

## **Prophet no poster-boy for forfeiture critics**

Robert Vivian's criticism of South Africa's asset forfeiture legislation published in *Business Day* on 13 March is misleading and inaccurate. Vivian says South Africa's asset forfeiture law "violates the "most fundamental safeguards ... intended to protect South Africans ... from violent state action".

To support his charge, Vivian uses the case of Simon Prophet, who was found "not guilty ... The state nevertheless took his house and the courts did not compel the state to return his property to him." Vivian neglects to mention that the criminal charge failed on a technicality – a defective search warrant – and that the use of the house for manufacturing and storing drugs was proved on a balance of probabilities – the same standard of proof applicable in all civil claims where money or property is claimed.

Vivian goes on to state sweepingly that "in other countries with similar legislation, property forfeiture orders cannot be granted until after a criminal conviction". Yet the definition of civil forfeiture is that a criminal conviction is not required. The United States has had a civil forfeiture regime since 1970, which regime was reformed in 1999 – to encompass reforms which we already have in our legislation. Other countries with civil forfeiture regimes include Australia and New Zealand. Indeed, the Commonwealth has developed model provisions to help jurisdictions who wish to introduce civil forfeiture do so.

Vivian makes much of the "secret hearing" – an *ex parte* application – which is conducted to obtain a preservation order. A preservation order is simply a temporary order designed to prevent the property from being disposed of pending a forfeiture order. *Ex parte* applications are not uncommon in our law, particularly where notice to the other party may frustrate a final application and the order is temporary in nature.

Vivian suggests the granting of the preservation order is a foregone conclusion and that police lie in their affidavits. An affidavit is written testimony under oath – lying would open a police officer to a perjury charge. The evidence in the affidavits must be sufficient to satisfy the court that there are *reasonable grounds* to believe the property is an instrumentality of a serious offence, the proceeds of certain serious crimes, or property associated with terrorist activities. In other words, if there are no such reasonable grounds the application is not granted – certainly not a foregone conclusion.

The preservation order expires 90 days after being advertised, unless the forfeiture application is already before court. Vivian says that the respondent (Prophet in this case) must "give up his right to silence" by responding to the forfeiture application because if he does not respond he loses his home. This is an elision of the truth. Owners may maintain silence if they wish – but as with any party to a legal matter, keeping silent means the other party need only provide evidence to the relevant standard of proof to succeed. The right to silence has never implied that you won't lose your case if you fail to put your case when the other party has made theirs.

The legislation requires the state to give notice to all persons who may have an interest in the property of the forfeiture application, and they have a right to apply for the exclusion of their interest. To do so they need to show (if the state has satisfied its burden of proof), on a balance of probabilities, that the interest was legally acquired and they neither knew nor had reasonable grounds to suspect the property was proceeds or an instrumentality or associated with terrorist activity.

Yet Vivian says: "The Prophet case illustrates how every known constitutional safeguard is violated in these asset forfeiture cases, including the presumption of innocence, the right of silence, the due process of law, the right to trial, the double jeopardy rule, punishment fitting the crime, and the rules of evidence."

South Africa's asset forfeiture legislation has a number of procedural safeguards including the reverting to court at various stages of the process, an innocent owner defence, and the right to apply for leave to appeal. The courts have also read in constitutional requirements that deprivation of property in terms of civil forfeiture should not be arbitrary and that the forfeiture satisfy the requirements of proportionality.

In Prophet's case, the courts found that "virtually the entire house and garage were used to store or keep chemicals and other equipment" to be used in the mini-laboratory also on the premises; almost every room was adapted to drug production. In considering proportionality, the courts considered that enough chemicals to produce drugs to the value of R250 000 were found on the premises, while the un-bonded portion of the house was valued at R200 000, and that Prophet had sufficient means to support alternative accommodation for himself.

As for Vivian's claim that the rules of evidence are flouted, in fact there is no difference in the rules of evidence applicable – it is merely the evidentiary burden which is different in civil cases (balance of probabilities) compared to criminal cases (beyond reasonable doubt). Prophet did not dispute the state's version of what was found at his home, so the court had no need to rely on the evidence arising from the defective search warrant (which saved him in the criminal case) in the civil case.

As for Vivian's "double jeopardy" claim, it is not uncommon for a civil case to be brought on the same facts as a criminal matter. Thus O.J. Simpson can be acquitted of double homicide in a California criminal prosecution, but then lose a civil wrongful death claim brought by the victims' families in the amount of \$33.5 million.

Why is Vivian so anti-asset forfeiture? Presumably, writing for the Free Market Foundation, he has the interests of property owners at heart. But consider this: Prophet's house was in a residential area. Owners who knowingly allow their houses to be used for serious criminality are negatively affecting the property values and safety of others. Property owners have nothing to fear if their conduct is blameless.

As the Constitutional Court put it, "the court is called upon to strike an appropriate balance between two constitutional principles. The one is that no one should be arbitrarily deprived of property. The other is that the state is under an obligation to protect members of the public from criminal depredations."

Yes, our forfeiture law and its application needs to be properly interrogated constitutionally, but it is hard to feel in Prophet's case that justice was not done.

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