"Pay back the money" – a paper on criminal and civil asset forfeiture within South Africa and suggestions for reform

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Abstract

Purpose: The purpose of this paper is to bring to light the present civil and criminal asset forfeiture procedures within the South African context and to make suggestions for reform thereof. While there exists and is a need for constant change and reform of the law to ensure that it remains transparent, up-to-date and applicable to all means through which economic crime can be committed, South Africa lacks the necessary resources and attitudes to accomplish this essential goal.

Design/methodology/approach: The approach used in this paper is purely qualitative using journal articles, textbooks, reports, periodicals, speeches and legislation as its basis. It is through a consolidation of this literature that this paper was formed.

Findings: While South Africa's present system of asset forfeiture is producing some impressive results, the process still has vast room for improvement. There are key areas which this paper outlines for reform. However, the probability of improvement is relatively low owing to the levels of corruption, illicit activities and attitudes of mistrust within the South African society at large.

Originality/value: The concept of asset forfeiture is not new to any international jurisdiction, let alone South Africa itself. However, this paper aims to give insight into the specific South African experience of this procedure and how it can possibly be improved within the specific context.

Keywords: Asset forfeiture, South Africa, Reform, Civil claims, Criminal claims, Fraud, Financial crime, Corruption, Cybercrime, Prison overcrowding, Transparency, Procedural law

Introduction

Asset forfeiture is a legal process through which authorities and victims of economic crimes are enabled to seize, realise and confiscate assets acquired through either criminal or other unlawful activities. In South Africa, this practice has gained significant attention in recent years. South Africa has a worrisome and exponential growth of their crime rate which is of both national and international concern. At the centre of this growing crime rate are violent and serious economic crimes. The country's efforts to combat organized crime, corruption and illicit financial activities have led to the implementation of a multi-faceted preventative effort

or drive and have included a myriad of legislation, sector development, establishment of units and regulators. This paper will explore the concept of asset forfeiture in South Africa by examining its current legal, political and social spheres and the stumbling blocks to change that form an inherent part thereof. This paper will tentatively delve into the complexities of economic crimes and the present legal framework within which South Africa attempts to combat such crimes, as well as retrieve and obtain the ill-gotten gains therefrom. From this discussion or exposé, certain possible recommendations of reform of the present asset forfeiture system will be made and certain conclusions reached.

Setting the stage: the current legal, political and social framework of South Africa

To fully understand how the occurrence and implementation of asset forfeiture could possibly be reformed in South Africa, both the legal and political landscapes that they operate within need to be clearly understood. The South African crime rate is reaching alarming rates which is extensive and of grave national concern (Curlewis, 2021). As a combatant to the malevolent rate of violent and serious economic crimes, the imposition of imprisonment is almost automatic in cases of this nature (Curlewis, 2021). However, the majority of the statistics with regards to the actual rate of economic crime within our borders as well as the true figures of prison overcrowding are shrouded in extreme secrecy.

In 2020, it was recorded that South Africa was ranked number 3 in the world, hence the third highest country for the most economic crime committed (PwC, 2020). The most frequently experienced types of economic crimes included customer fraud, bribery and corruption and financial statement fraud (PwC, 2020). Customer fraud is referred to as any fraud committed by the end user such as credit-card fraud, claim fraud, identity fraud and the like. The main perpetrators were internal staff and to a lesser extent external persons (PwC, 2020). Where the perpetrators were internal to the organisation, the senior and junior management staff were the prime culprits (PwC, 2020). However, the persons who committed the fraud are not only to blame but so is the lack of responsiveness of the companies themselves to fully investigate and also report matters of fraud. It was reported that 42% of the companies involved in the survey did not conduct investigations into possible fraud; 59% of incidents were not reported to the board; 66% of incidents were not reported to law enforcement or regulators; and 72% of incidents were not disclosed to auditors (PwC, 2020). This is obviously problematic in the national fight against the commission of economic crime, because it is systematically breaking down the communicative chain between the companies and the necessary bodies who can assist to investigate, prosecute and play an integral part in ultimately forfeiting such assets.

The Department of Correctional Services states that at present there is nearly 40% overcrowding in South African prisons (Curlewis, 2021). It does not require very much creativity or imagination to envisage the state of sanitation, sleeping and living conditions as well as the opportunity to participate in rehabilitative programmes (Curlewis, 2021). Resultantly, corruption amongst prison officials, criminal activity amongst prisoners and the transmission of life-threatening diseases within prison are rife. Furthermore, the frequency of sexual violence and the institution of heteronormative hierarchical structures amongst prisoners make prisons a hive for the transmission of diseases such as HIV AIDS, which is estimated to be around three times higher than that of the general population Wasserman (2023). It is no surprise that South African prisons are referred to as “universities of crime,” because it is surmised that if you entered prison innocent, you will leave a hardened criminal. Resultantly, the recidivism rate of previously convicted criminals in South Africa is estimated to be

somewhere between 55% and 97% (Schoeman, 2010, p. 81). Considering the secrecy surrounding the true numbers of crime in South Africa and the complexity of measuring the recidivism rate, the latter number or percentage seems a more plausible estimation.

The state of South African prisons is reflective of the state of our government, which has, over the past decade or two, been characterised as promoting a wilful disregard for the law, an abuse of positions of power and disdain for the criminal justice system (Curlewis, 2021). Furthermore, this has resulted in a large portion of the population being disadvantaged, uneducated and impoverished (Curlewis, 2021). A society with these characteristics inculcated within is a definite hub for criminal activity.

It is important to note that the corruption does not begin and end at the government; it has spread like a deadly virus throughout South Africa. Essentially, the entire legal value chain of South Africa has been broken, from the police who investigate a crime to public prosecutions and even so far as attempts to involve the criminal judicial services in corruption (Gumede, 2022, p. 3). This corruption has spread to such an extent that even the highly regarded professionals in our society are now involved. Highly regarded professionals are persons who are in a position of trust with the public such as medical professionals, legal professional and auditors. Generally, society holds these people to a higher moral standard because of this level of trust (Gumede, 2022, p. 4). As of late however, regulatory bodies over these professions have been failing to hold such professionals accountable for their corrupt activities (Gumede, 2022, p. 4). This means that South Africa's entire overarching regulatory framework as well as the institutions in charge of holding people accountable has fallen apart. These regulatory bodies have been staffed with corrupt and incompetent employees who allow for the spread of corruption to continue (Gumede, 2022, p. 7). Whether self-regulated or government regulated, there is little to no accountability for corrupt behaviour amongst professionals.

The message I am attempting to convey in this instance is that if our government, which is at the epicentre of all activity within the state, is generally corrupt and ubiquitous with criminal activity, what is the likelihood of our legal system, prison system or even society at large changing for the better?

Civil and criminal asset forfeiture within South Africa

Before delving into the understanding of how the fruits of criminal activity can possibly be obtained more efficiently, it is necessary to explain how this is effected within South Africa currently. Given that financial crimes are a lot more complex in nature than violent and contact crimes as they do not provide us with a physical "crime scene", fingerprints or any witnesses (other than those who have committed the crime), it can leave any police service (but particularly the South African police services) in a predicament as to how to investigate such crimes. Furthermore, the complexity of financial crimes often requires and necessitates the services of special units and experts to obtain, understand and dissect the relevant evidence of such a crime.

To understand how fraud (a main form of financial crime) takes place, I will provide the procedure of a "419 scam" more commonly referred to as advanced-fee fraud which originated from Nigeria. For context, advanced-fee fraud began as scammers using the religious beliefs of the Nigerian people to obtain money from them illicitly (Simon, 2009 , p. 6). It took place in person where the scammer attempted to get the victim to proffer up money either out of sympathy or because of a promise of more money if they follow the explicit instructions of the

scammer (Simon, 2009, p. 8). Although it is surmised that the idea of advanced-fee fraud originated from Nigeria, it takes very little imagination or travel knowledge to know that this has taken place all over the world and continues to do so. The *modus operandi* of advanced-fee fraud follows the following process:

- A letter is sent to a potential victim by the scammer containing an official-looking letterhead with either an offer to enter into contract or to obtain "unclaimed funds" from a supposed dead relative (Simon, 2009, p. 9);
- when the victim shows interest and begins to contact the scammer, the scammer will ask for company or personal details usually including banking details (Simon, 2009, p. 10);
- thereafter, the scammer will ask for transfers of amounts of money upfront to deal with certain matters such as to pay the legal team or for certification (Simon, 2009, p. 11);
- eventually, the victim gets tired of transferring amounts for the myriad of matters and the scammer may attempt to get into their bank account, but this is highly unlikely and they will most likely move on to the next victim (Simon, 2009, p. 11).

Therefore, it requires a misrepresentation to the victim which creates a form of trust between the scammer and the victim, in which the scammer takes advantage of the victim to obtain money.

The internet and advanced technology, designed to conceal one's identity, has proliferated the ability to commit financial crimes. Findlay (1999, p. 2) stated that the introduction of the internet has led to the "transformation of crime beyond people, places and even identifiable victims". It has allowed perpetrators to reach a whole range of victims internationally, easily and cost-effectively (Simon, 2009, p. 11). Originally, scammers could only usually have one or two victims owing to the time and effort required; however, now they are capable of crossing a wide-geographical area with a myriad of victims almost by the click of one button (Simon, 2009, p. 12). Furthermore, the use of the internet has made it easier for the perpetrators to conceal their identity and as such evade law enforcement (Simon, 2009, p. 13). It is apparent that the internet and technological advancement created a greater advantage to white-collar crime offenders to evade law enforcement and reach a greater victim base.

South Africa had adopted a multi-agency approach towards the fighting of economic crimes. Forensic investigation is carried out by the South African Police Services, the National Prosecuting Authority, the Directorate of Special Operations, Special Investigative Units and the Asset Forfeiture Unit (AFU). Their main aims are to investigate, monitor and combat economic crimes. The South African Police Services are empowered with the authority to enter premises in the pursuit of state security or any other offence for the purpose of obtaining evidence and the forfeiture of articles. In terms of Chapter 4 of the Cybercrimes Act 19 of 2020, these articles to be seized now include devices and the data that is stored within them.

Important legislative measures in this regard are the Financial Intelligence Centre Act 38 of 2001, Proceeds of Crime Act 76 of 1996, Prevention and Combating of Corrupt Activities Act 12 of 2004, Protection of Constitutional Democracy against Terrorist and Related Activities Amendment Act 23 of 2022 Financial Sector Regulation Act 9 of 2017 and most importantly for this article the Prevention of Organised Crime Act 121 of 1998. Essentially, the acts stated above create a wider network of institutions and sectors which are all tasked with the monitoring, investigating, reporting and combatting of financial crimes.

The Prevention of Organised Crime Act 121 of 1998 (hereafter "the Act") provides for both civil and criminal asset forfeiture. Chapter 5 of the Act provides for a conviction- based system and Chapter 6 provides for a non-conviction-based system which applies to acts that are not classed as offences and certain defined terrorist related activities. For the purposes of civil asset forfeiture, a causal link between the property and the offence needs to be proven (NDPP v RO Cook Properties (Pty) Ltd; NDPP v 37 Gillespie Street Durban (Pty) Ltd and Another; NDPP v Seevnarayan, 2004). The benefits to which the Act refers do not need to be quantified. The value of the assets will include any assets derived from offences provided for in: (1) Section 18(1) (a) and (b); (2) Section 18(1) (c); and (3) Section 22(2)–(3) of the Act.

Chapter 5 of the Act relates to criminal asset forfeiture. It requires that the State obtain a confiscation order against the defendant(s) for the value of the assets that they received during their illicit activities. The order should not exceed this amount. Where the defendant(s) fail to voluntarily pay the order to the state, the State can obtain a realisation order whereby the property of the defendant(s) is sold for the purpose of obtaining such assets. It is only at the realization stage of the process that the victim of the crime can become involved and attempt to recuperate their lost assets. The property eligible for sale includes untainted property or any gifts owned by the defendant(s). The state can also obtain a freezing order over the property of the defendant(s) until the finalisation of the case to ensure that such property is not dissipated or irregularly dispensed with. Freezing orders do not however relate to the tainted assets but rather only to the clean assets which can be sold. After the sale of assets, the victim will obtain the benefit received from such sale or forfeit same to the State.

Chapter 6 of the Act is important for the purpose of civil asset forfeiture. It provides for the forfeiture of assets that are the actual proceeds of unlawful activities or the instrumentalities of serious offences. Chapter 6 can be used where there is conviction of the accused or even where they are acquitted. This chapter provides for the freezing of the specific proceeds that have been the subject of unlawful activities and not untainted property. This is problematic, as it would mean that the victim will not obtain their assets if the tainted assets which they aim to claim are no longer in the possession of the accused.

However, a description of the process does little to depict its true practicality and effectiveness in practice. In a 2022 article in the *Daily Maverick*, it was reported that the AFU had achieved a 99% success rate in the previous financial year (Biseswar, 2022). Their freezing orders came to a total of R5.832bn and recoveries increased to R281m (Biseswar, 2022). These numbers are beyond impressive and as such, are probably leaving the reader to wonder why there is even a consideration of reform when the current system presents itself so effectively. It is important to remember that the law should never stagnate and should continuously be evaluated and amended where necessary, to ensure peak performance. It is also prudent to remember the fact that such large amounts are open to forfeiture necessitates a good look at the preventative legislation in the commission of such vastly impactful commercial crimes.

Asset forfeiture reform

Taking into account the exposition above of South Africa, its legal and socio-political landscapes and its present framework of asset forfeiture, it does not take an expert in criminal or commercial law to realize that the probability of change any time soon is negligible. However, I provide ideas for possible reform to the present system which could render the forfeiture of ill-gotten gains more effective.

Requiring a conviction for criminal asset forfeiture is a long-winded and time-consuming process within our jurisdictions which is directly hindering the freezing and obtaining of such assets. Considering that most of the groups or individuals committing these crimes have a mastery over technology, it is likely that the assets or any trace thereof will no longer exist or be in their possession when the conviction is effectively secured. Where possible the assets of a crime should be immediately forfeited and kept in trust until the finalisation of conviction for the relevant crime whereafter the victim or the State can rightfully confiscate such assets. Where a conviction is not attained, civil asset forfeiture procedures should be entertained.

Civil asset forfeiture requires the party requiring said forfeiture to prove that the assets to be claimed are causally linked to the criminal act, and as such they can only claim the tainted property and no other extraneous assets. Considering the nature of economic crimes and how they are often effected electronically, this is hindering the process of obtaining assets for a particular victim. As such, it is proposed that persons claiming civilly or on a non-convictional basis should be capable of obtaining the value of the asset through untainted property sale (as what takes place on a conviction basis) provided they can prove that the loss was because of the unlawful activity.

Given the systematic corruption which is proliferating South Africa's Government, professions and society, companies which are self-regulated need to be holding their members accountable for any behaviour which may be corrupt (Gumede, 2022, p. 9). Gumede argued that where countries are systematically corrupt, private companies should be entering into agreements between each other to hold each other accountable (Gumede, 2022, p. 2). Professional associations should be at the forefront of this movement because, as previously mentioned, society holds them to a higher moral standard. These persons should take a stronger stand to corrupt activities and behaviour within their sectors to ensure the safety of their own clients and that of the greater populous (Gumede, 2022, p. 9). Where corrupt activities can be reduced within companies, there is less of a chance of organised and financial crimes taking place or resulting therefrom.

Companies should furthermore seriously invest in more effective and safeguarding fraud detection programmes and resultantly become more responsive to the early signs of economic crimes inevitably taking place within their companies. However, this would require vast financial and expertise resources and regular practical training, which certain companies may not have access to.

Owing to the transnational nature of financial crimes, as they are based mainly in cyberspaces, Simon (2009, p. 14) suggested that there should exist an international body that targets, monitors and combats economic crime. However creating such a body presents challenges regarding who it will be made up of, how much it will cost and how inundated with cases will such a body be (Simon, 2009, p. 14). As such Simon argued that it is best to combat economic crimes through domestic legislation within a state (Simon, 2009, p. 14). Nonetheless, this also presents challenges within South Africa because of the corruption that exists within almost every branch of the legal framework. Creating legislation is easily done; however, the enforcement and procedure that flows therefrom is what is required to be effective. This requires a police force to enforce it, a prosecuting authority with an unwavering will to prosecute these crimes and an efficient judiciary to follow through with obtaining the proceeds of crime and punishment of those involved in the crime.

During 2015 the United States Congress (as a result of increased cyber-based crimes which resulted in large amounts of theft) attempted to pass legislation which would force companies to share access to their cyber networks with the Federal Bureau of Investigation (Bartol and Bartol, 2017, p. 469). This was suggested because the government upheld the idea that private companies do not have the relevant resources to combat internal promulgation of cybercrimes (Bartol and Bartol, 2017, p. 469). Therefore, it is suggested that such an information sharing or a centralised fraud detection system be used amongst all companies and the AFU. Within this, the AFU (who are experts in detecting and effectively dealing with economic crimes) can monitor the actions taken in this regard within businesses and detect and investigate possible fraud taking place a lot earlier than is presently the case. This system, however, presents several privacy concerns. Companies, especially those within South Africa, are apprehensive of sharing confidential information with the government, and rightfully so considering the above discussion of corruption within government and nationally. Successful companies are hesitant of being caught up in wider corruption generally speaking in South Africa, through transparency in respect of their own internal financial systems and practices and the possibility of reputational and financial risk involved in cybercrime.

For the sake of the greater populous, that may not fare as well as multi-million-rand companies; education and protective measures should be provided for. Access to and training should be provided by banks that have access to the relevant infrastructure, and telecommunication companies should be informing their customers of the dangers of economic crimes, especially in respect of their domestically used online and application-based platforms.

Advocate Priya Biseswar states there are cases in which the head of economic criminal syndicates have simply grinned at receiving 20-year sentences for their criminal activities but will be brought to tears when their favourite car is seized for sale (Biseswar, 2022). Bearing in mind the prison overcrowding taking place within South African prisons, it seems almost futile to continue to sentence non-violent offenders to imprisonment. Furthermore, this paper suggests that it would be best to require such offenders to forfeit even more than just the assets derived from their criminal activities and causally linked thereto.

Conclusion

In conclusion, asset forfeiture in South Africa serves as a powerful tool in the fight against corruption and unlawful financial activities. The legal framework surrounding asset forfeiture provides the relevant authorities with the means to disrupt criminal activities and recover ill-gotten gains. However, the process of asset forfeiture is not without its extraordinary challenges. South Africa's political, social and legal landscape cannot be compared to that of another country. This specific landscape stimulates criminal activity amongst the society through lack of transparency, stilted criminal statistics, lack of quick effective follow-up (slow process) and promotes corruption amongst government officials while not being conducive to change. With the nonchalant attitude towards financial corruption at the highest level, this filters through to the lacklustre forfeiture of assets and hence implantation of due process.

Much like the complexity of financial organised crime, the process of asset forfeiture is complex and multi-faceted. It requires continuous transparency and communication between multiple sectors who are all working towards a common goal. While asset forfeiture has the potential to be a lethal weapon in the fight against crime, its success is premised on its ability to be implemented with the utmost transparency, fairness and respect for both commercial and individual rights involved.

While the present framework of asset forfeiture being implemented has procured promising results in the last financial year, it is clear that there is still vast room for reform in this regard. Allowing for greater ease of access to the ill-gained assets; implementation of improved fraud detection systems and processes; enhanced training of companies and citizens about the dangers of economic crimes and how they are conducted; and the implementation of a centralised detection system which requires a group-based effort between the AFU and companies to ensure early detection of economic crimes and prevention thereof, are but a few of these suggested reforms.

Reformation of asset forfeiture in South Africa would require a balancing of rights of both individuals and companies with the need to combat organised crime on a large scale. In such a country as ours however, there is little hope and resources for such reform to take place. Considering the widespread corrupt activities of the government, individuals and companies alike are unlikely to place their financial or economic trust in any government sectors no matter the purported benefit it may offer to them.

South Africa has legislation and processes in place and at its disposal but fails in the utilisation of these tools to truly combat commercial crime through asset forfeiture.

It has become more a case of "taking the horse to water" but not being able to force it to drink.

Instead of a situation of "pay back the money", we have become a country that is renowned for "stealing the money" instead. Without an exuberant drive back towards succinctly orchestrating quick effective processes as suggested above and being able to aim resources back into fighting commercial crime through training and less costly imprisonment options and away from the pockets of politicians or the government, our task will remain a huge one and our battle an uphill one.

Acknowledgements

The author would like to acknowledge the work and help of his master's student, Ms Katelyn-Mae Carter. She was incredible during this journey.

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