****

***“Seizure, Confiscation and Forfeiture Orders: Practical Consideration”***

**Paper Presented**

**By**

**Abdulrasheed Bawa, *CFE, CAMS,***

**Executive Chairman, Economic and Financial Crimes Commission,**

**At the**

**National Workshop for Investigators and Prosecutors,**

**Held on**

**12th September, 2022**

**At The**

**National Judicial Institute, Abuja.**

**INTRODUCTION**

I am delighted to be here today at this august gathering organized by the National Judicial Council (NJI). As you already know, we have a thriving, collaborative relationship with the NJI, which is the citadel of learning for the Judiciary, and indeed, all stakeholders in the justice system. The Economic and Financial Crimes Commission (EFCC) is statutorily mandated to investigate and prosecute economic and financial crimes and recover assets illicitly acquired from the said crimes. The EFCC (Establishment) Act 2004 empowers the Commission to **adopt** measures to identify, trace, freeze, confiscate or seize proceeds derived from terrorist activities and economic and financial crimes related offences. I must state unequivocally that the Commission’s success in achieving its mandate requires the active participation of all stakeholders. The Commission prioritizes collaboration with all its stakeholders and this forms one of our core objectives.

﻿The primary aim of investigating and prosecuting these offences is to disgorge the criminals of the proceeds of crime and recover assets illicitly acquired through such crimes. In doing so, the processes of recovering such assets have to be diligently followed. That said, the core objective of this Paper is to examine the seizure confiscation and forfeiture of assets, the salient processes involved as well as other considerations.

**ASSET SEIZURE**

I will commence this discussion by stating that the provision for search seizures, confiscation and forfeiture can be found in a plethora of laws in Nigeria. It can also be found in laws establishing law enforcement institutions and procedural laws. For the purpose of this paper I will mostly concern myself with seizure and forfeiture proceedings under the laws enforced by the EFCC. Section 26 of the Establishment Act confers on the Commission, the power of seizure in the following circumstances:

1. Seizure incidental to arrest or search.
2. Seizure subject to Court order following an application for forfeiture by the Commission.

The procedure usually is to obtain authority for seizures of a particular item or a search warrant issued by a magistrate pursuant to which seizures can be made. The application for warrant can be based on a sworn affidavit describing in detail the item for seizure and the evidence showing its connection with the crime under investigation or prosecution.

The recently enacted Proceeds of Crime (Recovery and Management) Act 2022 also made copious provision for seizure of assets in part V of the Act. The part provides for Seizure and detention of imported and exported cash and application for forfeiture of seized or detained cash. More provision on seizure is contained in Part V11 dealing with investigation, search and seizure. The sole objective of these provisions is to provide relevant Organization with investigative tools, including tools relating to:

* 1. establishing the whereabouts and extent of a person’s realizable assets,
	2. identifying and recovery of property or instrumentalities that may be subject to civil forfeiture and confiscation, and
	3. a detained cash investigation.

It is important to state that seizures can be made at any place in the cause of execution of a search warrant, or during an arrest. This is because an Officer could discover or identify a potential item of evidential value requiring seizure. In such a circumstance, the item must be seized and legal advice sought on its evidential value.

Where practicable, investigators should undertake seizures after a full investigation and detailed evaluation of evidence collated by the Investigating Officers.

Investigators should begin with pre seizure planning once an asset has been identified for seizure or forfeiture. This helps agencies avoid potentially costly management or safekeeping of assets issues. The EFCC has developed pre seizure planning methodology which is incorporated in the SOP of the Department of Proceeds of Crime Management and Operations Department.

In Pre-Seizure Planning, investigating officers should consider the necessity of seizing an item. If there is no compelling reason to seize an item or if the cost of seizure will be prohibitive, the investigator should explore alternatives to seizure or forfeiture. Thus other issues such as storage, management concerns, and how value will be maintained should be consider before seizure. Investigators must also address additional considerations, such as third party interests in the items intended to be seized.

It is also important to determine the item’s worth by engaging the services of professionals to value the item. The value of cash is identified easily,

**ASSET FORFEITURE**

This is a legal tool enabling the state to take possession of property involved in a crime. It is a step to be taken after seizure is made. Though Seizure and forfeiture constitute two unique, distinct legal processes, both terms share many similarities as they are put into effect when there is evidence of an offense or when an Item is illegally possessed.

They are also deployed when the item is a Proceed of crime or an Instrumentality of crime. In the cause of investigation, evidence gathered in this respect may form part of the particulars of facts to be deposed to by investigators in an application for forfeiture

Forfeiture may be by way of a criminal forfeiture commenced during investigation or prosecution or upon conviction of an individual in a criminal trial (conviction based). The essence as stated earlier is to remove the profit motive from the crime and return property obtained illegally to the victims of the crime.  It also aims to punish the offender, deter illicit activity or crimes, and disrupt activities of illegal organization and restitution to the victims.

It is therefore important for Investigators, to understand the objectives of forfeiture as such knowledge helps to provide understanding of how it helps to deter crimes. Therefore, on no account should forfeiture actions be instituted without a proper evidentiary and legal basis supporting the application for forfeiture.

**FILING FORFEITURE APPLICATION IN COURT**

Immediately the asset seized is secured, the officers must work in collaboration with prosecution to commence an action against the property.

The procedure for forfeiture is spelt out in legislation on asset recovery which include but not limited to the following:

1. The EFCC Establishment Act 2004
2. The Advance Fee Fraud and Other Fraud related Offences Act, 2006
3. Administration of Criminal Justice Act, 2015
4. Money Laundering Prohibition Act 2015
5. Proceeds of Crimes Management Act 2022
6. Criminal procedure laws of the southern states
7. Criminal procedure code of Northern states

An action for forfeiture can be conviction based and non-conviction based depending on evidence available to the investigator and the circumstance through which the asset came into possession of the Commission. The procedure for both are different.

**CONVICTION BASED FORFEITURE UNDER THE EFCC ESTABLISHMENT ACT**

 This is usually preceded by obtaining Interim forfeiture of assets that are of criminal origin or instrumentality of crime or Bank accounts linked to an accused pending investigation or prosecution of criminal case in court.

Section 28 of the EFCC (Est) Act 2004 provides that Where a person is arrested for an offence under this Act, the EFCC shall Immediately trace and attach all the assets and property of the person acquired as a result of such economic and financial crime.

Thereafter it shall cause to be obtained an interim attachment order from the court. The **procedure** is by way of *exparte* application to court supported by an affidavit. See section 29 of the Act

The Act also provide in Section 34 for Freezing order on banks or other financial institutions. It states that:

‘’The Chairman of the Commission or any officer authorized by him may, if satisfied that the money in the account of a person is made through the commission of an offence under this Act or any enactments apply to the **Court ex-parte** for power to issue or instruct a bank to freeze an account’’.

This is commenced by way of *exparte* application supported by an affidavit to freeze the account(s) or other asset found to be proceeds of crime belonging to a person being investigated. See section 28, 29 and 34 of EFCC (Establishment) Act 2004.

Thus, for an account to be frozen, the officer must be satisfied that the money in the account of a person is made through the commission of crime before approaching the court vide an *exparte* application.

Final forfeiture comes at the end of trial where the defendant is found guilty of an offence and assets linked to the crime under interim forfeiture will be forfeited finally by the court for the purpose of restitution of the victims of the crime. **See Section 20 EFCC Act.**

**Civil forfeiture or Non conviction based asset recovery** on the other hand is a civil process for forfeiture of assets. It is an effective tool in any asset recovery regime. Civil forfeiture of assets has emerged as the preferred mechanism for tackling serious crimes in many jurisdictions. The EFCC has utilized the Non Conviction based civil forfeiture provision under Section 17 of the Advance Fee Fraud and Other Fraud Related Offences Act 2006 to forfeit corruptly acquired assets. The section applies in the case of unclaimed property or any property reasonably suspected to be proceeds of unlawful activities under the Money Laundering Prohibition Act 2004 or the EFCC Act 2004.

A comprehensive provision on Non Conviction based civil forfeiture is embedded in the recently enacted Proceeds of Crimes (management) Act 2022. The Act has introduced new provisions bordering on seizure and forfeiture of assets. Under the non-conviction based proceedings, there is the requirement of obtaining preservation order for properties involved in the proceedings.

Thus perishable or depreciating items under preservative order can be disposed of under the Act. The section provides:

“Where there are reasonable grounds to believe that a property, which is subject to a preservation order, may have its value diminished, or be disposed of, destroyed, or damaged, removed contrary to the Order or may deteriorate in terms of quality or utility”

Proceeds from such sales are to be paid into a designated interest yielding account pending the determination of the proceedings. The court can also order that managers should be appointed to assume control and administer the property pending the time that the Relevant Organization may apply to the Court for a forfeiture order against all or any part of the property that is subject to the preservation order

It is important to stress that the investigators must have at the back of their minds that proof of any crime does not apply to civil forfeiture Whatever forfeiture option intended to be undertaken, the investigators and prosecutors should ensure that:-

1. there is factual basis for suspicion that funds / property is proceeds of Criminal violation
2. there is forfeiture provision for the crime
3. the property is forfeitable under the law
4. there is Evidence connecting the asset to the crime or violation
5. Procedure required for its seizure is complied with
6. the value of the property is ascertained
7. the location of the property is known
8. the person in control of the property is ascertained
9. The involvement of the asset in the commission of the crime is ascertained
10. Whether the property was acquired with proceeds obtained from the illicit activity or crime
11. The person in whose name the property was registered is known.
12. What will be the cost of maintaining the asset pending the forfeiture application?

Investigators and prosecutors also have to note the provision in the Proceeds of Crime Management Act 2022 regarding realizable property and value of seized property. The Act has spelt out the quantum of properties that can be forfeited which must correspond to the amount of proceeds of crime traced to the convict. Investigators have to determine the actual sum or property lost by the victim in applying for forfeiture order and this forms the basis of value based forfeiture provision in the Act.

Investigators must note that evidence that ties the asset to the crime or the criminal is very crucial in an application for forfeiture order. The investigators and the prosecutors must therefore review available evidence to determine requirement of additional proof and filling of any identify gaps where necessary. Therefore, in deposing to an affidavit in support of application for forfeiture, evidence gathered in the cause of investigation is very important as that will form the basis for Court to give order of forfeiture. This is very necessary for the court to evaluate evidence put forward in a forfeiture proceedings.

Lastly, where international asset recovery is involved there may be need for request for assistance in enforcement of forfeiture and confiscation order. This however depends on the existence of multilateral or unilateral treaties which States concerned are signatories. The request for mutual legal assistance to other countries is made through the Central Authority domiciled in the office of the Attorney General and Minister of Justice.

**WHAT NEXT AFTER ASSETS ARE FORFEITED**

Recovery of stolen assets has become a recognised and fully factored source of government revenue. Going by the provision of Section 31(2),the Secretary to the Commission shall take steps to dispose of the property concerned by sale or otherwise and where the property is sold, the proceeds thereof shall be paid into the Consolidated Revenue Fund (CRF) of the Federation. It is from this account that National Budget are usually funded. However, the recently enacted proceeds of Crime Act 2022 has also given powers to the respective organizations to appoint managers to manage or dispose of forfeited assets and the proceeds paid into designated interest yielding account pending the determination of the proceedings. There is also the provision for disposal of finally forfeited assets by respective organizations and payment of proceeds into confiscated and forfeited properties account established under the Act.

Under section 70 of the Proceeds of Crimes (Management) Act, the President may, subject to the approval by Federal Executive Council authorize the expenditure, from time to time, for moneys in the Confiscated and Forfeited Properties Account to be used to –

1. Permit the Relevant Organization to invest in various government portfolios to ensure that the funds can accrue interest that would be applied for the implementation of development projects as approved by the Federal Executive Council (FEC) or the National Assembly;
2. Compensate any State, any person any foreign country or an agency under the provisions of any treaty agreement or scheme for mutual legal assistance which has suffered grave pecuniary loss on account of the offence or conduct that gave rise to the confiscation or forfeiture order;

Other purpose which the money may be applied include judicial, criminal justice reform and crime prevention measures, law enforcement measures, education, health, youth development, mass housing, rural electrification, agricultural reform, water, and sanitation etc. see sections 71 and 72 Proceeds of Crimes (Management) Act 2022

Recent policies in managing returned assets in Nigeria which can be classified under social {re}use is the use or allocation of forfeited assets for use by Government Agencies for Office Accommodation. A lot of Agencies have benefitted and it has saved the government a lot of money it would have spent in rent of office accommodation some properties subject of interim forfeiture are also being occupied under lease agreement.

**CONCLUSION**

In conclusion, Seizure, confiscation and forfeiture constitute three different concepts and legal processes but they constitute the entire process of asset recovery.

Therefore, the investigators and the prosecutors that are in the pursuit of forfeiture of proceeds of crime must conduct proper investigations to establish a criminal liability of the offender. They must establish the relationship of the property to the crime under investigation, and must ensure that the property is secured in custody. Investigators and prosecutors must realize that the essence of seizure and interim forfeiture is not to deprive a suspect of his property or assets but to preserve the property from being wasted or dissipated thus rendering subsequent proceedings nugatory.

Asset forfeiture seizure and forfeiture will continue to evolve as it has become an important tool in fighting corruption and organized crime in Nigeria. It is therefore important for investigators and prosecutors to understand its legal requirement, the procedure for its application and its benefits particularly for restitution of victims of crime.

Thank you.

**REFERENCES**

1. U.S. Department of Justice, Criminal Division, Asset Forfeiture and Money Laundering Section, Guide to Equitable Sharing for State and Local Law Enforcement Agencies, April 2009, https://www.justice.gov/criminal-afmls/file/794696/download.
2. “Introduction to Asset Forfeiture: Lecture Outline,” Asset Forfeiture Law, LLC, February 18, 2016, accessed April 11, 2016, <http://assetforfeiturelaw.us/wp-content/uploads/2016/03/Introduction-to-Asset-Forfeiture.pdf>.
3. Overview of asset forfeiture from the FBI, <https://www.fbi.gov/about->. us/investigate/white\_collar/asset-forfeiture
4. Professor Yemi Akinseye – George , SAN FCIArb- paper presented at the 3 day capacity building workshop for justices and judges organized by the NJI and the EFCC 22-24 October 2019.
5. The case of Esai Dangaba v FRN (2014) 12 NWLR (Pt 1422) 575 and Nwude V Chairman EFCC (2005) All FWLR (Pt 276) 74
6. Hon Justice C. M. A Olatorgun in the case of Avanna & Chemical Industries Ltd V Economic and Financial Crimes Commission & Anor Suit No. FHC/L/CS/1304/2010.
7. The EFCC Establishment Act 2004
8. The Advance Fee Fraud and Other Fraud related Offences Act, 2006
9. Administration of Criminal Justice Act, 2015
10. Money Laundering Prohibition Act 2015
11. Proceeds of Crime (Recovery and Management) Act 2022
12. Terrorism (Prevention and Prohibition) Act 2022
13. Criminal Procedure Laws of the Southern States
14. Criminal Procedure Code of Northern States
15. Corrupt Practices and Other Related Offences Act 2000
16. Code of Conduct Bureau and Tribunal Act 1991