

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

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

(a) that the immovable property shall not without the consent of the superior court be mortgaged or otherwise encumbered;

(b) that the immovable property shall not without the consent of the superior court be attached or sold in execution; and

(c) that the immovable property shall not without the consent of the superior court-

(i) vest in the Master of the Supreme Court or trustee concerned, as the case may be, when the estate of the owner of that immovable property is sequestrated; or

(ii) where the owner of that immovable property is a company or other juristic person which is being wound up, form part of the assets of such company or juristic person,

if the owner of that immovable property has not made the payment

referred to in that subsection to the State.

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

- such
- (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 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 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;
- (b) when the original of the title deed is produced to him or her, make the necessary endorsement thereon.

(4) Unless the superior 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 sequestered; or
- (b) where the owner of the immovable property is a company or other juristic person, such company or juristic person is being wound up, in the person in whom the said custody would have vested if such a restriction were not so endorsed.

(5) Where the superior 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-

- (a) if the estate of the owner of the immovable property was sequestered, to have vested in the Master of the Supreme 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.

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

(7) (a) The superior court which made an order contemplated in subsection (1)-

- (i) may at any time rescind the order; and
- (ii) shall rescind the order if the relevant restraint order is rescinded or the amount payment of which is ensured by the order has with the consent of that court been paid into court.

(b) If such order is rescinded, the superior 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.

CHAPTER 4

Realisation of property

Realisation of property

20. (1) A superior court may exercise the powers conferred upon it by subsection (2) when-

- (a) a confiscation order has been made against the defendant concerned;
- (b) such confiscation order is no longer subject to review or appeal; and
- (c) the proceedings against that defendant have not been concluded.

(2) A superior court may, on the application of the attorney-general concerned or any public prosecutor authorised thereto in writing by that attorney-general-

- (a) if a curator bonis has not been appointed in respect of any of the property concerned, appoint a curator bonis in respect of realisable property;
- (b) subject to subsection (3), authorise a curator bonis appointed under section 18(1) (a) or under paragraph (a) of this subsection, as the case may be, to realise any realisable property in such manner as that court may determine;
- (c) order any person who holds realisable property to surrender the said property forthwith into the custody of a curator bonis appointed under section 18(1) (a) or under paragraph (a) of this subsection, as the case may be.

(3) A superior court shall not exercise its powers under subsection (2) (b) unless it has afforded all persons having any interest in the property concerned an opportunity to make representations to it in connection with the realisation of that property.

Application of certain sums of money

21. (1) The following sums of money in the hands of a curator bonis appointed under this Act, namely-

- (a) the proceeds of any realisable property realised by virtue of section 20; and
- (b) any other sums of money, being property of the defendant concerned, shall, after such payment as the superior court may direct have been made out of such sums of money, be applied on that defendant's behalf

in

satisfaction of the confiscation order made against him or her: Provided that where the superior court may direct payment out of such sums of money, the State shall not have a preferential claim: Provided further that, if sums of money remain in the hands of the curator bonis after the amount payable under such confiscation order has been fully paid, the curator bonis shall distribute those sums of money-

- (i) among such persons who held realisable property which has been realised by virtue of section 20; and

(ii) in such proportions,

as that court may, after affording such persons an opportunity to make

representations to it in connection with the distribution of those sums of money, direct.

(2) Without limiting the generality of subsection (1) such payment as the superior court may direct shall, for the purposes of that subsection, include any payment in respect of an obligation which was found to have priority in terms of section 10.

Functions of curator bonis

22. (1) Immediately after letters of curatorship have been granted to a curator bonis appointed under this Act, the curator bonis shall take into his or her custody all the property in respect of which he or she was appointed, as well as any book, record or other document in the possession or custody or under the control of any person referred to in section 18(1)(b) or 20(2)(c) which relates to the said property.

(2) Save as is otherwise provided in this Act, the provisions of the Administration of Estates Act, 1965 (Act No. 66 of 1965), shall mutatis mutandis apply in respect of a curator bonis appointed under this Act.

Exercise of powers by superior court and curator bonis

23. (1) The powers conferred upon a superior court by sections 16 to 21, or upon a curator bonis appointed under this Act, shall-

- (a) subject to paragraphs (b) and (c), be exercised with a view to making available the current value of realisable property for satisfying any confiscation order made or which might be made against the defendant;
- (b) in the case of realisable property held by a person to whom that defendant has directly or indirectly made an affected gift, be exercised with a view to realising not more than the current value of such gift;
- (c) be exercised with a view to allowing any person other than that defendant or the recipient of such gift to retain or recover the current value of any property held by him or her,

and, except as provided in sections 10(1) and 16(6), any obligation of that defendant or the recipient of such gift which conflicts with the obligation to satisfy a confiscation order shall be left out of account.

(2) The provisions of subsection (1) shall not be construed as prohibiting any superior court from making any additional order in respect of a debt owed to the State.

Variation of confiscation orders

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

(2) For the purposes of subsection (1), the superior court may-

- (a) in the case of realisable property held-
 - (i) by a person whose estate has been sequestrated, take into account the extent to which the proceeds of property in that estate may be

distributed among the creditors; or

(ii) by a company or other juristic person which is being wound up, take into account the extent to which the assets of such company or juristic person may be distributed among the creditors;

(b) leave out of account any inadequacy in the realisable property which is in the opinion of that court wholly or partly attributable to anything done by the defendant for the purpose of preserving any property held

by

a person to whom the defendant had directly or indirectly made an affected gift from the risk of any realisation in terms of this Act.

(3) (a) If a certificate referred to in subsection (1) has been issued, the defendant may apply to the court which made the confiscation order against him or her for the reduction of the amount to be recovered under that confiscation order.

(b) Such court or, if the judge or judicial officer concerned is not available, any judge or judicial officer of that court may substitute for the amount to be recovered under such confiscation order such lesser amount as that court may consider just in the circumstances of the case.

Effect of sequestration of estates on realisable property

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

(a) the property for the time being subject to a restraint order made before

the date of sequestration; and

20 (b) the proceeds of any realisable property realised by virtue of section and for the time being in the hands of a curator bonis appointed under this Act,

shall not vest in the Master of the Supreme Court or trustee concerned, as the case may be.

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

(a) no court shall set aside the disposition of such gift under section 29, 30 or 31 of the Insolvency Act, 1936 (Act No. 24 of 1936)-

(i) if a prosecution for an offence has been instituted against the defendant and the proceedings against him or her have not been concluded; or

(ii) if the property of such other person is subject to a restraint order;

(a) (b) any court which sets aside any disposition contemplated in paragraph

after the conclusion of the proceedings against the defendant, shall take into account any realisation of the property of such other person in terms of this Act.

(3) Where the estate of an insolvent has been sequestrated, the powers conferred upon a superior court by sections 16 to 21 and 23(2) or upon a curator bonis appointed under this Act, shall not be exercised-

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

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

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

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

- (a) no property for the time being subject to a restraint order made before the relevant time; and
- (b) no proceeds of any realisable property realised by virtue of section 20 and for the time being in the hands of a curator bonis appointed under this Act,

shall form part of the assets of any such company or juristic person.

(2) Where an order mentioned in subsection (1) has been made in respect of a company or other juristic person or a resolution mentioned in that subsection has been registered in respect of such company or juristic person, the powers conferred upon a superior court by sections 16 to 21 and 23(2) or upon a curator bonis appointed under this Act, shall not be exercised in respect of any property which forms part of the assets of such company or juristic person.

(3) Nothing in the Companies Act, 1973 (Act No. 61 of 1973), or any other law relating to juristic persons in general or any particular juristic person, shall be construed as prohibiting any superior court or curator bonis appointed under this Act from exercising any power contemplated in subsection (2) in respect of any property or proceeds mentioned in subsection (1).

(4) For the purposes of subsection (1), "the relevant time" means-

- (a) where an order for the winding-up of the company or juristic person, as the case may be, has been made, the time of the presentation to the court concerned of the application for the winding-up; or
- (b) where no such order has been made, the time of the registration of the resolution authorising the voluntary winding-up of the company or juristic person, as the case may be.

(5) The provisions of section 25(2) are mutatis mutandis applicable to a company or juristic person who has directly or indirectly made an affected gift.

Liability

27. 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.

CHAPTER 5

Offences

Money laundering

28. Any person who, knowing or having reasonable grounds to believe that property is or forms part of the proceeds of crime-

- (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 crime

29. Any person who knowing, or having reasonable grounds to believe, 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.

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, 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.

Failure to report suspicion regarding proceeds of crime

31. (1) Any person who carries on a business or is in charge of a business undertaking who has reason to suspect that any property which comes into his or

her possession or the possession of the said business undertaking forms the proceeds of crime, shall be obliged to report his or her suspicion and 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.

(2) Any person who fails to comply with an obligation contemplated in subsection (1) shall be guilty of an offence.

(3) (a) No obligation as to secrecy and no other restriction on the disclosure of information, whether imposed by any law, the common law or any agreement, shall affect any obligation imposed by subsection (1).

(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 subsection (1).

Misuse of information, failure to comply with order of court, and hindering person in performance of functions

32. (1) Any person who, knowing or having reasonable grounds to believe-

(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.

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

(3) Any person who hinders a curator bonis, a police officer or any other person in the exercise, performance or carrying out of his or her powers, functions or duties under this Act, shall be guilty of an offence.

Penalties

33. (1) Any person convicted of an offence contemplated in section 28, 29 or 30 shall be liable to a fine, or to imprisonment for a period not exceeding 30 years.

(2) Any person convicted of an offence contemplated in-

(a) section 31, 32(1) or (2) shall be liable to a fine, or to imprisonment for a period not exceeding 15 years;

(b) section 32(3) shall be liable to a fine, or to imprisonment for a period not exceeding two years.

CHAPTER 6

Miscellaneous

Jurisdiction of magistrate's courts

34. A magistrate's court or regional court shall have jurisdiction-

- (a) to impose any penalty mentioned in section 31, even though that penalty may exceed the punitive jurisdiction of that court; and
- (b) to make any order referred to in section 8(1), even though the amount payable under that order may exceed the civil jurisdiction of a magistrate's court.

Measure of proof

35. Any question of fact to be decided by a court in any proceedings in respect of an application contemplated in this Act shall be decided on a balance of probabilities.

Regulations

36. The Minister may make regulations-

- (a) with regard to the fees referred to in section 18(3)(c);
- (b) with regard to the nature of the information contemplated in section 31§ and the manner in which it is to be reported;
- (c) with regard to the designation of persons for purposes of section 31; and
- (d) providing for any matter which he or she may consider necessary or expedient to prescribe or to regulate with a view to achieving the objects of this Act.

Repeal of Chapter V of Act 140 of 1992

37. Chapter V of the Drugs and Drug Trafficking Act, 1992, is hereby repealed.

Amendment of section 64 of Act 140 of 1992

38. Section 64 of the Drugs and Drug Trafficking Act, 1992, is hereby amended by the deletion of paragraph (b).

Short title and commencement

39. This Act shall be called the Proceeds of Crime Act, 1996, and shall come into operation on a date fixed by the President by proclamation in the Gazette.