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Breaking every safeguard in the book

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THE Simon Prophet series of court cases illustrates how the operation of SA's pernicious asset forfeiture legislation violates the most fundamental constitutional safeguards intended to protect South Africans and their property from violent state action and seizure. Prophet had his house seized as being "an instrumentality of an offence", but he was found not guilty of the charge that was brought against him. The state nevertheless took his house and the courts did not compel the state to return his property to him. In other countries with similar legislation, property forfeiture orders cannot be granted until after a criminal conviction. In SA, being found not guilty of criminality does not protect the individual, as it should, from asset forfeiture.

First, the facts of the case. We cannot with certainty say what the facts of the case are. The asset forfeiture procedure avoids a trial, which means that the facts are not tested in court. All we know is what the police allege and that these allegations are treated as facts. In January 2001, the police suspected that the unemployed Prophet was manufacturing drugs at his home, which if true would have contravened several laws. They raided his home and found parts of it set up as a laboratory. They also found some manufactured chemicals, which were poured down the drain when the police captain, assigned to keep watch, left to let the press in. Prophet was subsequently acquitted of all criminal charges, but his home was nevertheless declared forfeit to the state.

An application for a preservation order (for the state to hold the asset) starts off with a secret hearing based exclusively on police affidavits. Prophet need not be informed of the hearing and has no right to appear before the court. The police may even, if they so choose, lie in the affidavits. If found out, the police can file further affidavits. The double jeopardy (being punished twice for the same offence) rule is not applied. Since the court has only the police affidavits to go by, it is a foregone conclusion that the preservation order will be granted, allowing the state to hold the asset until it has obtained a forfeiture order. In the Prophet case, it was granted in June 2001.

The next step is the forfeiture order. Now Prophet may file an answering affidavit. To do so he must give up the right of silence. Whatever he says (or does not say) can be used against him. If he does not reply he loses his home. He replied, and made an unsuccessful application to stay the forfeiture case pending the outcome of the criminal case. He applied for leave to appeal; this was denied.

He appealed to the Supreme Court of Appeal (SCA), which granted the right to appeal. In the meanwhile, the criminal case was heard and he was acquitted of all criminal charges. He lost the case before the Supreme Court. It decided that if he did not want to lose his house he should have filed reasons why he should not lose his house. It is difficult to see when he should have done so, since his application before the high court was to stay the proceedings pending the criminal case. The SCA is a court of appeal, not a trial court, so filing reasons

relating to forfeiture of his house would be inappropriate to do so at the appeal stage. So now the matter was bogged down by mere procedures, caused by the fact that the forfeiture legislation is designed to avoid the proper, centuries-old, trial procedures. The court granted Prophet leave to appeal in respect of the question of whether the forfeiture of his property was constitutional or not. Prophet took the matter to the Constitutional Court.

To date, the Constitutional Court has agreed with the state on all asset forfeiture cases, overturning high court decisions declaring the asset forfeiture legislation to be unconstitutional. The court decided that Prophet could not argue that the asset forfeiture legislation was unconstitutional since he did not do so at the previous hearings. So if we understand the courts correctly, when filing the initial replying affidavit, the accused must at the same time also file reasons why he should not lose his property and why the action is unconstitutional — that is, before the courts have decided anything. His application to adduce further evidence about the dismissal of the criminal charge was also dismissed. He could not raise this earlier, since it had not happened when the high court first heard the case.

Prophet had protested that he was not involved in organised crime. The court referred to his own answering affidavit in which he agreed that the country faced an organised crime problem. This illustrates why the right of silence is important. He clearly can have no knowledge of the state of organised crime in the country. His statement about organised crime was both hearsay and irrelevant. The court has now indicated that it is not overly concerned about these rules. Had the centuries-old due process of law been followed, all of these procedural issues would have been dealt with in the correct sequence.

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. That Prophet could not rely on these safeguards means that no one can, which could not have been the intention of the legislature in approving the asset forfeiture legislation to assist the state in confiscating “the proceeds of organised crime”.

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