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Serious Offences (Confiscation of Proceeds) Act, 2001 Act 8 of 2001

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Schedule 11

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Serious Offences (Confiscation of Proceeds) Act, 2001

Act 8 of 2001

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Assented to on 21 August 2001

Commenced on 18 October 2001

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An Act to provide for the confiscation of proceeds of serious offences and to provide for matters connected therewith.

ENACTED by the King and the Parliament of Swaziland.

Part I – Preliminary

1. Short title and commencement

This Act may be cited as the Serious Offences (Confiscation of Proceeds) Act, 2001 and shall come into force on such date as the Minister may by Notice in the *Gazette*, appoint.

2. Interpretation

In this Act, unless, the context otherwise requires—

“**Banker’s books**” means any ledger, ledger card, statement of account, day book, cash book, account book or other book or document used in ordinary business of banking and it also means any cheque, voucher, record card, report, letter or other document whatsoever or a copy of any thing referred to in the foregoing which is used in the ordinary business of banking or the activities of a Building Society, Co-operative Society or other similar institution;

“**court**” means the High Court or a Magistrate’s court, as the case may be;

“**document**” includes any register, book, record, tape recording, any form of computer input or output and any other material (whether produced mechanically, electrically or manually or by any other means whatsoever) and also a banker’s books;

“**Minister**” means the Minister for Justice;

“**premises**” includes vessel, aircraft, vehicle and any place whether built upon or not;

“**police officer**” means a member of the Royal Swaziland Police Force;

“**property**” means real or personal property of every description wherever situated, whether tangible or intangible and it also means any interest in any such real or personal property;

“**proceeds of serious offence**” means any property used in or in connection with the commission of a serious offence or any property that is derived or realised directly or indirectly by any person from the commission of any offence or from any act or omission which had it occurred in Swaziland would have constituted a serious offence;

“**serious offence**” means any offence specified in the Schedule to this Act.

Part II – Forfeiture and pecuniary penalty orders

3. Application for forfeiture or pecuniary penalty order

- (1) When a person has been convicted of a serious offence, the Director of Public Prosecutions may, subject to subsection (2), apply to the court convicting that person not later than 6 months after that person's conviction for either or both of the following orders:
 - (a) a forfeiture order in respect of particular property;
 - (b) a pecuniary penalty.
- (2) The Director of Public Prosecutions shall not, except with leave of the court, make an application under subsection (1)—
 - (a) if any application has previously been made under that subsection or any other law; and
 - (b) the application has been finally determined.

4. Forfeiture orders

- (1) When an application is made to a court under [section 3](#) the court may, if it considers it appropriate, order that the property be forfeited to the government if it is satisfied that the property was the proceeds of a serious offence.
- (2) In considering whether to make an order under subsection (1) in respect of a particular property, the court may have regard to—
 - (a) the use that is ordinarily made or had been intended to be made of the property;
 - (b) any hardship that may reasonably be likely to be caused to any person by the order; and
 - (c) the gravity of the offence committed.
- (3) The Director of Public Prosecutions in applying for an order under subsection (1) shall give notice of application in the manner prescribed by the appropriate rules of court—
 - (a) to the person in respect of whose conviction the application is made; and
 - (b) to any other person whom the applicant has reason to believe has an interest in the property.
- (4) The court may, at any time before the final determination of the application, direct the applicant to give or publish notice of the application to such other persons, in such manner and within such time as the court thinks fit.
- (5) The court may, at anytime before the final determination of the final application and whether or not the period for making the application has expired, amend the notice of application as it thinks fit, either at the request of the applicant or with the approval of the applicant.
- (6) The person in respect of whose conviction the application is made and any other person who claims an interest in the property are entitled to appear and to give evidence at the hearing of the application.

5. Effect of forfeiture order

- (1) Subject to subsection (2), when the court makes an order in respect of a particular property then immediately on the making of the order the property shall vest absolutely in the Government.
- (2) Where immovable property or other property whose ownership passes on by virtue of registration is forfeited to the government, the government shall be entitled to be registered as the owner of the property, and the Minister shall do or authorise to be done all that is necessary to effect the

registration of the government as the owner, including the execution of any instrument required to be executed by a person transferring an interest in the property of that kind.

- (3) The Court may give all directions that may be necessary to give effect to a forfeiture order made by it.
- (4) Except with leave of the court which made the forfeiture order, property vested in the crown shall not be disposed of or otherwise dealt with by the crown or by any other person authorised by the crown before the expiration of the appeal period.
- (5) If at the expiration of the appeal period the forfeiture order has not been discharged, the property may be disposed of or otherwise dealt with in accordance with any direction of the Minister or the person authorised by the Minister for the purposes of this subsection.
- (6) For the purposes of subsection (4) and (5), the appeal period expires when an appeal may no longer be lodged against either the forfeiture order or the conviction in respect of which the order was made or if such appeal has been lodged, when the appeal has lapsed or had been finally determined.

6. Effect of forfeiture order on third parties

- (1) Any person who claims an interest in any property in respect of which the forfeiture order has been made by a court may, subject to subsection (2), apply to the court for an order under subsection (4).
- (2) An application under subsection (1) shall be made within 6 months after the making of the forfeiture order, and notice thereof shall be served on the Director of Public Prosecutions.
- (3) Notwithstanding subsection (2), the court may permit a person to apply under subsection (1) after the expiration of the 6 months if it is satisfied that the failure to apply within that period was not due to any delay on the part of that person.
- (4) If on an application under subsection (1), the court is satisfied—
 - (a) that the applicant was not in any way involved in the commission of the serious offence in respect of which the forfeiture order was made;
 - (b) that the applicant acquired the interest in the property in good faith and for value; and
 - (c) that the applicant acquired the interest in the property without knowing or in circumstances such as not to arouse a reasonable suspicion that the property—
 - (i) was used in, or in connection with, the commission of a serious offence; or
 - (ii) was derived or realised directly or indirectly by any person as a result of the commission of a serious offence

the court shall make an order declaring the nature, extent and value (as at the time of making the order) of the applicant's interest in the property and for the transfer of the property to the applicant or for the payment to the applicant of the declared value of the applicant's interest in the property.
- (5) If the applicant had been given notice under [section 4\(3\)](#) of the application for the forfeiture order or had attended the hearing of the application for the forfeiture order, the court shall not make an order under subsection (4) unless it is satisfied that making of the order is justified on these special grounds:
 - (a) there is good reason why the applicant did not attend the hearing of the application for the forfeiture order;
 - (b) that the evidence now being given by the applicant was not available to the applicant at the time of the hearing of the application for the forfeiture order.
- (6) No transfer duty or stamp duty shall be paid under the Transfer Duty Act, 1902 or the Stamp Duties Act, 1970 in respect of the transfer of any property under this section.

7. Discharge of forfeiture order

A forfeiture order may be discharged if—

- (a) the conviction in respect of which the order was made is subsequently quashed; or
- (b) it is discharged by the court which hears an appeal against the order under [section 24](#).

8. Effect of discharge of forfeiture order

- (1) If the forfeiture order is discharged in the manner, referred to in [section 7](#), the person who claims to be the person in whom the property was vested immediately before the making of the forfeiture order may—
 - (a) if the property is still vested in the crown by virtue of that forfeiture order, by application in writing to the Minister, request the return of the property; or
 - (b) if the property is no longer vested in the crown, apply to the court which made the forfeiture order for an order declaring the value (as at the time of making the order under this paragraph) of the property.
- (2) The Minister shall, upon receipt of an application under subsection (1)(a), arrange for the property to be transferred to the applicant and for this purpose, the Minister may do or authorise to be done all that is necessary to give effect to the transfer.
- (3) Upon the court making an order following an application made under subsection (1)(b) declaring the value (as at the time of making the order) of the property, the applicant for the order may by application in writing to the Minister request the payment of the amount declared by the order.
- (4) The Minister shall, upon receipt of an application under subsection (3), direct the person in whom the property is vested to pay to the applicant the amount declared in the order by the court.
- (5) No transfer duty or stamp duty shall be paid under the Transfer Duty Act, 1902 or the Stamp Duties Act, 1970 in respect of the transfer of any property under this section.

9. Pecuniary penalty order

- (1) If an application is made to the court under [section 3\(1\)\(b\)](#) for a pecuniary penalty order in respect of the benefits derived by the person in respect of whose conviction the application is made, the court may—
 - (a) assess the value of those benefits;
 - (b) order the person to pay to the government a pecuniary penalty equal to the value of such benefits as assessed under paragraph (a) less—
 - (i) the value (as at the time of making the order under this subsection) of any property in respect of which a forfeiture order has been made in relation to the same conviction; and
 - (ii) any amount payable by way of restitution or compensation in relation to the same conviction if the court thinks it desirable to take such assessed benefits into account.
- (2) The amount payable by a person to the government under a pecuniary penalty order shall for all purposes be taken to be a civil debt owed by that person to the government.
- (3) A pecuniary penalty order made by a court may be enforced as if it were an order made by the court in civil proceedings instituted by the government against the person concerned to cover a debt owed by that person to the government.

10. Discharge of pecuniary penalty order

A pecuniary penalty order may be discharged if—

- (a) the conviction in respect of which the order was made is subsequently quashed; or
- (b) it is discharged by the court which hears an appeal against the order under [section 24](#).

Part III – Restraining orders

11. Restraining orders

- (1) If a person has been, or is about to be charged with a serious offence, the Director of Public Prosecutions may apply to the court for a restraining order under this section in respect of—
 - (a) specified property of that person;
 - (b) all the property of that person, including property acquired by that person after the making of the order; or
 - (c) specified property of any other person which was used in, or in connection with, the commission of the offence or was derived or realised, directly or indirectly, by that other person, as a result of the commission of the offence.
- (2) An application under subsection (1) shall be supported by an affidavit stating the following matters and the grounds therefor—
 - (a) that the person charged or about to be charged with the serious offence, committed the offence;
 - (b) in the case of an application in respect of specified property—
 - (i) that a forfeiture order may be made in respect of the property, if the person is convicted of the offence; and
 - (ii) that the property is the property of the person charged or about to be charged, and that a pecuniary penalty may be made if the person is convicted of the offence;
 - (c) in the case of an application in respect of all the property of the person, that a pecuniary penalty order may be made if the person is convicted of the offence; and
 - (d) that there is a risk that before a forfeiture order or pecuniary penalty order is made, the person concerned would likely, unless restrained from doing so, dispose of or otherwise deal with the property, to such an extent as to prevent the forfeiture or pecuniary penalty order being effected or complied with.
- (3) An applicant for an order under this section shall give notice of the application in the manner prescribed by the appropriate rules of court—
 - (a) to any person whose property is the subject of the application; and
 - (b) to any other person whom the applicant has reason to believe has an interest in any property that is the subject of the application.
- (4) The court may grant a restraining order notwithstanding that no notice of the application has been given under subsection (3) if the court is satisfied that—
 - (a) circumstances of urgency require the granting of the order; or
 - (b) it is not in the public interest to give notice of the application.

- (5) The court may, at any time before the final determination of the application, direct the applicant to give or publish notice of the application to such other persons, in such manner and within such time as the court thinks fit.
- (6) Any person whose property is the subject of the application, and any other person who claims an interest in any such property, is entitled to appear and to give evidence at the hearing of the application.
- (7) On an application under subsection (9), the court may, if it considers that having regard to the matter contained in the affidavit, there are reasonable grounds in support of the application—
 - (a) direct that the property specified in the order is not to be disposed of or otherwise dealt with by any person, except in such manner and in such circumstances (if any) as specified in the order; or
 - (b) direct a trustee to take control and custody of the property.
- (8) If an application is made in anticipation of a charge being laid against the person of the offence in respect of which the application is made, the court shall not issue the restraining order unless it is satisfied that the person will be charged with the offence within 7 days.
- (9) A restraining order may provide for meeting the reasonable living and business expenses of the person to whose property the order relates and reasonable costs and expenses of the person defending a criminal charge against that person.

12. court may make further orders

When a court grants a restraining order, it may at the time it makes the order or at any later time, make any ancillary order which it considers just, including—

- (a) an order varying the property to which the restraining orders relates;
- (b) an order varying any condition of the restraining order;
- (c) an order for the examination before a court on oath of the person (in the section referred as the respondent) whose property is the subject of the application;
- (d) where the property is in the custody or under the control of a trustee—
 - (i) an order directing the manner in which the trustee may exercise his powers; or
 - (ii) an order determining any question relating to the property, including any question relating to the liabilities of the respondent; or
 - (iii) any order directing the respondent to furnish the trustee within a specific period with a statement setting out such particulars of the property as the court may think fit.
- (2) Any person who has an interest in the property which is the subject of a restraining order may apply to the court for variation of the order to exclude that person's interest from the order and the court shall grant the application if it is satisfied that—
 - (a) the application was not in any way involved with the commission of the offence; and
 - (b) the interest in the property was acquired in good faith or for sufficient value without knowledge and in circumstances such as not to arouse a reasonable suspicion that the property was derived or realised, directly or indirectly by any person as the result of the commission of a serious offence.
- (3) A person who has been convicted of or has been charged or is to be charged with a serious offence and whose property is subject to a restraining order, may apply to the court for the exclusion of the property from the order, and the court shall grant the application if it is satisfied that—
 - (a) the property was not used in or in connection with the commission of the offence; and

- (b) the property or the interest in the property was lawfully acquired.
- (4) If a person is examined before a court by virtue of an order under subsection (1)(c), that person shall not be excused from answering any question on the ground that the answer might tend to incriminate him or make him liable to a penalty.
- (5) A statement or disclosure made by a person in answer to a question put in the course of an examination referred to in subsection (1)(c) shall be admissible against that person in—
 - (a) any civil proceeding;
 - (b) a proceeding for giving false testimony in the course of the examination;
 - (c) a proceeding for the making of a forfeiture order, for the purpose only of facilitating the identification of the property which is subject to the forfeiture order; or
 - (d) a proceeding for the making of a pecuniary penalty order, for the purpose only of assessing the value of the benefits derived by the person as a result of the commission of the offence,but shall not otherwise be admissible in evidence against that person.
- (6) A person ordered under subsection (1)(b) to attend an examination before a court who—
 - (a) without reasonable excuse fails to attend as required by the order;
 - (b) without reasonable excuse refuses or fails to take an oath or make an affirmation for the purpose of the examination;
 - (c) refuses or fails to answer a question that the person is directed by the court to answer; or
 - (d) knowingly makes a statement in the course of the examination that is false or misleading in a material particular,shall be guilty of an offence and liable on conviction to a fine not exceeding two thousand Emalangeni or imprisonment not exceeding two years or both.

13. Contravening of restraining orders

- (1) Any person who disposes of or otherwise deals with property which is the subject of a restraining order shall be guilty of an offence and liable—
 - (a) in the case of an individual, to a fine not exceeding ten thousand Emalangeni or the value of the property, whichever is the greater, or to imprisonment not exceeding five years or both;
 - (b) in the case of a body corporate, to a fine not exceeding fifty thousand Emalangeni or three times the value of the property, whichever is the greater.
- (2) Any authorised dealing with any property which is the subject of a restraining order may be set aside by the court at the instance of the Director of Public Prosecutions.

14. court may renounce restraining orders

- (1) The court may, on application by the person against whom a restraining order has been granted under [section 11](#), revoke the order if that person gives security to the satisfaction of the court for the payment of any pecuniary penalty that the court may impose or gives an undertaking satisfactory to the court concerning that person's property.
- (2) Notice of the application under subsection (1) shall be given in the manner prescribed by the appropriate rule of court to the Director of Public Prosecutions and, where the property is in the custody or under the control of a trustee, to the trustee, both of whom are entitled to appear and give evidence at the hearing of the application.

15. When restraining order ceases to have effect

- (1) A restraining order shall cease to have effect if the charge against the person in respect of whom the order is made is withdrawn or if the person is acquitted of the charge.
- (2) If the court makes a forfeiture order or pecuniary penalty order, the restraining order shall cease to have effect if that order is satisfied or otherwise discharged.

Part IV – Powers of search and seizure

16. Search warrant

- (1) A police officer may apply to a magistrate's court for a search warrant to be issued under this Part in respect of any premises if the officer has reasonable grounds to suspect that there is in or on the premises property that—
 - (i) was used in or in connection with the commission of a serious offence; or
 - (ii) was derived or realised, directly or indirectly, by any person as a result of the commission of a serious offence.
- (2) The court may, if satisfied that there are reasonable grounds for believing that there is in or on the premises property that—
 - (a) was used in or in connection with the commission of a serious offence; or
 - (b) was derived or realised, directly or indirectly, by any person as a result of the commission of the serious offenceissue a search warrant authorising the police officer to enter and search the premises for property of the kind referred to in the warrant and to search any person found in or on the premises, and to seize such property.
- (3) There shall be stated in the warrant—
 - (a) the purpose for which the warrant is issued;
 - (b) the nature of the serious offence in respect to which the warrant is issued; and
 - (c) a description of the kind of property authorised to be seized.
- (4) A warrant issued under subsection (2) shall be in the form prescribed under the Criminal Procedure and Evidence Act, 1938.

17. Search and seizure without warrant

Where by reason of circumstances of urgency a police officer, after having obtained the approval of the Commissioner, may without warrant—

- (a) enter any premises and search for any proceeds of a serious offence;
- (b) search any person in or on the premises for the proceeds of a serious offence and seize such proceeds if the officer believes on reasonable grounds that it is necessary to do so in order to prevent the disposal, concealment, loss or destruction of the proceeds of the offence.

18. Seizure of property under search warrant

- (1) A police officer executing a search warrant may seize property of the kind described in the warrant.

- (2) A police officer executing a search warrant may also seize property which is not of the kind described in the warrant if—
 - (a) the officer believes on reasonable grounds that the property is of a kind which would have been included in a search warrant issued under this Part;
 - (b) the officer believes on reasonable grounds that it is necessary to seize that property in order to prevent its disposal, concealment, loss or destruction or its use in the commission or continuing commission of a serious offence.

19. Responsibility for seized property

- (1) When property is seized under this Part, the Commissioner of Police shall arrange for the property to be kept by making an inventory of all the properties seized and shall ensure that all reasonable steps are taken to preserve it while it is so kept until it is required for the purposes of this Act or disposed of under this Act.
- (2) A person whose property has been seized shall be served with a copy of the inventory, which copy shall be signed by the police officer effecting the seizure and the person whose property has been seized.

20. Obstruction of person executing search warrant

Any person who without reasonable excuse obstructs or hinders any person executing a search warrant under this Part, commits an offence and is liable on conviction to a fine not exceeding one thousand Emalangenzi or to imprisonment not exceeding twelve months or both.

21. Return of seized property

- (1) If the property has been seized under a warrant and—
 - (a) it appears that the property was seized otherwise than because it may afford evidence of the commission of a serious offence;
 - (b) at the expiration of seven days after the property was seized, no person has been charged with the serious offence in respect of the commission of which the warrant was issued, and an application for forfeiture has not been made in respect of the property; or
 - (c) a person has been charged with and convicted of such serious offence but at the expiration of the period of six months after the date of conviction or the expiration of a forfeiture, an order has not been made in respect of the property; or
 - (d) a person has been charged with such offence and has been discharged or acquitted,the Commissioner of Police shall arrange for the property to be returned to the person from whose possession it was seized.
- (2) If property has been seized under a search warrant and an application has been made under this Act to a court for a forfeiture order in respect of the property and the court has refused to make the forfeiture order, it shall make an order directing that the property be returned to the person from whose possession it was seized.

22. Production of documents

- (1) Where a person has been convicted of or is reasonably suspected of having committed a serious offence and a police officer has reasonable grounds to suspect that any person has possession, control or custody of any document relating to property in respect of which the offence is committed or is suspected to have been committed, he may apply to the court for an order directing that person to produce to the Commissioner any document described in the order and which is in that person's possession, control or custody.

- (2) An application under subsection (1) shall be supported by an affidavit stating the grounds for the suspicion.
- (3) Where a document is produced to the Commissioner of Police, a police officer may—
 - (a) inspect the document;
 - (b) take extracts from the document;
 - (c) make copies of the document; or
 - (d) retain the document if the retention of the document is reasonably necessary for purposes of this Act.
- (4) A person shall not be excused from producing a document on the ground that the production of the document—
 - (a) might tend to incriminate or render him liable to a penalty; or
 - (b) would be in breach of any obligation or privilege not to disclose the existence or contents of the document.
- (5) The production of a document under this section or any other information, document or thing obtained as a direct consequence of the production of that document, shall not be admissible against any person other than the person against whom charges have been or are to be laid in any criminal proceedings which are not proceedings relating to—
 - (a) a contravention of the order of the court; or
 - (b) the production of a document known to the person to be false or misleading in a material particular.

23. Variation of production order

If a court makes an order requiring a person to produce a document to the Commissioner of Police, that person may apply to the court for a variation of the order, and if the court is satisfied that the document is essential to the business of that person, it may vary the order so as to require that person to make the document available to the Commissioner of Police for inspection only.

Part IV – Miscellaneous

24. Appeals

- (1) Without prejudice to any other right of appeal, a person who has an interest in property in respect of which a forfeiture order is made, may appeal against that order in the same manner as if the order were part of the sentence imposed on the person convicted of the serious offence in relation to which the order was made.
- (2) Without prejudice to any other right of appeal, a person against whom a pecuniary penalty order is made may appeal against the order in the same manner as if it were, or were part of, the sentence imposed in respect of the offence in relation to which the order was made.
- (3) On appeal, a forfeiture order or a pecuniary penalty order may be confirmed, discharged or varied.
- (4) The Director of Public Prosecutions may appeal against a forfeiture order or a pecuniary order against the refusal of a court to make such order in the same manner as if the order were, or were part of, the sentence imposed in respect of the offence.

25. Amendment of Schedule

The Minister may by notice in the *Gazette* amend the Schedule to this Act.

26. Regulations

The Minister may make regulations in respect of any matter necessary to be prescribed to give effect to this Act.

27. Operation of other law not affected

Nothing in this Act shall limit the operation of any other law.

Schedule**Serious offences**

1. Murder;
2. Culpable homicide;
3. Robbery or Extortion;
4. Arson;
5. Breaking and entering any premises with intent to commit an offence either at common law or in contravention of any statute;
6. Theft either at common law or under statute;
7. Receiving stolen property knowing such goods or property to have been stolen;
8. Fraud;
9. Forgery or uttering of forged document knowing it to be forged;
10. Offences against the statute dealing with theft and kindred offences by public officers;
11. Offences against the law for the prevention of illicit dealing in or possession of precious metal or stones;
12. Offences against the law relating to the possession, conveyance or supply of dangerous or poisonous drugs or habit forming drugs;
13. Offences relating to coinage;
14. Illicit dealing in arms and ammunition;
15. Offences against the law relating to the prevention of corruption;
16. Any conspiracy, incitement or attempt to commit any of the above offences.