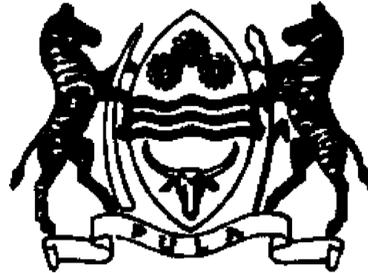


# PROCEEDS OF SERIOUS CRIME ACT, 1990

No. 19



of 1990

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**An Act to deprive persons convicted of serious crimes of the benefits or rewards gained from such crimes, and to deal with the problems of money laundering, and matters incidental thereto or connected therewith.**

*Date of Assent:* 25. 10. 1990.

*Date of Commencement:* 2. 11. 1990.

ENACTED by the Parliament of Botswana

**PART I *Introduction***

Short title  
Interpretation

1. This Act may be cited as the Proceeds of Serious Crime Act, 1990.

2. (1) In this Act, unless the context otherwise requires —  
“confiscation order” has the meaning assigned to it under section 5;  
“production order” means an order made under section 17 for the production of a document;  
“restraining order” has the meaning assigned to it under section 8;  
“serious offence” means an offence the maximum penalty for which is death, or imprisonment for not less than two years.

(2) Where reference is made in this Act to anything received in connexion with the commission of a serious offence, such reference shall be deemed to include a reference to anything received both in that connexion and in some other connexion.

(3) For the purposes of this Act a person shall be deemed to have been charged with a serious offence if any information has been laid against him for that offence, whether or not a warrant for his apprehension or a summons requiring his attendance to answer to the information has been issued.

(4) Where a person is convicted of a serious offence, and with his consent another serious offence, of which he has not been convicted, is taken into consideration by the court in passing sentence, he shall, for the purposes of this Act, be deemed to have been convicted by the court of the offence so taken into consideration.

(5) For the purposes of this Act a person shall be deemed to have obtained the proceeds of a serious offence if he receives a payment or other reward in respect of, or derives a pecuniary advantage as a result of —

- (a) the commission of the offence; or
- (b) any part of a course of conduct by him, alone or in association with any other person, having as its purpose or one of its purposes the carrying out or furtherance of criminal activities, of which the commission of the offence is shown to be a part.

(6) When, for the purposes of this Act, it is necessary to assess the value of any proceeds referred to in subsection (5), such value shall be deemed to be the aggregate of the values of all the payments, rewards or pecuniary advantages so received or derived.

(7) Where in this Act reference is made to the Attorney-General, such reference shall be deemed to include any person specially or generally authorized by the Attorney-General in that regard.

## **PART II *Confiscation Orders***

3. (1) Where a person has been convicted of a serious offence, the Attorney-General may apply to the court before which the conviction was obtained, or to the High Court, for a confiscation order in respect of that serious offence, or, if convictions were obtained for more than one serious offence, in respect of all or any of those offences.

Application  
for confis-  
cation order

(2) An application under subsection (1) shall be made within 12 months of the date of the conviction for the offence in respect of which it is made.

4. (1) Where an application is made under section 3, the court shall satisfy itself that the defendant in the case concerned has received the proceeds, as defined in section 2 (5), of the serious offence or offences in respect of which the application is made, and if it decides that he has, shall proceed to assess the value of the proceeds received by him:

Decision of  
court in  
respect of  
application  
for confis-  
ation order

Provided that in making such assessment where more than one serious offence is involved, the court shall make an assessment of the proceeds received by the defendant in respect of each offence separately.

(2) For the purpose of making an assessment under subsection (1), the court may —

- (a) treat any property which the court is satisfied was held by the defendant since his conviction for the offence in respect of which the application is made, or was transferred to him at any time within a period of 5 years prior to the date when he was charged with that offence, or, in the case of a serious offence of which he is deemed to have been convicted by virtue of section 2 (4), within a period of 5 years prior to the date when he was so convicted, as having been received by him as payment or reward in connexion with the commission of the offence;
- (b) treat any payment, reward or pecuniary advantage as having been received or derived by him, notwithstanding that it was received

or derived by another person at the request or at the direction of the defendant, or that it was received or derived by him or so received or derived by that other person before the commencement of this Act, or outside Botswana;

- (c) treat any property vested in any trustee or receiver by reason of the defendant's bankruptcy, as continuing to be the defendant's property;
- (d) treat property as being held by the defendant if he holds an interest in it, or as having been transferred to him if an interest in the property has been transferred or granted to him;
- (e) disregard any expenses or outgoings of the defendant in connexion with the offence or any other serious offence.

(3) For the purpose of making an assessment under this section, the court may treat as property of the defendant any property that, in the opinion of the court, is subject to the effective control of the defendant, whether or not the defendant has any legal or equitable estate or interest in it, or any right, power or privilege in connexion with it.

(4) Without limiting the generality of subsection (3), the court may have regard to —

- (a) shareholdings in, debentures over or directorships of any company that has an interest (whether direct or indirect) in the property;
- (b) any trust that has a relationship to the property; and
- (c) family, domestic and business relationships between persons having an interest in the property, or in companies of the kind referred to in paragraph (a), or trusts of the kind referred to in paragraph (b), and any other person or persons.

(5) For the purpose of satisfying itself in accordance with subsection (1) in respect of a serious offence, the court may have regard to the transcript of any proceedings against the defendant for the offence or offences.

(6) For the purpose of making an assessment under this section, the court shall value property, other than money, at its market value determined as at the date when the court makes the assessment, and when any person other than the defendant holds an interest in the property, the value of that interest shall be taken into account in determining the value of the property to the defendant.

5. (1) When a court has satisfied itself in accordance with section 4 that the defendant has received or derived any benefit from proceeds of a serious offence, it shall issue an order (in this Act referred to as a "confiscation order") ordering the defendant to pay to the Government a pecuniary penalty of an amount equal to its own assessment of the value of the proceeds of the offence, received by the defendant or from which

he has benefited, unless the court for good reason decides that the penalty shall be for a lesser amount.

(2) The penalty ordered under subsection (1) shall, for all purposes, be deemed to be a civil debt owed by the defendant to the Government, and may be enforced as if it were an order made by the court in civil proceedings instituted by the Government against the defendant to recover a debt due by him to the Government.

(3) A confiscation order following the conviction of the defendant may be issued before or after the court trying the offence or offences has passed sentence:

Provided that -

- (a) where a confiscation order is made before sentence has been passed, the court in passing sentence shall take into account the total value of the confiscation order when assessing the amount of any fine or order for compensation or restitution to be imposed on the defendant; and
- (b) where a confiscation order is made after sentence has been passed, the court in assessing the size of any such order shall take into account any fine or order for compensation or restitution passed by the court which sentenced the defendant.

6. (1) Notwithstanding the provisions of section 5 the court, instead of issuing a confiscation in favour of the Government, may on the application of the victim of the offence make the confiscation order in favour of the victim of the offence.

Issue of a  
confiscation  
order to  
victim of  
offence

(2) A confiscation order made under this section shall be deemed to be an exercise of the civil jurisdiction of the court in an action between the victim of the offence as plaintiff and the offender as defendant and may be enforced as if it were an order made by the court in civil proceedings instituted by the plaintiff against the defendant to recover a debt due by him to the plaintiff.

7. (1) A confiscation order made against the defendant shall be discharged —

Discharge of  
confiscation  
order

- (a) on the satisfaction of the pecuniary penalty;
- (b) where the conviction or the confiscation order is set aside on appeal or where a free pardon is granted by the President in respect of the conviction.

(2) Where a confiscation order is made in respect of a conviction for more than one offence, and the successful appeal or the free pardon is not in respect of all of the offences, the confiscation order shall not be discharged, but the amount of the pecuniary penalty under the order shall be deemed to be reduced by the amount attributable to the offence or offences the conviction for which has ceased to have effect.

Restraining  
order

### PART III *Restraining Orders*

8. (1) Where a person has been or is about to be charged with a serious offence, the Attorney-General may apply to a magistrate's court or the High Court, ex-parte, for a restraining order.

(2) An application for a restraining order may be made in respect of one, or more than one, serious offence and shall be supported by an affidavit of a police officer of or above the rank of Inspector stating —

- (a) the serious offence or offences in respect of which the application is made;
- (b) that the officer has a reasonable belief that the defendant committed the offence, or each of the offences, as the case may be, and that he received or derived proceeds from the said commission;
- (c) identifying the property which the officer reasonably believes to represent the proceeds received or derived by the defendant from the said commission; and
- (d) setting out the basis for such beliefs.

(3) An application for a restraining order shall not be made or continued if proceedings against the defendant in respect of the serious offence or offences are abandoned or cease to have effect.

(4) Where, on an application under this section, the magistrate's court or the High Court is satisfied that there is reasonable cause to believe that the defendant has benefited from the proceeds of the serious offence or offences in respect of which the application is made, the court may, by order, (herein referred to as a "restraining order",) prohibit any person from dealing in any way with any property to which the order applies, subject to such conditions as may be specified in the order.

(5) A restraining order shall identify the defendant and the offence or offences in respect of which it is made, and shall provide for notice to be given to any person affected by the order.

(6) A restraining order may apply to —

(a) property described in the order, being property —

- (i) of the defendant, or
- (ii) received in connexion with, or derived from, the commission of the offence and held by any person, other than the defendant in the order; or

(b) all property of the defendant, whether described in the order or not, and including property acquired by the defendant after the making of the order.

(7) The conditions, subject to which a restraining order may be made, may include conditions with respect to the meeting of reasonable living and business expenses of any person to whom the order applies, or who is affected by the order.

(8) The magistrate's court or the High Court may rescind or vary an order made under this section if the defendant gives security, satisfactory to the court, for the payment of any future pecuniary penalty which may be made in respect of any serious offence to which the application for a restraining order relates, or if the defendant gives undertakings, satisfactory to the court, concerning any of his property which might become liable to a future pecuniary penalty.

9. (1) The High Court may appoint a receiver to take possession of any property to which a restraining order relates, and, in accordance with such directions, or subject to such conditions or exceptions as the court may give or impose, to manage or otherwise deal with any property in respect of which he is appointed.

Appointment  
of receiver

(2) Any person having possession of any property in respect of which a receiving order is made under this section, shall give control or possession thereof to the receiver.

(3) The High Court may, on application, or of its own motion, revoke the appointment of a receiver, or vary the conditions or exceptions subject to which he was appointed.

(4) Where a confiscation order is made against the defendant, any property in respect of which the receiver was appointed and which is in his possession or under his control, shall be made available by the receiver, to such extent as may be necessary, to satisfy the amount of the pecuniary penalty imposed under the confiscation order, unless the High Court otherwise directs.

(5) A person appointed a receiver under subsection (1) shall be paid such remuneration as may be specified by the High Court.

(6) Where the appointment of a receiver ceases, whether by reason of the discharge of the restraining order or for some other reason, any property in respect of which he was appointed and which is then in his possession or under his control, shall be dealt with by the receiver as the High Court directs.

(7) Where a receiver takes any action in relation to property which is not property in respect of which he was appointed, being action which he would be entitled to take if it were such property, and believing and having reasonable grounds for believing, that he is entitled to take that action in relation to that property, he shall not be liable to any person in respect of any loss or damage resulting from his action, except in so far as, and to the extent that, the loss or damage results from his own negligence.

10. (1) When the High Court makes a restraining order, or at any subsequent time, either of its own motion or on application made to it by the Attorney-General, the defendant or, with leave of the court by any other person, as appropriate, it may —

Further  
orders of  
court

(a) vary the property to which the order is to apply;

- (b) vary any condition or exception subject to which the order is made;
- (c) order the examination of the defendant, or any other person, whether affected by the order or not, before the High Court, or before any specified person, concerning the nature and location of any property to which the order relates; or
- (d) make or vary any order relating to any undertaking given in accordance with section 8(8).

(2) Any statement or disclosure made by a person in answer to questions put to him in the court of an examination referred to in subsection (1)(c) shall be admissible against him in any civil proceeding, any proceeding relating to the giving of false testimony in the course of the examination, or any proceeding for the making of a confiscation order for the purpose only of assessing the value of the benefit to the person from the proceeds of the serious offence or offences, but shall not otherwise be admissible in evidence against him.

Discharge of  
restraining  
order

**11.** (1) A restraining order shall be deemed to be discharged —

- (a) if the proceedings against the defendant in respect of the serious offence giving rise to it are discontinued, or if the defendant is not charged with the serious offence within a week of the making of the order;
- (b) if a confiscation order is made against the defendant in respect of the same serious offence to which the restraining order relates; or
- (c) if a confiscation order is not applied for within the period specified in section 3 (2).

(2) The High Court may, on application by the defendant, discharge a restraining order if the defendant gives security or undertakings of the kind referred to in section 8 (8).

(3) Where a restraining order is made in respect of more than one offence, and the proceedings against the defendant in respect of one or some of the offences are discontinued, or if he is not charged with all of the offences within the period specified in subsection 1 (a), the order shall be discharged only in relation to the offence or offences so discontinued or not so charged.

#### **PART IV *Charge on Property***

Charge on  
property  
subject to  
confiscation  
order

**12.** (1) Where a confiscation order is made in respect of property subject to a restraining order, then, by virtue of this section, and unless the High Court otherwise directs, a charge is created on the property to secure payment to Government or the victim of the offence, as the case may be, of the amount of any pecuniary penalty imposed under the confiscation order.

(2) A charge created by subsection (1) shall be subject to every encumbrance to which the property was subject immediately before the confiscation order was made, but shall have priority over all other encumbrances, and shall remain on the property despite any disposal of the property:

Provided that this subsection shall not affect the title of a bona fide purchaser of the property for value, who acted in good faith and who, at the time of the purchase, had no notice of the charge.

(3) A charge on property created by this section shall cease to have effect if the confiscation order is discharged, or if the property is disposed of with the consent of the High Court, or in the circumstances referred to in the proviso to subsection (2).

13. If a restraining order or a confiscation order is in respect of property, charges over, incumbrances on, title to or documents relating to which are registrable under the law of Botswana, the Attorney-General or the receiver may register such order, and any person who purchases the property after such registration shall be deemed to have notice of the order, and of the effect thereof.

Registration  
of orders

#### PART V *Money Laundering, etc.*

14. (1) For the purposes of this section, a person shall be deemed to engage in money laundering if he engages, directly or indirectly, in a transaction that involves money, or other property, that is the proceeds of a serious offence, whether committed in Botswana or elsewhere, or if he receives, possesses, conceals, disposes of, or brings into Botswana, any money, or other property that is the proceeds of a serious offence, whether committed in Botswana or elsewhere, and the person knows, or ought reasonably to know, that such money or other property is derived or realised, directly or indirectly, from some sort of unlawful activity.

Money  
laundering

(2) A person who engages in money laundering shall be guilty of an offence and shall be liable, if he is an individual to imprisonment for a term not exceeding three years or to a fine not exceeding P10 000, or both, or if the offender is a body of persons, then, every person who at the time of the commission of the offence was a director, manager or partner of such body shall be liable to a fine not exceeding P25 000.

15. (1) Any person who receives, possesses, conceals, disposes of or brings into Botswana any money, or other property, that may reasonably be suspected of being proceeds of a serious offence, shall be guilty of an offence and liable, if he is an individual, to imprisonment for a term not exceeding three years or to a fine not exceeding P10 000, or both, or if the offender is a body of persons, then, every person who at the time of the commission of the offence was a director, manager or partner of such body, shall be liable to a fine not exceeding P25 000.

Possession  
of property,  
etc. suspected  
of being  
proceeds of  
serious  
offence

(2) It shall be a defence to a charge under this section if the person charged satisfies the court that he did not know and had no reasonable

grounds for suspecting that the money or property referred to in the charge was derived or realised, directly or indirectly, from some form of unlawful activity.

Contravention  
of restraining  
order

16. A person who knowingly contravenes the terms of a restraining order by disposing of, or otherwise dealing with money or property to which the order relates shall be guilty of an offence and liable to imprisonment for a term not exceeding three years or to a fine not exceeding P10 000, or both.

#### PART VI *Production Orders*

Production  
orders

17. (1) Where a person has been convicted of a serious offence, or there are reasonable grounds for suspecting that he has committed a serious offence, and there are reasonable grounds for suspecting that documents relevant to the offence, or that may assist in any way in tracking or identifying the proceeds of the offence, or in assessing the value of those proceeds, or in tracking, identifying or assessing the value of any property of the person convicted of the offence, or suspected of having committed the offence, are in the possession of or under the control of any person, the Attorney-General may apply to a magistrate or a judge of the High Court for a production order in respect of those documents.

(2) An application for a production order shall be supported by an affidavit sworn by a police officer of or above the rank of Inspector setting out the grounds for the application, and the basis for any suspicions as to the commission of the offence, or as to the location of any such documents as are referred to in subsection (1).

(3) A magistrate or a judge before whom an application is made under this section, may, if he is satisfied that there are reasonable grounds for making the order, issue a production order, subject to such conditions as he may think fit to impose, ordering any person to produce to a police officer any document of the kind referred to in subsection (1) that are in such person's possession or under his control, or to make such documents available to a police officer for inspection, at such time or place as may be specified in the order.

(4) Where a document is produced or made available to a police officer under this section he may take extracts from it or make copies of it, and if it was ordered to be produced to him, he may retain it if, and for so long as, its retention is reasonably necessary for the purposes of this Act.

(5) A person shall not be excused from producing or making available a document when ordered to do so under this section on the ground that producing it or making it available might tend to incriminate him or make him liable to a penalty, or that it would or might be in breach of an

obligation (whether imposed by an enactment or otherwise) of the person not to disclose the existence or contents of the document:

Provided that any information, document or thing obtained as a direct or indirect consequence of the production or making available of the document shall not be admissible in evidence against the person producing it or making it available in any criminal proceedings except in respect of an offence under section 18.

(6) For the purposes of the proviso to subsection (5) proceedings on an application for a confiscation order or a restraining order are not criminal proceedings.

(7) Where a police officer retains a document pursuant to an order under this section, he shall, on request of the person to whom the order is addressed, give to that person a copy of the document, certified under his hand to be a true copy of the document.

(8) Where a production order requires a person to produce a document to a police officer, the person may apply to a magistrate's court or the High Court for a variation of the order, and if the court is satisfied that the document is essential to the business activities of the person, and the interests of justice will not thereby be jeopardised, it may vary the terms of the production order so that it requires the person to make the document available to a police officer for inspection.

18. Where a person is required in accordance with the terms of a production order to produce a document to a police officer or to make a document available to a police officer for inspection, and contravenes the order without reasonable excuse, or in purported compliance with the order produces or makes available a document which he knows or has good reason to know is false or misleading in a material particular without disclosing that the document is so false or misleading, and without providing correct information, if he possesses or can reasonably acquire such correct information, shall be guilty of an offence and shall be liable to imprisonment for a term not exceeding three years or to a fine not exceeding P10 000, or both.

Failure to  
comply with  
production  
order

#### PART VII *Mutual Assistance Between Countries*

19. (1) Where, in any country to which the Mutual Assistance in Criminal Matters Act, 1990, applies, an order similar to a confiscation order or a restraining order is made against any person, in respect of an offence that is the equivalent of a serious offence as defined in this Act, and the order is registered by the High Court in accordance with the said Act, the provisions of this Act shall have effect as if the order were made under this Act, subject to such modifications as may be prescribed, as it has effect to a confiscation order or a restraining order, as the case may be.

Foreign  
request for  
assistance

(2) Where a request for assistance in identifying, locating or assessing

the value of the proceeds of a serious offence is transmitted under the terms of the Mutual Assistance in Criminal Matters Act, 1990, and the request is not refused under that Act, the provisions of this Act —

- (a) in relation to production orders and their enforcement shall have effect, subject to such modifications as may be prescribed, as they have effect in the circumstances described in section 17(1); and
- (b) in relation to search warrants and their enforcement shall have effect, subject to such modifications as may be prescribed, as they have effect in the circumstances described in section 20.

### PART VIII *Search Warrants*

Powers of  
search, etc.

20. (1) Where a person has been convicted of a serious offence, or there are reasonable grounds for suspecting that a person has committed a serious offence, and there are reasonable grounds for suspecting that there is on any land, or upon any premises, any document such as is described in section 17 (1) in relation to the offence, the Attorney-General may apply to a magistrate or a judge of the High Court for a search warrant in respect of that land or those premises.

(2) A police officer of or above the rank of Inspector may, under the authority of a search warrant issued under subsection (1), enter upon any land or upon or into any premises specified in the warrant, to search for and seize any document which he believes on reasonable grounds to be a document such as is described in section 17 (1).

(3) A magistrate or judge shall not issue a search warrant under this section unless he is satisfied that —

- (a) the document involved cannot be identified or described with sufficient particularity for the purpose of obtaining a production order in respect of it;
- (b) a production order has been given in respect of the document and has not been complied with;
- (c) a production order in respect of the document would be unlikely to be effective because there are reasonable grounds to suspect that it would not be complied with; or
- (d) the investigation for the purposes of which the search warrant is sought might be seriously prejudiced if immediate access to the document is not obtained without prior notice to any person.

(4) If, in the course of a search authorized under this section, a document or any other thing is found that the person conducting the search believes on reasonable grounds to be a document such as is referred to in section 17 (1), though not of a kind specified in the warrant, or such as will afford evidence, relating to the serious offence in respect of which the warrant was issued, or to any other serious offence, and it is believed on reasonable grounds that it is necessary to seize that

document or thing immediately to prevent its concealment, loss or destruction, the warrant shall be deemed to authorize such seizure.

**PART IX *Miscellaneous***

**21.** There shall be a right of appeal by any interested party in respect of the issue of a confiscation order, a restraining order or a search warrant under this Act, or by the Attorney-General against the refusal of a court to issue a confiscation order, a restraining order or a search warrant. **Appeals**

**22.** Any question of fact to be decided in connexion with any application under this Act shall be decided on a balance of probabilities: **Standard of proof**

Provided that where the issue is whether a person has been convicted of, or charged with, or about to be charged with a serious offence, or has had a serious offence taken into account in being sentenced for another serious offence, the court shall require to be satisfied beyond a reasonable doubt on such issue.

**23.** The Minister may make regulations for or with respect to any matter that is required or permitted by this Act to be prescribed, or for or with respect to any matter that is necessary or desirable for carrying out or giving effect to the purposes of this Act. **Regulations**

**PASSED** by the National Assembly this 20th day of September, 1990.

**C.T. MOMPEI,**  
*Acting Clerk of the National Assembly.*