

The role of forensic investigators in combating fraud and corruption in South Africa

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1. My background

- Worked for Homes Trust (now Metropolitan) as a student actuary in late 1970s
- Good background in life assurance, but less so in insurance
- I am a bit of an anomaly, a numbers person who ended up in a legal job!!
- At the time I was banned for 5 years for my activities against apartheid
- I have some experience of how poorly the law is enforced
- I was arrested about 40 times, but thanks to good lawyers I was never convicted except for one admission of guilt fine!!

2. Asset forfeiture and financial disruption

- Focusing on the money is relatively new concept in law enforcement, and it is only in last 35 years that it became increasingly important internationally
- It started to become an issue in the early Mafia cases in the US in 1980s when it became clear that it does not make sense to send criminals to long periods in gaol, but leave them with the money they made from crime
- Even today, some experts argue that it is often so difficult to put organised criminals behind bars that law enforcement should focus on the financial disruption of syndicates
- The reason is that the most vulnerable part of organised crime is often the huge amount of cash generated by its operations
- This is because crime bosses want to stay far away from the crime, but they do want to enjoy the benefits of the money

3. Organised crime in new democracies

- Taking effective action against organised crime is even more important in new democracies such as ours where the state is often weak, and lacks sophisticated skills, resources, and the legal tools to combat organised crime effectively
- Organised crime on the other hand often have access to huge resources, and can much of corrupt law enforcement and society
- When that happens, it is difficult to reverse - can result in state virtually run by organised crime
- And we should not limit the notion of organised crime – much of corruption takes place in a very organised way

4. Organised and economic crime

- Internationally it has been argued that organised crime operates increasingly like a business, seeking the best “investment opportunities” and doing a proper risk assessment
- Thus over time there was a massive increased involvement in economically motivated crime, where the returns are high and the risks are low as law enforcement did not take it seriously and was often ineffective
- Thus anti-money laundering measures and asset forfeiture are aimed at decreasing the returns and increasing the risk by financial disruption
- Traditional examples were white collar crime and corruption
- But even more important was that criminals do their own risk assessments and identify areas that we do not take seriously - the so-called “**emerging crimes**” such as abelone, copper theft, rhino, illicit wildlife, rare plants, etc

5. AFU as part of anti-money laundering strategy

- To be effective it is not enough to aim only at the criminals – have to deal with those who do business with them
- The priority for prosecution is to deal with the active collaborators – friends, lawyers and accountants who devise elaborate schemes, or who assist in laundering
- During the period of state in our country, we saw much evidence of this
- But we also have to deal with the passive collaborators – those who turn a blind eye

5. AFU as part of anti money laundering strategy

- It is important to bear in mind that asset forfeiture is part of a broader anti money laundering strategy
- Know your client requirements
- The creation of money laundering offences
- Structuring or smurfing offences
- The creation of Financial Intelligence Centre
- The requirements to report suspicious and large cash transactions

6. AFU: Legal, institutional framework

- The first Proceeds of Crime Act was drafted by the SA Law Commission to comply with the initial UN conventions. It provided for conviction-based asset forfeiture similar to the UK model
- Final confiscation happens only after conviction in a trial, but assets can be frozen earlier early to keep them safe
- The complexities of civil litigation and new law, and lack of specialisation meant that it was little used before 1998
- I was an MP at the time and was keen to make the law more effective.
- We had heard about the USA system of **Non-conviction based forfeiture** and went there on a study tour and were convinced that we need this in our law
- The US system in a sense “convicts” the assets themselves as being proceeds or instruments of crime
- NPA set up the AFU 1999 to ensure that the law is properly implemented

7. Progress in implementation

- A vital lesson we learnt early is that specialist capacity is vital as it involves complex civil litigation with which prosecutors are not familiar
- Thus we recruited a number of civil lawyers from the private sector.
- It involved very complex stakeholder management as AFU does not have law enforcement powers and relies on SAPS, the Scorpions and later the Hawks to do the criminal investigation
- Today it has grown to about **200 staff including 45** seconded detectives from Hawks in all the provinces

Progress to date

- **Frozen assets: R16.5bn in 6 245 cases**
- **Forfeited assets: R8.35bn in 5 607 cases**
- **Recovered R6.74bn:**
 - R5.68bn** returned to victims of crime
 - R1.05bn** in special account to be used to fight crime
- Success rate has been over 90% for many years

Some notable cases

1. David King: tax fraud (possibly R1 billion or more frozen)
 - With freezing orders in Guernsey and UK
2. Johan Block – former premier in NCP
3. Gauteng Health R1.4bn forfeited
4. Hendrik Delpont: customs fraud (R800m frozen)
5. Jabulani Mabaso: corruption (R191m frozen)
6. Mastermind Tobacco: fraud, excise tax (R88m forfeited)
7. David Alexander: fraud (R85m frozen, released to victim)
8. Fraud on Absa (R70m forfeited)
9. Alexander Falk (German): fraud (R70m frozen)

Some notable cases (cont)

9. GEMS: medical scheme : (R61m forfeited to victims)
10. General Health: fraud by directors (R48m frozen)
11. Tannenbaum: Ponzi scheme (R44m frozen)
12. Hout Bay Fishing: over-fishing, corruption (R44m forfeited)
13. Schabir Shaik: corruption (R40m forfeited)
14. Geiges and Wisser: nuclear smuggling (R34m forfeited)
15. Boekhout: platinum smuggling (R33m frozen)
16. Johan van Staden: tax fraud (R30m frozen)
- 17. Others:** Macmed, Regal Bank, Saambou, Leisurenet, JCI/Kebble, Porrit, Ghavalas

Conviction based confiscation

- Chapter 5 of POCA is based on UK law
- It requires a criminal charge to freeze assets, and a conviction before they can be finally taken
- The easiest way to understand it is that process is similar to a normal civil judgement
- Obtain a judgement (**confiscation order**) for the value of the benefit of the crime once the criminal case is finalised - eg R2m (as a normal litigant can do)
- If not paid voluntarily, AFU can execute against any property of the person through a **realisation order** (as in normal civil litigation)

Important advantages vs normal civil litigation

1. Value is **gross benefit**, ie anything that passed through the hands of the accused- no deduction for expenses
2. Can **recover gifts** made in last 7 years as in insolvency proceedings
3. Can force **disclosure of assets** on affidavit though it cannot be used in criminal proceedings
4. **Joint and several liability** in certain cases – can recover the amount from co-perpetrators who have money
5. Legal presumption that all property owned and all recent income and expenditure is proceeds of crime
6. AFU will assist innocent victims by returning recovered funds to them

Non-conviction based forfeiture

- Chapter 6 of POCA based on US model
- Forfeit through a civil application with evidence under oath
- Only need to prove case evidence on a balance of probabilities
- **Preservation order** to freeze property

Unlike criminal forfeiture - criminal conviction not needed

- But have to prove that the property itself is tainted – either as proceeds of crime or as an instrument used to commit crime
- Action in rem - directly against property, not against the person

Advantages

- Can be used where evidence is strong but not strong enough to secure a conviction
- Have used it even after an acquittal on technical grounds, eg persons acquitted because of induced confession, or where accused died
- It is a very powerful tool to act against properties used to commit crime where owner is not directly involved in crime
- Act can be used to assist countries that do not have forfeiture laws as it applies to crimes committed elsewhere

Lessons – resource intensive

- Today criminals tend to put the investigation and prosecution on trial rather than the accused – need to be ready
- Must be able to fight fire with fire - match best advocates in the country
- Heavy litigation – millions spent against us
- Have to be tough enough to take the losses – we cannot win all cases – though success rate is good at 90%+
- Economic crimes with huge amounts of documentation
 - Time and resource intensive
 - Problems of chain of evidence
- War by correspondence add to complexity
 - Turnover of staff in the state

Lessons: Litigation

- Litigate on technical points rather than merits
 - Constitution – still a few unresolved issues
 - Had to get used to losing some and continuing the fight
 - But success rate is well over 90%
- Minute examination of every bit of work that has been done by best counsel in the country
- Big case example – 8 teams of lawyers, each with senior counsel, junior counsel and attorneys
- Legal challenges by rich criminals can delay criminal trial almost indefinitely. AFU is one way of limiting the amount that they can spend
- POCA needs to be updated

The future

- The new Investigating Directorate may help to expedite cases
- Need to think about remedies for future
- Only consolation is the others have same problem
- Integration of efforts by state agencies is vital
 - NPA, SAPS, FSB, SARS, SARB, intelligence
- Cannot afford mistakes
 - Have to deal with rich and/or powerful people who can come close to destroying an institution
 - Personal reputation risks

What can business do better?

- Blow the whistle on state corruption - do not pay bribes
- Ensure good governance in business
- Take serious action when required against own people
 - Risk of not doing anything
- Assist with Investigating Directorate with resources
- Contribute skills – project management, data analysis

Forensic profession

- Forensic firms have played a vital role in building capacity to deal with complex cases and assisting law enforcement
- And it was also vital at a time when law enforcement was captured
- But as we have seen, it also had its own limited experience of capture
- It would be naïve to think that those on the other side do not do their own risk mitigation
- There has even been indications some years ago that those implicated in corruption had arranged “friends” to set up forensic firms to deal with cases where the AG had found that a forensic audit needs to be done

Forensic profession

- There has been real attempts to subvert the profession
- I believe we should think seriously about much stronger self-regulation of the industry
- Perhaps some kind of formal complaints mechanism
- As for lawyers? Or an ombud with capacity
- Will need to have powers and capacity to investigate

Conclusion

- SA has a scourge of violent crime and it is vital to focus on that
- But we ignore profit-driven crime at our peril – it has a huge on the economy, investment, and service delivery
- To deal effectively with crime, we have to ensure that crime does not pay