

TAKING THE PROFIT OUT OF CRIME -

# THE ASSET FORFEITURE UNIT

Article compiled by Annalise Kempen  
Information provided by Adv Dianne Willman

Losing one's possessions, in whatever way, can be very traumatic, especially when they are stolen. But theft has become part of our daily lives in South Africa, and therefore we are all somehow "prepared" for becoming one of these statistics. However, when one's property is repossessed, one feels humiliated and it is far more difficult to explain such a situation to one's friends and family. Being unable to pay one's debt is in the majority of cases the reason why the bank or a sheriff will repossess one's possessions. But there are exceptions.

If you have been under the impression that your possessions would be safe against repossession if you were not to involve yourself with illegal activities, you are mistaken. In the beginning of 2004 a Western Cape High Court ruled that the Asset Forfeiture Unit could seize the vehicle of a Karoo man, charged with three serious offences after previous convictions for drunken driving and speeding.

One could ask: Why? In principle, vehicles can be seized legally if they are used in the perpetration of crime, even if the perpetrator has not been part of organised crime. But, road carnage in our country has become almost as serious as crime, and therefore radical efforts are needed to put an end to it. On the issue of confiscating vehicles of drunk drivers, John Schnell (Director: Road Traffic Inspectorate, KZN) said that there are many people who have no problem breaking road rules as they can afford the fines they get, but that he believes that confiscating a vehicle being used to commit a serious offence will act as a huge deterrent.

## Who is responsible for the seizures?

The Prevention of Organised Crime Act 121 of 1998 provides that property obtained by means of criminal activities may be forfeited to the State. After consultation with local and international experts, it was agreed that South Africa needed a



The National Prosecuting Authority of South Africa  
Igunya Jikelele Labetshutshisi boMzantsi Afrika  
Die Nasionale Vervolgingsgesag van Suid-Afrika

the South African Police Service, the Directorate of Special Operations ("Scorpions") and members of the Special Investigative Unit ("Cobras").

Certain crimes in particular are selected as priority crimes to be targeted by the AFU: economic crime (fraud, 419 scams), corruption, cases involving natural resources, brothels, drugs, precious metals, violent crimes such as robbery, housebreaking, theft and possession of stolen property.

## The key objectives of Asset Forfeiture:

### Taking the profit out of crime

The main aim of asset forfeiture is to take the profit out of crime, in other words, to ensure that crime does not pay. It is clear that one of the main incentives to commit crime is due to the substantial financial benefit derived from it. If the benefit is removed, so is the reason to do crime. Asset forfeiture targets the proceeds of crime.

Studies in the United States have shown that criminals are prepared to go to prison for a time to pay for their crimes or that they are prepared to pay a fine, but touching their asset base seriously affects them.

### Removing property which is an instrumentality of an offence(s)

The Unit does not prosecute, but works closely and in parallel with the prosecution and the police investigation officers. The Unit comprises State advocates and financial investigators from

specialised unit to ensure that forfeiture took place in an organised and legal way.

The Asset Forfeiture Unit (AFU) was established in May 1999 in the Office of the National Prosecuting Authority (NPA) to focus on the implementation of Chapters 5 and 6 of the Prevention of Organised Crime Act 121 of 1998. The AFU was created in order to ensure that the powers in the Act to seize criminal assets would be used to the maximum effect in the fight against crime, and in particular, organised crime.

The small, friendly face of Willie Hofmeyr has become a familiar one on South African television. And despite the seriousness of any task that he has at hand, he always manages to save a smile for the camera. He was appointed as the Head of the Asset Forfeiture Unit in May 1999, surely not a position for which many would envy him. (The recent Schabir Shaik case is only one case in point.)

The AFU became a full division of the NPA (National Prosecuting Authority) in 2001 due to its growth and the increasingly important role. As a result of this, the Head of the AFU, Willie Hofmeyr, became a Deputy National Director.

### **The Asset Forfeiture Unit**

The AFU in the Office of the National Director of Public Prosecutions is a major component in the State's war against organised crime. The AFU is a law enforcement tool and its importance must not be ignored or underestimated.

According to ISS Monograph no 51, January 2001 "Clean money, suspect source: turning organised crime against itself," the aim of the Asset Forfeiture Unit is to ensure that regulations for the confiscation and forfeiture of criminal assets are applied effectively. This is in accordance with international experience that has shown that forfeiture provisions will not be applied on a large scale unless a dedicated unit is created for this purpose. This is due to the fact that a confiscation and forfeiture system usually consists of a complex combination of criminal and civil laws, as well as a range of concepts new to both criminal and civil law. "Forfeiture specialists" are therefore needed who can build up the necessary expertise in order to ensure the effective application of the relevant legislation.

Asset forfeiture is not only aimed at removing assets that are the proceeds of crimes, but also to remove property used to commit crimes. Property that is instrumental in an offence can also be forfeited, ie a vehicle that is used as a getaway car in an armed robbery case, or a house that is used as a laboratory to manufacture drugs (see Pollex in SERVAMUS: April and May 2006). The aim behind that is clear: no person should use or allow his/her property to be used to commit crimes. In a Supreme Court of Appeal judgment in NDPP v Cook Properties; NDPP v 37 Gillespie Street Durban; NDPP v Seevnarayan 2004 (8) BCLR 844 SCA, the court said that the owner of property cannot be supine (subpoenaed?). The matter concerned was, inter alia the forfeiture of property on the basis of it being an instrumentality. The court warned owners that they needed to be vigilant in how their property is being used by them and others.

### **Why is asset forfeiture necessary?**

In the M-net series Prison Break, one of the inmates who is a member of the Mafia, has a prison guard on his "payroll" in exchange for preferential treatment. Being able to pay someone, while you are in prison having no income, is only possible if your asset status is very healthy despite your conviction. The main income of career/professional criminals' (such as Mafia members) is normally derived only from crime. If this inmate's assets were forfeited to the State during his trial, he would most probably not have been in a position to pay one of the prison wardens, or would look forward to the "good life" once he is released from prison. Knowing that one's family would be able to continue with the "high life" while serving a prison sentence, somehow makes it "worthwhile" for the criminals, as they will also be able to return to this lavish lifestyle, once released. As Mr Hofmeyr said in an interview with Carte Blanche: "Criminals are in a sense career criminals and they see going to jail at some stage almost as an occupational risk. And they are willing to take that risk, as long as they know that when they come out of jail they will be well-off and while they are in jail their families will be well-looked after."

Criminal prosecution is often not enough to make a significant impact on crime in South Africa as criminals know that their proceeds of crime are safe from being taken away from them. Because organised crime's main objective is for the perpetrator to lead a better life, it is necessary that the objects that s/he has gained through his/her illegal actions be taken away from him/her. Remember: the harsh reality of a seizure is that it affects not only the individual criminal, it affects his/her whole family. Not only is the house in which the family lives taken, the majority of its contents is also at risk, leaving only the basics. It is not only the assets of a suspect that are seized, but also those owned by other persons who are holding property on the criminal's behalf or who have received property from the criminal as a "gift". The property or property to the value thereof can be seized.

In an interview with Carte Blanche aired on 12 March 2006, Mr Willie Hofmeyr said that there was no reason why anyone should benefit from any crime. "You won't believe (how) many criminals are actually benefiting. The latest estimates say white-collar crime costs South Africa R150 billion every year. That's enough money to fund the justice, police and prison budget for 3 years."

In the same programme the Head: Forensics at Sonnenberg Hoffman Galombik, Mr Steven Powell said that the implications of white-collar crime are far more devastating than street crime.

### **How are assets seized?**

Assets can only be seized once a court order has been obtained. The AFU investigators and advocates cannot be summonsed to a crime scene and order goods to be seized. Only after a court order has been granted by the High Court may the goods be seized.

After a case has been referred to the AFU, the matter is referred to the investigators for investigation.

The main functions of the investigators are the following:

- Investigating cases with forfeiture potential;
- Identifying cases with forfeiture potential;
- Compiling financial profiles on suspects linked to cases with forfeiture potential;

After the case has been investigated, it is handed to an advocate to draft legal papers. In order for asset forfeiture to occur, a court order has to be obtained.

Asset forfeiture proceedings are civil proceedings. The standard of proof is therefore proof on a balance of probabilities and not beyond a reasonable doubt. This makes it easier to obtain such orders. Different kinds of order can be obtained depending on the facts of the case.

These are:

- Restraint order
- Confiscation order
- Preservation order
- Forfeiture order.

### **Restraint and Confiscation Orders**

The first two orders, namely restraint and confiscation orders, depend on whether there has been a prosecution of a criminal and his/her conviction. In order to obtain these orders, it has to be shown that the accused benefited from his/her offence, and what the amount of that benefit was. The advocate seeks a confiscation order for the amount for which the accused benefited from his/her crime(s).

There are provisions in the Act that increase the amount that can be requested from the Court in the confiscation order. This is, for example, in cases where the accused has previously been engaged in related-criminal activities. Another example is where the accused cannot justify owning assets that s/he has, ie s/he cannot show that the assets are derived from a legitimate source of income. The value of those assets is calculated. A confiscation order is sought in the amount of the value of his/her property.

A restraint order is usually obtained prior to a confiscation order being made after the accused's conviction. The accused's property is seized or restrained before his/her conviction to ensure that property is available to be sold later to pay the confiscation order that may be made should the accused be convicted.

### **Preservation and Forfeiture Orders**

The latter two orders, namely preservation and

- Tracing assets linked to suspects in cases with forfeiture potential;
- Acting as a link between advocates from the AFU and the investigators from other units;
- Assisting advocates in preparing applications for court;
- Monitoring the criminal proceedings;
- Attending crime scenes with the criminal investigators;
- Assisting the curator bonis/sheriff of the court to effect service of an order and also to execute the order;
- General administration of files;
- Effecting deposits into CARA (Criminal Assets Recovery Account) at the Reserve Bank;
- Performing standby duties and attending crime scenes after hours; and
- Making presentations regarding AFU proceedings and training members of other law enforcement agencies.

forfeiture orders, do not depend on a prosecution. Some evidence of criminal activity is however required. It has to be proved that the particular property, like a house or vehicle, is the proceeds of crime and/or an instrumentality of an offence. These orders target specific items of property like the house or car of the accused. The property has to be tainted in some way.

## **CONFIDENTIALITY OF INVESTIGATIONS**

**Confidentiality in cases involving AFU is of utmost importance**

SAPS members are strongly requested not to disclose any information regarding the involvement of the Asset Forfeiture Unit in a particular matter to the Defence or anyone else.

Other investigations may seek to ascertain whether a certain item of property is an instrumentality of an offence. Such investigations explore: was the house or vehicle previously used to commit crimes? Are the suspects members of an illegal syndicate? Is the property in some way essential to their illegal operations?

### **What happens after an order has been obtained?**

Once an order has been granted by the relevant High Court, the assets need to be seized and stored to be sold later once a final order has been obtained. An independent person is appointed in the court order to seize the assets and preserve them until such order has been issued. This person is referred to as the curator bonis. Personnel from companies such as Deloitte and Touche, Pricewaterhousecoopers and Ernst and Young may act as a curator bonis.

A specific date is arranged for when the court order will be executed and the assets seized by the curator bonis. This is usually undertaken with the assistance of the SAPS.

The court order is formally served on the suspect and/or other relevant parties by the sheriff of the court.

**Referring a case is easy. Details of contact persons in the different divisions are provided below:**

#### **JOHANNESBURG REGION:**

Office: (011) 220 4096

AFU Head: Adv Raylene Keightley: (011) 220 4134/4084

#### **PRETORIA REGION:**

Office: (012) 845 6000

AFU head: Adv Richard Chinner: (012) 845 6736

#### **FAR NORTH REGION:**

Office: (012) 845 6000

AFU Head: Adv Peter Volmink: (012) 845 6722

After a sale, the proceeds are deposited into an account known as the Criminal Assets Recovery Account (CARA). These monies are then used for law enforcement purposes. Money is distributed to the prosecution and police to assist them in fighting crime. Victims of crimes are also considered.

### **Success rate**

On 21 November 2005 The Star reported that a cheque for R50 000 (the amount Leigh's Matthew's father paid Donovan Moodley for her safe release) was handed to Mr Rob Matthews by Adv Camilla Botes of the Johannesburg Asset Forfeiture Unit.

The AFU succeeded in gaining a confiscation order after Moodley had been charged with kidnapping and murdering Leigh and extorting money from her family. The order entitled the Unit to seize assets to the value of R53 000 - equal to the ransom plus the value of a ring Leigh received for her 21st birthday, which Moodley had taken from her.

In the last 5 years, approximately R700 million worth of assets have been frozen. Approximately R70 million is currently available in CARA (Criminal Asset Recovery Account) to be distributed. Over R100 million has been paid to victims. This in itself demonstrates the effectiveness of asset forfeiture thus far.

### **What is the SAPS' role in asset forfeiture?**

The SAPS has a very important role to play in asset forfeiture and its importance cannot be stressed enough.

The key phrase is the referral of cases, including:

- A suspect who has benefited from his/her crime;
- A house that has been used to manufacture drugs or operate a brothel;
- Cash seized from a drug dealer,
- The syndicate leader who is unemployed (and never arrested) but seems to maintain a lavish lifestyle;
- Vehicles found with drugs in them.

Investigators must refer cases to the AFU as much as possible, and as often as possible. As indicated above, the AFU and the financial investigators undertake investigations. Investigating officers may

### **CAPE TOWN:**

Office: (021) 487 7000

AFU head: Adv Hermione Cronje: (021) 487 7084

### **DURBAN REGION:**

Office: (031) 327 5584

AFU head: Adv Monty Moodley: (031) 327 5684

### **BLOEMFONTEIN REGION:**

Office: (051) 400 6700

AFU contact person: Adv Amanda Maree: (051) 400 6720

### **PORT ELIZABETH REGION:**

Office: (041) 502 5700

AFU Head: Adv William Kingsley: (041) 502 5701

### **EAST LONDON REGION:**

Office: (043) 722 4082

AFU contact person: Adv Henke Ackerman

### **Interesting cases**

One of the cases that made headlines for the most of 2005, was the Shabir Shaik case, and at the same time the AFU's role in asset forfeiture also came under the spotlight. In June the State indicated that it wished to apply to court to have more than R30 million of Shaik's assets confiscated as "proceeds of crime". These assets followed from Shaik's use of (former deputy president) Jacob Zuma's name to obtain contracts, as well as Zuma's intervention to get Shaik to profit from the Government arms deal.

In another case the assets of an alleged American-Israeli drug dealer and money-laundering kingpin were seized by the AFU in March 2006. The AFU had obtained an order from the Johannesburg High Court to seize the assets which included a R12 million game farm in Limpopo, a R2.5 million mansion in Umhlanga, a Mercedes-Benz and various bank accounts. The man had been living in South Africa since 2002. The seizure came after the US Dept of Homeland Security had tracked him to South Africa and notified local authorities of his

be required to supply an affidavit to be used to obtain the order. This is drafted by the AFU advocates after consultations with the relevant police official.

**There are other benefits to referring cases to the AFU. Evidence that is useful to prove the criminal case may be obtained. The criminal case is therefore strengthened and further charges may be added such as money laundering. In addition, SAPS Units that refer cases stand a better chance of receiving a payout from CARA. It may even happen that vehicles that are seized are handed to the SAPS to fight crime.**

The main reason for confidentiality is to prevent the concealment or dissipation of assets by a suspect. Once the suspect or other relevant party becomes aware of the AFU's interest in their assets, there is a great incentive for them to either conceal or dissipate them.

Members of the AFU will not disclose to the Defence, suspect or any other relevant party information in the docket provided by the police without the consent of the relevant authority.

links to several individuals involved in the production and distribution of Ecstasy. AFU investigations revealed that the kingpin had often conducted affairs with legal institutions using false information. He also supplied false information to immigration

officials, illegally obtained extensions on his temporary residence permits and used a false South African birth certificate and ID number. This man had used South Africa essentially as a hideout, but due to the extradition request from US authorities, it tipped off a bigger case here - a classic case of money laundering.

### **Conclusion**

For many people asset forfeiture simply means the reclaiming of what has been wrongfully gained by criminals - the State claiming the fruits of crime on behalf of society. For the Asset Forfeiture Unit their job is to ensure that they take the profit out of crime by seizing the proceeds of crime. As normal law-abiding citizens we are encouraged by any effort of the State to protect us from harm - physically or materially, and as the AFU has been trying to hit criminals where it hurts most, namely their pockets, this Unit should receive our full support.

### **Sources:**

[www.cartelblanche.co.za](http://www.cartelblanche.co.za) visited on 17 March 2006  
[www.iol.co.za/general/news](http://www.iol.co.za/general/news) visited on 28 March 2006  
[www.iss.co.za/pubs/ars](http://www.iss.co.za/pubs/ars) visited on 27 March 2006  
[www.iss.co.za/pubs/monographs](http://www.iss.co.za/pubs/monographs) visited on 28 March 2006  
[www.radio786.co.za/news/archives](http://www.radio786.co.za/news/archives) visited on 27 March 2006  
[www.npa.gov.za/afu](http://www.npa.gov.za/afu) visited on 16 March 2006  
[www.sabcnews.com](http://www.sabcnews.com) visited on 27 March 2006  
[www.wheels24.co.za](http://www.wheels24.co.za) visited on 28 March 2006