

ASSET RECOVERY: ENFORCEMENT OF FOREIGN ORDER

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ASSET RECOVERY IN SOUTH AFRICA

Statute:

Prevention of Organised Crime Act 121 of 1998 (POCA)

Both asset recovery regimes adopted:

- Conviction based forfeiture
- Non-conviction based forfeiture



ASSET RECOVERY IN SOUTH AFRICA

Conviction based forfeiture

- value / benefit based
- reasonable grounds to believe (interim seizure order) / balance of probabilities (final order)

Non-conviction based forfeiture

- proceeds of unlawful activities / instrumentality of an offence
- standard of proof: as above

“[66] It is necessarily and rightly far reaching and robust. ... [70] We should embrace POCA as a friend to democracy, the rule of law and constitutionalism – and as indispensable in a world where the institutions of state are fragile, and the instruments of law sometimes struggle for their very survival against criminals who subvert them.”

NDPP v Elran 2013(1) SACR 429 CC



ENFORCEMENT OF FOREIGN ORDERS

- Given effect in South Africa subsequent to the registration process described in s20 or 24 of the **International Cooperation in Criminal Matters Act (ICCMA)**.
- Both conviction and non-conviction based orders can be registered:
 - Interim orders: restraint and preservation orders
 - Final orders: confiscation and forfeiture orders

ENFORCEMENT OF FOREIGN ORDERS

- Requirements for registration apply
- Interim order: s24 and 26 ICCMA
 - certified copy
 - notice given and time period provided
 - foreign court had jurisdiction
 - not subject to appeal or review
 - interests of justice
 - order not satisfied

ENFORCEMENT OF FOREIGN ORDERS

- Final order: s20 and s22 ICCMA
 - order is final
 - foreign court had jurisdiction
 - fair hearing: opportunity to defend
 - cannot be satisfied in country
 - enforceable in the country
 - property exists in SA
 - in the interests of justice
 - certified copy
 - notice given and time period provided

ENFORCEMENT OF FOREIGN ORDERS

- A registered foreign order has the same effect as an order made by a domestic court

Note:

It is possible for South Africa to apply for a domestic order based on evidence obtained from a criminal investigation in the foreign state.

Foreign (victim) interests can be recognized.



ENFORCEMENT OF FOREIGN ORDERS

- Mandatory return and disposal of proceeds of unlawful activity to requesting States.
- S21 of ICCMA: less expenses incurred, unless an agreement or arrangement provides otherwise.

BEST PRACTICES

- Both conviction and non-conviction based forfeiture foreign orders recognised
- The existence of a competent authority
- The existence of a specialized Unit: Asset Forfeiture Unit to handle requests, registration, and implementation of orders
- The development of AFU internal policies for handling asset recovery requests
- SA Police Service liaison officers in countries to facilitate asset recovery requests

BEST PRACTICES

- International relationships / contact points developed through networks like ARINSA and training programmes: for example: prosecutor placement programme
- Training and knowledge management eg shared folder
- Use of standard templates: creates consistency, ensures compliance and expedites registration:
 - notice to registrar for registration of order
 - notice to parties

BEST PRACTICES

- Speedy process of registration: not require evidence from foreign state to be presented
 - Litigation in foreign state in respect of merits of case
 - Litigation in SA only in respect of registration process

BEST PRACTICES

- If the order is opposed and state is not successful, requested state pays the costs: agreement made (preferably beforehand)
- If successful:
 - both litigation and preservation costs deducted from assets
 - net proceeds goes to foreign state unless sharing agreement exists: can be shared equally between the states if there is no victim

BEST PRACTICES

- Curator / receiver can be appointed to look after property – separate application
- Property management costs is a major issue, especially in cases that take a long time to be finalised: options should be considered to limit costs / loss of value, for example:

BEST PRACTICES

- Businesses, such as a hotel, may be profitable, but running expenses are high. They may also be difficult to run because they may be used for criminal purposes such as prostitution or drug dealing
- Houses may appreciate over time, but are expensive to maintain.
- Assets that eat are very expensive to maintain, or may die: eg race horses, exotic animals, etc

BEST PRACTICES

- Plan properly and make a careful assessment of the value of the assets, and the costs of maintaining them during the freezing order period
- Consider alternatives to prevent loss of value or limit costs: for example:
 - Agreement to sell and the cash kept in an interest bearing investment
 - If no agreement, approach court to make order: on the basis that it will be damaging to the victim state

CHALLENGES AND BARRIERS

- Costs: maintaining property and curator costs high; quantification of country costs eg use of officials' time – prior agreement
- Incorrect details of the property causes delays;
- Natural and juristic persons: clear indication in order to seize interests in companies etc

CHALLENGES AND BARRIERS

- Uncertified order sent that causes delays
- Continental law: comply with SA requirements. Liberal interpretation of statute required.

CHALLENGES AND BARRIERS

- Costs resulting from unsuccessful restraint or confiscation action. Agreement needed beforehand: an undertaking or indemnity by the foreign State prior to pursuit of an enforcement action
- Problems with service of notice: arrangements to be made with foreign state
- Technical area: lack of skills and knowledge

South African Constitutional Court in justifying confiscation order:

“[72] ... corruption undermines the “institutions and values of democracy and ethical values and morality” and jeopardises development and the rule of law. Corruption is therefore antithetical to the founding values of our constitutional order.”

Shaik and Others v The State 2008 (2) SA 208 CC

