



# GOVERNMENT GAZETTE

## OF THE

# REPUBLIC OF NAMIBIA

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No. 289 Promulgation of Prevention of Organised Crime Act, 2004 (Act No. 29 of 2004), of the Parliament ..... 1

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### Government Notice

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#### OFFICE OF THE PRIME MINISTER

No. 289

2004

#### PROMULGATION OF ACT OF PARLIAMENT

The following Act which has been passed by the Parliament and signed by the President in terms of the Namibian Constitution is hereby published in terms of Article 56 of that Constitution.

No. 29 of 2004: Prevention of Organised Crime Act, 2004.

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## ACT

To introduce measures to combat organised crime, money laundering and criminal gang activities; to prohibit certain activities relating to racketeering activities; to provide for 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 unlawful activities; to provide for the forfeiture of assets that have been used to commit an offence or assets that are the proceeds of unlawful activities; to provide for the establishment of a Criminal Assets Recovery Fund and a Criminal Assets Recovery Committee; to prohibit the smuggling of migrants and trafficking in persons; to amend the International Co-operation in Criminal Matters Act, 2000 (Act No. 9 of 2000), and to provide for incidental matters.

*(Signed by the President on 19 December 2004)*

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## CHAPTER 1 PRELIMINARY

### Definitions and interpretation

1. (1) In this Act, unless the context otherwise indicates -

“anti-disposal order” means an order referred to in section 33;

“authorised member of police” or “member of the police” means any member of the Namibian Police Force referred to in section 2 of the Police Act, 1990 (Act No. 19 of 1990), who is assigned by the Inspector-General to act under this Act;

“Bank” means the Bank of Namibia established under the Bank of Namibia Act, 1997 (Act No. 15 of 1997);

“Committee” means the Criminal Assets Recovery Committee established in terms of section 77;

“confiscation order” means an order referred to in section 32;

“Convention” means the United Nations Convention against Transnational Organised Crime which was adopted on 15<sup>th</sup> November 2000 by the General Assembly of the United Nations (Resolution 55/25);

“criminal gang” includes, whether or not it has an identifiable name or identifying sign or symbol, any formal or informal ongoing organisation, association, or group of two or more persons -

- (a) which has as one of its aims the commission of one or more criminal offences; and
- (b) whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity;

“divisional court” means the court of a regional division established in terms of section 2(1) of the Magistrates Courts’ Act, 1944 (Act No. 32 of 1944);

“document” means any record of information, and includes -

- (a) anything on which there is writing;
- (b) anything on which there are marks, figures, symbols or perforations having a meaning for persons qualified to interpret them;
- (c) anything from which sounds, images or writings can be reproduced with or without the aid of anything else; or
- (d) a map, plan, drawing or photograph;

“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;

“forfeiture order” means a forfeiture order referred to in section 61(1);

“Fund” means the Criminal Assets Recovery Fund established under section 74;

“High Court”, includes any judge of that court;

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

“interest” includes any right;

“legal practitioner” means a legal practitioner as defined in section 1 of the Legal Practitioners Act 1995 (Act No. 15 of 1995);

“Minister” means the Minister responsible for justice;

“money laundering” means doing any act which constitutes an offence under sections 4 to 6;

“pattern of criminal gang activity” includes the commission of two or more criminal offences referred to in Schedule 1, but, at least one of those offences must have occurred after the commencement of this Act 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,

by two or more persons who are members of, or belong to, the same criminal gang;

“pattern of racketeering activity” means the planned, ongoing, continuous or repeated participation or involvement in any offence referred to in Schedule 1 and includes at least two offences referred to in Schedule 1, of which one of the offences occurred after the commencement of this Act and the last offence occurred within 10 years (excluding any period of imprisonment) after the commission of such prior offence referred to in Schedule 1;

“prescribe” and its derivatives, means prescribe by regulations made under section 100;

“preservation of property order” means an order referred to in section 51;

“proceeds of unlawful activities” means any property or any service, advantage, benefit or reward that was derived, received or retained, directly or indirectly in Namibia or elsewhere, at any time before or after the commencement of this Act, in connection with or as a result of any unlawful activity carried on by any person, and includes any property representing property so derived and includes property which is mingled with property that is proceeds of unlawful activity;

“property” means money or any other movable, immovable, corporeal or incorporeal thing and includes any rights, privileges, claims and securities and any interest in the property and all proceeds from the property;

“restraint order” means an order referred to in section 25;

“smuggling of migrants” means the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person who is not -

- (a) a national or a permanent resident of Namibia; or
- (b) lawfully resident in Namibia;

into Namibia or enabling such a person to remain in Namibia without complying with the law of Namibia;

“staff member” means a staff member as defined in section 1 of the Public Service Act, 1995 (Act No. 13 of 1995);

“trafficking in persons” means the recruitment, transfer, harbouring or receipt of persons by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation and includes any attempt, participation or organising of any of these actions. Exploitation includes, at a minimum, the exploitation or the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs; and

“unlawful activity” means any conduct which constitutes an offence or which contravenes any law whether that conduct occurred before or after the commencement of this Act and whether that conduct occurred in Namibia or elsewhere as long as that conduct constitutes an offence in Namibia or contravenes any law of Namibia.

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

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

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

(4) Nothing in Chapters 5 or 6 is to be construed to limit prosecution under any other provision of the law.

(5) Nothing in this Act, or in any other law, is to be construed so as to exclude the application of any provision of Chapter 5 or 6 on account of the fact that -

(a) any offence or unlawful activity concerned occurred; or

(b) any proceeds of unlawful activities were derived, received or retained

before the commencement of this Act.

## **CHAPTER 2 OFFENCES RELATING TO RACKETEERING ACTIVITIES**

### **Offences**

2. (1) Any person who, within Namibia or elsewhere -

(a) receives or retains any property derived, directly or indirectly, from a pattern of racketeering activity;



- (b) knows or ought reasonably to have known that that property is so derived; and
- (c) uses or invests, directly or indirectly, any part of that property in the acquisition of any interest in, or the establishment or operation or activities of, any enterprise,

commits an offence.

- (2) Any person who, within Namibia or elsewhere -
  - (a) receives or retains any property, directly or indirectly, on behalf of any enterprise; and
  - (b) knows or ought reasonably to have known that that property derived or is derived from or through a pattern of racketeering activity,

commits an offence.

- (3) Any person who, within Namibia or elsewhere -
  - (a) uses or invests any property, directly or indirectly, on behalf of any enterprise or in the acquisition of any interest in, or the establishment or operation or activities of any enterprise; and
  - (b) knows or ought reasonably to have known that that property derived or is derived from or through a pattern of racketeering activity,

commits an offence.

(4) Any person who, within Namibia or elsewhere, acquires or maintains, directly or indirectly, any interest in or control of any enterprise through a pattern of racketeering activity commits an offence.

(5) Any person who, whilst managing or employed by or associated with any enterprise, within Namibia or elsewhere, conducts or participates in the conduct, directly or indirectly, of that enterprise's affairs through a pattern of racketeering activity commits an offence.

(6) Any person who, within Namibia or elsewhere, manages the operation or activities 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 that enterprise's affairs through a pattern of racketeering activity commits an offence.

(7) Any person who, within Namibia or elsewhere, conspires or attempts to violate subsections (1) to (6) commits an offence.

(8) The court may hear evidence, including evidence with regard to hearsay, similar facts or previous convictions, relating to offences contemplated in subsections (1) to (7) notwithstanding that that evidence might otherwise be inadmissible, provided that the evidence would not render a trial unfair.

(9) For the purposes of proving a previous conviction during a trial in respect of an offence contemplated in subsections (1) to (7) it is sufficient to prove the original record of judicial proceedings if a copy of that record, certified or purporting to be certified as a true copy -

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**PREVENTION OF ORGANISED CRIME ACT, 2004**

- (a) by the -
  - (i) registrar or clerk of the court or other staff member having the custody of the record of those judicial proceedings; or
  - (ii) deputy of that registrar, clerk of the court or other staff member, or
- (b) in the case where judicial proceedings are taken down in shorthand or by mechanical means, by the person who transcribed those proceedings,

is produced in evidence at the trial, and that copy is *prima facie* proof that any matter purporting to be recorded therein was correctly recorded.

(10) A person must not be charged with committing an offence contemplated in subsections (1) to (7) unless a prosecution has been authorised in writing by the Prosecutor-General.

**Penalties**

3. (1) Any person convicted of an offence referred to in section 2(1) to (7) is liable to a fine not exceeding N\$1 billion, or to imprisonment for a period not exceeding 100 years, or to both the fine and imprisonment.

(2) Notwithstanding any other law dealing with the penal jurisdiction of the divisional court, if a divisional court, after it has convicted an accused of an offence referred to in section 2(1) to (7), but before sentence is passed, is of the opinion that the offence in respect of which the accused has been convicted merits punishment -

- (a) in excess of the penal jurisdiction of the divisional court, but not exceeding a fine of N\$100 million or a period of 30 years imprisonment, the divisional court has jurisdiction to impose that penalty even though that penalty may exceed the penal jurisdiction of that court; or
- (b) exceeding a fine of N\$100 million or a period of 30 years imprisonment, the divisional court must stop the proceedings and commit the accused for sentence by the High Court.

(3) A sentence imposed in terms of this section is not subject to postponement or suspension in terms of section 322 of the Criminal Procedure Act, 2004 (Act No. 25 of 2004).

**CHAPTER 3  
OFFENCES RELATING TO MONEY LAUNDERING****Disguising unlawful origin of property**

4. Any person who knows or ought reasonably to have known that property is or forms part of 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 that agreement, arrangement or transaction is legally enforceable or not; or
- (b) performs any other act in connection with that property, whether it is performed independently or in concert with any other person,

and that agreement, arrangement, transaction or act has or is likely to have the effect -

- (i) of concealing or disguising the nature, origin, source, location, disposition or movement of the property or its ownership, or any interest which anyone may have in respect of that property; or
- (ii) of enabling or assisting any person who has committed or commits an offence, whether in Namibia 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,

commits the offence of money laundering.

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

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

- (a) the retention or the control by or on behalf of that other person of the proceeds of unlawful activities is facilitated; or
- (b) the proceeds of unlawful activities are used to make funds available to that other person or to acquire property on his or her behalf or to benefit him or her in any other way,

commits the offence of money laundering.

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

6. Any person who -
- (a) acquires;
  - (b) uses;
  - (c) has possession of; or
  - (d) brings into, or takes out of, Namibia,

property and who knows or ought reasonably to have known that it is or forms part of the proceeds of unlawful activities commits the offence of money laundering.

#### **Offences of corporations**

7. Where an offence under section 4, 5 or 6 is committed by a body of persons, whether corporate or incorporate, every person who, at the time of the commission of the offence acted in an official capacity for or on behalf of that body of persons, whether as a director, manager, secretary or other similar office, or was purporting to act in that capacity, commits that offence.

#### **Jurisdiction in respect of offences**

8. (1) Where an act which constitutes an offence under this Act is or was -
- (a) done by a national of Namibia within Namibia or elsewhere;

- (b) done by any person on a vehicle, ship or other seafaring vessel or aircraft traveling through Namibia, putting into port in Namibia or landing on a landing strip or airport in Namibia; or
- (c) done by any person outside Namibia and other acts forming part of the offence are done or are to be done in Namibia;
- (d) done by any person outside Namibia and the effects of the offence are felt in Namibia;

the person concerned may, regardless of anything in any law to the contrary, but subject to this Act, be tried and punished for that offence by any court which has jurisdiction over criminal offences in Namibia.

(2) For the purposes of subsection (1) an "act" includes any omission or circumstances or other course of conduct which constitutes the offence in question.

#### **Reporting of suspicion regarding proceeds of unlawful activities**

9. (1) Any person who carries on a business or is in charge of, or manages a business undertaking or who is employed by a business undertaking and who suspects or ought reasonably to have suspected that -

- (a) any property which comes into his or her possession or the possession of the 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 the possession of the person or business undertaking; or
  - (ii) may have facilitated the transfer of the proceeds of unlawful activities, had the transaction been concluded,

must report his or her suspicion and provide all available information concerning the grounds on which it rests, without unreasonable delay to the Bank and must take all reasonable steps to discharge that obligation.

(2) Documents directly relevant to the suspicion and the grounds on which the suspicion rests must be included with the report under subsection (1).

(3) On receipt of a report made under subsection (1), the Bank may, in writing, require the person making the report to provide it or an official identified in the request with -

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

(4) When the reporter receives a request under subsection (3), he or she must furnish the person who made the request with the requested particulars or further particulars and copies of documents to the extent that those particulars or documents are available to him or her within a reasonable time.

(5) Subject to subsection (6), 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, affects any obligation imposed under this section to report or disclose information or to permit access to any registers, records or other documents.

(6) Subsection (5) does not apply if the obligation of secrecy or other restriction is based on the common law right to professional privilege between a legal practitioner and his or her client in respect of information communicated to the legal practitioner so as to enable the legal practitioner to -

- (a) provide advice to the client;
- (b) defend the client; or
- (c) render other legal assistance to the client,

in connection with an offence under any law in respect of which -

- (i) the client is charged;
- (ii) the client has been arrested or summoned to appear in court; or
- (iii) in respect of which an investigation with a view to institute criminal proceedings is being conducted against the client.

(7) 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, arises from a disclosure of any information in good faith and in compliance with any obligation imposed by this section.

(8) 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.

(9) Any person who fails to comply with an obligation contemplated in this section commits an offence.

### **Defence**

10. If a person is charged with negligently committing an offence under section 2(1) or (2), or section 4, 5 or 6, that person may raise as a defence the fact that he or she had reported a suspicion in terms of section 9.

### **Penalties**

11. (1) Any person convicted of an offence contemplated in section 4, 5 or 6 is liable to a fine not exceeding N\$100 million, or to imprisonment for a period not exceeding 30 years.

(2) Any person convicted of an offence contemplated in section 9(9) is liable to a fine not exceeding N\$300 000, or to imprisonment for a period not exceeding 15 years.

**CHAPTER 4**  
**OFFENCES RELATING TO CRIMINAL GANG ACTIVITIES**

**PART 1**  
**CRIMINAL GANG OFFENCES**

**Gang related offences**

**12.** (1) Any person who participates in or is a member of a criminal gang and who -

- (a) 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 any criminal activity by a criminal gang or with the assistance of a criminal gang; or
- (c) threatens any specific person or persons in general, with retaliation in any manner or by any means whatsoever, in response to any act or alleged act of violence,

commits 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 activity;
- (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; or
- (c) causes, encourages, recruits, incites, instigates, commands, aids or advises another person to join a criminal gang,

commits an offence.

**Penalties**

**13.** (1) Any person convicted of an offence under -

- (a) section 12(1) or 12(2)(a), is liable to a fine not exceeding N\$500 000 or to imprisonment for a period not exceeding six years, but, if the offence was committed under the circumstances referred to in subsection (2), is liable to a fine not exceeding N\$800 000 or to imprisonment for a period not exceeding eight years; and
- (b) section 12(2)(b) or (c), is liable to a fine not exceeding N\$250 000 or to imprisonment for a period not exceeding three years, but, if the offence was committed under the circumstances referred to in subsection (2), is liable to a fine not exceeding N\$400 000 or to imprisonment for a period not exceeding five years.

(2) If any of the offences contemplated in section 12 is committed on the premises or grounds of, or within 500 metres of a school, or any other educational institution, during hours in which the facility is open for classes or school related programmes or when minors are using the facility, that fact must be regarded as an aggravating factor for sentencing purposes.

(3) If a court, after having convicted an accused of any offence, including an offence contemplated in this Act, finds that the accused was a member of a criminal gang at the time of the commission of the offence, that finding must be regarded as an aggravating factor for sentencing purposes.

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

14. In considering whether a person is a member of a criminal gang for the purposes of this Act, the court may have regard to all relevant factors, including the following factors, namely that, that person -

- (a) admits to criminal gang membership;
- (b) is identified as a member of a criminal gang by his or her parent, guardian or relative;
- (c) resides in or frequents a particular 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;
- (d) 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 activities;
- (e) is identified as a member of a criminal gang by physical evidence such as photographs or other documentation.

## **PART 2 OTHER OFFENCES**

#### **Trafficking in persons**

15. Any person who participates in or who aids and abets the trafficking in persons, as contemplated in Annex II of the Convention, in Namibia or across the border to and from foreign countries commits an offence and is liable to a fine not exceeding N\$1 000 000 or to imprisonment for a period not exceeding 50 years.

#### **Smuggling of migrants**

16. Any person who participates in or who aids and abets the smuggling of migrants, as contemplated in Annex III of the Convention, by land, air or sea, in order to obtain, directly or indirectly, a financial or other material benefit, commits an offence and is liable to a fine not exceeding N\$500 000 or to imprisonment for a period not exceeding 25 years.

## **CHAPTER 5 CONFISCATION OF BENEFITS OF CRIME**

### **PART 1 APPLICATION OF CHAPTER**

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

17. (1) In this Chapter, unless the context indicates otherwise -  
"affected gift" means a gift referred to in section 22;

"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 24(1)(b);

"encumbrance" in relation to property, includes any interest, mortgage, charge, right, or claim in respect of the property;

"fixed date" in relation to a defendant -

- (a) if a warrant for the arrest of the defendant has been issued, means the date of issue of that warrant;
- (b) if the defendant has been arrested without a warrant of arrest having been issued, means the date on which the defendant first appeared in court after the arrest; or
- (c) if the defendant has been summoned to appear in court on a criminal charge, means the court date indicated in the summons;

"realisable property" means property referred to in section 20.

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

- (a) to a person who holds property must be construed as a reference to a person who has any interest in the property, and -
  - (i) if the estate of that person has been sequestrated, also to the trustee of his or her insolvent estate; or
  - (ii) if that person is a company or other juristic person which is being wound up, also to the liquidator of that company or juristic person;
- (b) to a person who transfers property to any other person must 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 must 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 the commission of an offence or related criminal activity if he or she has at any time, whether before or after the commencement of this Act, received or retained any proceeds of an offence or related criminal activity, whether or not that person is still in possession of those proceeds of an offence or related criminal activity subsequent to having received or retained those proceeds.

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

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

(2) The rules of evidence applicable in civil proceedings apply to proceedings under this Chapter, but, any evidence that would be admissible in criminal proceedings is admissible in proceedings under this Chapter.



(3) No evidence, which is inadmissible in criminal proceedings pursuant to a rule of evidence applicable only in those proceedings, is for that reason alone inadmissible in proceedings under this Chapter.

(4) No rule of construction applicable only in criminal proceedings applies to proceedings under this Chapter.

(5) Any question of fact to be decided by a court in any proceedings in respect of an enquiry in terms of section 32(1) into any benefit which a defendant may have derived from an offence or related criminal activity, or arising from that enquiry, must be decided on a balance of probabilities.

#### **Confiscation proceedings not affected by forfeiture**

19. A restraint order, preservation of property order or confiscation order may be granted against a person in spite of the fact that separate proceedings in terms of this Chapter or Chapter 6 have been instituted in respect of that person or any property in which that person may have an interest.

#### **Realisable property**

20. (1) Subject to subsection (2), the following property is realisable in terms of this Chapter, namely -

- (a) any property held by the defendant concerned;
- (b) any property held by a person to whom that defendant has directly or indirectly made any affected gift; or
- (c) the instrumentality of an offence attributable to the defendant.

(2) Property is not realisable property if -

- (a) a forfeiture order; or
- (b) a declaration of forfeiture in terms of any other law,

has taken effect in respect of that property.

#### **Value of property**

21. (1) For the purposes of this Chapter, the value of property, other than money, in relation to any person holding the property is -

- (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 subsection (1), any reference in this Chapter to the value at a particular time of a payment or reward, must 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 referred to in subsection (2) the recipient holds -
- (a) the property, other than cash, which he or she received, the value concerned is the value of the property at the particular time; or
  - (b) property which directly or indirectly represents in his or her hands the property which he or she received, the value concerned is the value of the property, in so far as it represents the property which he or she received, at the relevant time.

**Affected gifts**

22. (1) Any gift -
- (a) made by a defendant not more than seven years before the fixed date; or
  - (b) made by a defendant at any time, if it was a gift -
    - (i) of property received by that defendant in connection with the commission of an offence or related criminal activity carried out by him or her or any other person; or
    - (ii) of property which directly or indirectly represented in that defendant's hands property received by him or her in connection with the commission of an offence or related criminal activity,

is, whether that gift was made before or after the commencement of this Act, an affected gift.

(2) If, in the circumstances referred to in subsection (1), a defendant received consideration for any property which he or she had transferred to any other person, that defendant is deemed, unless the contrary is proved, to have made a gift if he or she had transferred the property concerned directly or indirectly for a consideration the value of which is significantly less than the value of the property transferred by the defendant.

(3) In the case where a defendant is deemed to have made a gift as referred to in subsection (2), the gift which the defendant is deemed to have made is the 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.

(4) The value of an affected gift at the time of the realisation of the property concerned is -

- (a) the value of the affected gift at the time when the recipient received it, as adjusted to take into account any subsequent fluctuations in the value of money; or
- (b) where subsection (5) applies, the value mentioned in that subsection, whichever is the greater value.

(5) If property, other than cash, is given as an affected gift, the value of that gift at the time of the realisation of the property concerned is -

- (a) the value of the property at that time; or
- (b) the value at that time of the property which directly or indirectly represents, in the hands of the recipient, the property he or she received as an affected gift.

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

23. For the purposes of this Chapter, the proceedings contemplated in terms of this Chapter against a defendant are concluded -

- (a) when the defendant is acquitted of an offence;
- (b) when the court convicting the defendant of an offence, subject to section 32(3), sentences the defendant without making a confiscation order against him or her;
- (c) when the conviction in respect of an offence is set aside on review or appeal;
- (d) when the defendant satisfies the confiscation order made against him or her; or
- (e) where section 47 applies, when the defendant satisfies the confiscation order made against him or her by paying the amount substituted in terms of section 47(4).

## **PART 2 RESTRAINT ORDERS**

#### **Cases in which restraint orders may be made**

24. (1) The High Court may exercise the powers conferred on it by section 25(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) the 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 that person.

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

**Restraint orders**

25. (1) The Prosecutor-General may apply to the High Court for a restraint 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) If the High Court when considering an application made in terms of subsection (1), is satisfied that the facts referred to in section 24(1) appear on the face of it from the application, it must make, without requiring that notice of the application be given to any other person or the adduction of any further evidence from any other person, an order having immediate effect -

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

(3) When the High Court makes a restraint order under subsection (2) it -

- (a) may include in that order any ancillary orders that the court considers appropriate for the proper, fair and effective execution of the order; and
- (b) may at the same time include an order authorising the seizure of all movable property concerned by a member of the police.

(4) A restraint order must provide for notice to be given to persons affected by the order and the Minister must prescribe the manner in which the notice will be served on the affected persons.

(5) Property seized under subsection (3) must be dealt with in accordance with the directions of the High Court.

(6) A restraint order made under subsection (2) expires when the proceedings against the defendant are concluded.

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

**Provision for expenses from restrained property**

26. (1) Without derogating from the generality of the powers conferred by section 25(1), the High Court, when it has made a restraint order may, on application by a person against whom the order is made, make provision as the court may think fit for the payment from the property of that person which is subject to the restraint order -

- (a) of reasonable living expenses for that person and any person whom he or she is legally liable to support or maintain; and

- (b) of reasonable legal expenses for that person in connection with any proceedings instituted against him or her in terms of this Chapter or any criminal proceedings to which those proceedings may relate.
- (2) A court must not make provision for the payment of any expenses under subsection (1) unless the court is satisfied that -
- (a) the person applying for the payment of those expenses, and every other person whom he or she is legally liable to support or maintain, has disclosed under oath or affirmation all their interests in the property from which such a provision is to be made and has submitted to that court a sworn and full statement of all their assets and liabilities; and
  - (b) neither the person applying for the payment of those expenses nor any other person whom he or she is legally liable to support or maintain, can meet the expenses concerned out of their unrestrained property.

#### **Variation or rescission of orders**

27. (1) The High Court may vary or rescind a restraint order or an order made under section 33(2) if it is satisfied that -

- (a) the order concerned -
  - (i) will deprive the person against whom it was made of the means to provide for his or her reasonable living expenses; and
  - (ii) will cause undue hardship for the person against whom it was made which outweighs the risk that the property concerned may be destroyed, lost, damaged, concealed or transferred; or
- (b) there is an ambiguity or a patent error in, or omission from, that order, but only to the extent of that ambiguity, error or omission.

(2) When the court orders the variation or rescission of an order authorising the seizure of property in terms of subsection (1)(a), the court must make any other order which it considers appropriate for the proper, fair and effective execution of the restraint order concerned.

(3) The High Court may rescind a restraint order or an order made under section 33(2) if -

- (a) it was erroneously sought or erroneously made in the absence of the person applying for its rescission; or
  - (b) it was made as a result of a mistake that is common to both the Prosecutor-General and the person against whom it was made.
- (4) Only the -
- (a) Prosecutor-General; or
  - (b) person against whom the order was made on notice to the Prosecutor-General.

may apply for an order under subsection (1) or subsection (3).

(5) A restraint order or an order made under section 33(2) may not be varied or rescinded on any grounds other than those provided for in this section.

**Seizure of property subject to restraint order**

28. (1) In order to prevent any realisable property from being disposed of or removed before a restraint order can be made, any member of the police may seize that property if he or she has reasonable grounds to believe that that property will be so disposed of or removed.

(2) Property seized under subsection (1) must be dealt with in accordance with the directions of the High Court when a restraint order is subsequently made.

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

29. (1) Where the High Court has made a restraint order, the court may at any time -

- (a) appoint a *curator bonis* to do, subject to the directions of the 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 property;
  - (iii) to administer the property; and
  - (iv) where the property is a business or undertaking, to carry on, with due regard to any law which may be applicable, the business or undertaking;
- (b) order any person against whom the restraint order has been made to surrender immediately, or within such period as the 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*;
- (c) subject to the directions of the court, authorise the *curator bonis* to recover from the property in respect of which he or she was appointed, any expenses associated with the performance of his or her functions referred to in paragraph (a); and
- (d) subject to the directions of the court, authorise the *curator bonis* to realise any property in respect of which he or she was appointed -
  - (i) in order to recover an expense referred to in paragraph (c); or
  - (ii) if the court is satisfied that -
    - (aa) the property is subject to waste or substantial loss of value; or
    - (bb) the cost performance of the functions referred to in paragraph (a) in respect of that property would exceed the value thereof.

(2) Any person affected by an order contemplated in subsection (1) 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

