Forfeiture to the State: Using Grammar to Interpret Section 35 of the *Criminal Procedure Act*

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Abstract

Section 35(1)*(a)* of South Africa's *Criminal Procedure Act* 51 of 1977 allows a court of law to declare items forfeited to the state if they were used as weapons or instruments in aid of committing an offence. However, it is not always clear what qualifies as potential instruments of crime or what the proximity of the instrument is to the offence. For the purpose of statutory interpretation, this contribution identifies a grammatical construction frequently present in abstractions of offence descriptions as a means to identify an instrument and its direct involvement in an offence. It takes the form of the construction, "X does Y to Z with A", which contains the instrument prepositional phrase "with A". Read with other thematic roles like "Agent" and "Patient", the statutory interpreter should be able to determine both the relevant instrument role and its potential to affect a change in the object of a sentence, suggesting direct involvement. To better understand the grammar, this contribution modestly explains the Cognitive Linguistic approach to argument structure and thematic roles and briefly summarises Ronald Langacker's "action chain" model. The grammatical construction is then applied to examples taken from South African and Dutch case law dealing with forfeiture to illustrate its potential as a tool for interpretation.

Keywords

Cognitive linguistics; forfeiture; grammar; instrument; language and law; *Criminal Procedure Act*; statutory interpretation; thematic roles.

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1 Introduction

Various countries have legislation permitting the state to seize property used to commit a crime. In South Africa, this is regulated by section 35 of the *Criminal Procedure Act* 51 of 1977 (*CPA*).[1] According to section 35(1), a court may declare the following items forfeited to the state:

> (a) any weapon, instrument or other article by means whereof the offence in question was committed or which was used in the commission of such offence.[2]

The wording gives rise to at least two issues contested during legal proceedings:

- What items may be included under "other article"?
- What is the proximity of the instrument to the crime?

For example, if X uses a knife to stab Y, the knife is used as an instrument to commit the offence. The knife can easily be exhibited in court as evidence.[3] A production plant used to manufacture yeast illegally was initially not considered an instrument, because it was not a single item used to commit a crime and cannot be presented to the court as evidence in the same way.[4] However, it becomes somewhat complicated when the proximity of the instrument to the crime is questioned. For instance, in a Dutch case, a man was found guilty of operating an illegal cannabis plantation.[5] Upon his arrest, the state also confiscated the motor vehicle he used.[6] The accused applied to have the car returned to him based on the argument that he never used the vehicle to exploit the cannabis plantation. Instead, he only used it to visit the nursery. The court agreed that the car was not used as an instrument to commit the offence. To qualify as an instrument of crime, the accused had to at least transport the cannabis (or other items associated with the nursery) to connect the vehicle directly to

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1 South Africa has various laws that allow forfeiture to the state, like ss 25-27 of the *Drugs and Drug Trafficking Act* 140 of 1992 and s 91 of the *Diamonds Act* 56 of 1986. In this regard, the *Prevention of Organised Crime Act* 121 of 1998 (*POCA*) is the closest to s 35 of the *Criminal Procedure Act* 51 of 1977 (*CPA*) but has a much broader scope. The *POCA* targets organised criminal groups. To deter criminal activity, the *POCA* allows the state to not only confiscate property used as instruments of crime, but to also seize property owned by criminal groups as well as property that qualifies as proceeds of unlawful activity.

2 Section 35(1) of the *CPA*.

3 *R v Green* 1941 WLD 209 211 (hereafter *Green*).

4 *Green* 209, 211.

5 ECLI:NL:PHR:2023:270 para 1.

6 ECLI:NL:PHR:2023:270 para 1.

the exploitation.[7] A similar situation played out in *S v Bissessue*, in which two men were caught fishing without a valid licence.[8] The vehicle they used to reach the dam was initially confiscated but later returned to them because the journey to the dam and the fishing were seen as unrelated acts.[9] Justice Kumbleben made the point that to qualify for forfeiture, the thing in question must play a direct part in the commission of the offence.[10] A disconnect is clearly visible between an accused that uses a vehicle to reach a dam and an accused that fishes illegally with a fishing rod or net. If we say that the accused used a vehicle to catch fish, in no way does it imply that the accused used the car for transportation. If we say, "the vehicle caught the fish", we imply that the vehicle was used like a fishing rod or net.

It was established that the purpose of section 35 of the *CPA* is not to punish the offender but to prevent them from perpetuating the same crime.[11] By removing the instrument, the offender would have difficulty in repeating the offence. However, the question remains whether the contested instrument played any part in the commission of the offence. Why would the owner of a cannabis nursery visit his business if not to check up on his product for later exploitation? How will the angler be able to catch fish illegally if he did not set out on the journey to reach the dam? The Act is silent on the proximity of the crime to the offence,[12] but a line must be drawn somewhere to prevent absurdity and unbusinesslike interpretation.[13] From a review of relevant case law, it seems as though no consistent test exists.

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7 ECLI:NL:PHR:2023:270 paras 25-39; ECLI:NL:HR:2023:614.

8 *S v Bissessue* 1980 1 SA 228 (N) (hereafter *Bissessue*).

9 *Bissessue* 230.

10 *Bissessue* 230.

11 *Green* 208; *Attorney-General (Transvaal) v Steenkamp* 1954 1 SA 351 (A) 356; *R v Moloto* 1961 3 SA 496 (T) 500 (hereafter *Moloto*); *S v Khan* 1965 3 SA 783 (A) 785, 789-790 (hereafter *Khan*); *Ex Parte die Minister van Justisie* 1968 1 SA 380 (A) 382-383, 386-387 (hereafter *Ex Parte*). See also *R v Dawood* 1947 2 SA 1097 (T).

12 Interestingly, in *National Director of Public Prosecutions v RO Properties (Pty) Ltd* (260/03) [2004] ZASCA 36 (13 May 2004), the Supreme Court of Appeal addressed the question whether a direct link should exist between an instrument and offence if the instrument is property. In terms of the *POCA*, it seemed as if property may be forfeited if there were proof or suspicion of its involvement in committing an offence, regardless of whether the owners or possessors knew about any illicit activity. That said, the court decided that a "functional" relationship must be established between the identified property and the relevant offence. It must be clear that the property in question was used to effect the crime, that the illicit activity was advanced by means of the property. See paras 6-32.

13 Kumbleben J illustrates this by referring to a fly fisherman. When a fly fisherman is seen replacing one fly with another and temporarily holds the old fly between his teeth as he attaches the new one, both his spectacles and dentures would be susceptible to forfeiture because they were used as instruments in connection with the offence of illegal fishing. *Bissessue* 229; *Natal Joint Municipal Pension Fund v Endumeni Municipality* (920/2010) [2012] ZASCA 13 (15 March 2012) (hereafter *Endumeni*) para 18. In the same vein, the state could confiscate an angler's shoes if he walked to the dam.

Statutory interpreters might, therefore, be interested to learn that a specific grammatical description exists through which syntactic participants are characterised. These syntactic participants occur frequently in cases dealing with forfeiture. The participants are called "thematic roles", and they are present in argument structures.[14] Thematic roles express a semantic relation between arguments and the situation that the verb describes.[15] The thematic role that is the most relevant in cases dealing with forfeiture is called the "instrument role", which forms part of the schematised construction "X does Y to Z with A". Consider the following examples:

1.1 The accused sold cannabis with his car.[16]

1.2 The accused caught fish with his car.[17]

1.3 The accused transported people with his car.[18]

In all three examples, the prepositional phrase "with his car" indicates instrumentality. More importantly, the instrument role is directly linked to the verb, which means the instrument is closely connected with the offence. The drug dealer sells the cannabis directly from his car or by transporting the product to clients. The fisherman uses the car to attract the fish or to trap fish by dragging a net attached to the car through parts of the dam. The taxi driver uses his car to carry people from one destination to the next. There seems to be no offence without the car. The reason for this is because the instrument is used to effect a change in the object of the sentence. The cannabis changes from "available" to "sold", the fish changes from "free" to "caught", and the passengers change in terms of their location. The grammar, then, gives indication of the proximity of the object to the offence.

The relationship between the instrument and the action (the offence) is best described through Ronald Langacker's "action chain" model. The model uses thematic roles to indicate who initiates the action and what objects or items the actor uses to achieve this action. The model also illustrates how pivotal the instrument's role is in achieving the intended action (offence), which reinforces the notion that the proximity of the offence is directly influenced by its connection to the instrument. Consequently, once the proximity between the instrument and the offence can be established, the instrumentality of the object or item is confirmed as well.

The use of grammar in statutory interpretation is not strange. In his landmark case, *Joint Natal Municipal Pension Fund v Endumeni*

14 In syntax, "argument" refers to the noun phrase that occurs with a verb and helps to elaborate on the verb's meaning. See section 3 in this contribution for an elaboration.
15 Fromkin, Rodman and Hyams *Introduction to Language* 156-157.
16 ECLI:NL:PHR:2023:270.
17 *Bissessue*.
18 *Khan*.

Municipality, Appellate Justice Wallis sets out the conditions for legal interpretation.[19] Concerning the language, he states that interpreters should regard ordinary grammar.[20] Generally, this is seen as a reference to the ordinary meaning canon and more specifically the meaning of words. Linguistic interpretation is usually undertaken to confirm meaning, to clarify words or phrases or to clear up any vagueness or ambiguity.[21] Sometimes, the grammar is explored to work out what larger text excerpts, paragraphs or provisions mean in the light of conjunctions and other discourse markers.[22] Occasionally linguistic analysis is attempted to determine the extent of trademark infringement and to identify the authors of word crimes.[23] However, for the purpose of statutory interpretation, the scope of Wallis' words is much wider and encompasses the system that underlies language and its construction of meaning. This allows for in-depth grammatical analysis. In line with Wallis' scope, the present contribution proposes that a grammatical application can be used to both clarify section 35(1) of the *CPA*, and by doing so, assist in evaluating evidence in support of the instrumentality of objects considered for forfeiture.

Broadly speaking, grammar is traditionally defined as the system of rules that govern the composition of words and the arrangement of words into sentences.[24] In this view, grammar determines the sequence and function

19 *Endumeni* para 18.

20 *Endumeni* para 18.

21 In following *Endumeni* as well as *Cool Ideas 1186 CC v Hubbard* (CCT99/13) [2014] ZACC 16 (5 June 2014), reference to "grammatical meaning" is still quite evident in recent cases like *University of Johannesburg v Auckland Park Theological Seminary* (CCT70/20) [2021] ZACC 13 (11 June 2021); *S v Okah* (CCT 315/16; CCT 193/17) [2018] ZACC 3 (23 February 2018); *Restivox (Pty) Ltd t/a Crazy Slots v Chairperson of the Free State Gambling, Liquor and Tourism Authority* (6271/2018) [2020] ZAFSHC 80 (13 March 2020); *UASA Union v Anglo American Platinum Limited* (J400/23) [2024] ZALCJHB 199 (10 May 2024).

22 *Smartpurse Solutions (Pty) Ltd v Firstrand Bank Ltd* (35882/2022) [2024] ZAGPJHC 961 (26 September 2024); *Namibian Association of Medical Aid Funds v Namibian Competition Commission* (A348/2014) [2016] NAHCMD 80 (17 March 2016); *Forestry South Africa v Minister of Human Settlements, Water and Sanitation* (19684/2019) [2021] ZAWCHC 164 (15 November 2023); *Lueven Metals (Pty) Ltd v Commissioner for the South African Revenue Service* (31356/2021) 2022 ZAGPPHC 325 (19 May 2022); *S v Lewis* (54/2024) [2024] ZAWCHC 59 (26 February 2024).

23 Almost no South African examples of authorship analysis exist. See *Chaplin v Fine* (A115/2019) [2020] ZAWCHC 139 (21 July 2020) for the best example. Even though the presiding officer does not refer to the authorship report in *S v Hoho* 2009 1 SACR 276 (SCA), a forensic analysis was used to determine the likelihood of the contested author. It is a lot more common to find linguistic reports for trademark disputes, such as *Media 24 Bpk v Ramsay, Son and Parker (Edms) Bpk* 2006 5 SA 204 (C) and *Media 24 Books (Pty) Ltd v Oxford University Press Southern Africa (Pty) Ltd* (23368/12) [2015] ZAWCHC 68 (21 April 2015). See Viljoen-Massyn *Handelsmerkdispute in Suid-Afrika*, in general. In addition, linguistic analysis is used in cases of threats, defamation, and hate speech but they are seldom published.

24 Fromkin, Rodman and Hyams *Introduction to Language* 9.

or roles of words within sentences. It is the rules that allow speakers to use language productively. The approach followed in this article is informed by Cognitive Linguistics, which takes a different view and sees grammar as a symbolic system (as opposed to an inventory of governing rules). In this view, language is user-based and entrenches simple and complex constructions through repetitive use, which are then recalled by the speaker. What this means is that words and sentences are not structured by applying rules, but instead by selecting "ready-made" constructions.[25] Instrument prepositional phrases are examples of constructions that speakers use when talking about certain offences ("X does Y to Z with A"), and which a legal interpreter can find when investigating language data. There are at least two reasons why a cognitive approach is preferred and offered as opposed to the known, traditional method. The first reason is simply to expose legal interpreters to alternative methodologies of legal-linguistic interpretation. New perspectives often lead to renewed comprehension and new ideas. The second reason lies in the fact that Cognitive Grammar focuses on generalised abstract patterns present in sentences (like those in offence descriptions), and can, as a result, be easily identified.

Therefore, understanding the grammar involved in forfeiture cases could provide a new way of looking at section 35 of the *CPA*. In addition, the grammar present in forfeiture cases opens a window onto the value of linguistics for statutory interpretation, which goes beyond the conventional (and limited) method of linguistic analysis in existing South African case law.[26] Hence, the purpose of this article is a modest attempt at describing the grammar of forfeiture cases so that legal interpreters can use

25 Construction Grammar is an established field in Cognitive Linguistics and shows potential for statutory interpretation because both written legal texts and spoken utterances reflect patterned language structure. However, I am not aware of its application in South African case law.

26 With reference to a grammatical analysis for the purpose of statutory interpretation, this contribution is not entirely novel. It contributes towards a discourse started more than 40 years ago. Klopper and Van den Bergh published an impressive syntactic analysis of a Transvaal ordinance as far back as 1980. Through their analysis, they tried to clarify several concepts like "person" and "vehicle". This was followed by a similar analysis in 1981 by Van den Bergh. In both articles, the authors advocated the use of grammar, specifically transformational generative grammar (TGG), to clarify and interpret difficult legislative texts. Their syntactic approach was primarily Chomskyan. The TGG approach has since experienced many changes but has also fallen out of favour somewhat, because the notion of "grammar" broadened with a shift towards semantics and functional language. Where the TGG views syntax and its governing rules as paramount in language use, the role that language users play, and the functional aspect of language, are now considered more important. For this reason, the approach in this article is entirely different, highlighting user-based patterns as opposed to prescriptive languages rules. Klopper and Van den Bergh 1980 *TRW* in general; Van den Berg 1981 *TSAR* in general. In addition, see Carney 2022 *LitNet Akademies* 836, 843; Carney *Linguistics for Legal Interpretation* 19-24, and Carney 2024 *LitNet Akademies* 507-510.

constructions like "X does Y to Z with A" as an interpretation test when a court must decide if a contested object qualifies as an instrument of crime. To guide the discussion, the remainder of the contribution is divided into three parts: first, related case law is reviewed for context followed by a brief overview of Cognitive Linguistics, argument structure and thematic roles. Thereafter, the action schema and Langacker's "action chain" model are described. To end, the "action chain" model is applied to examples taken from case law to determine its value for statutory interpretation.

2 Cases dealing with section 35 of the *Criminal Procedure Act*

Over time, courts seemed to have struggled the most in determining what items may be forfeited, under what conditions and to what effect. An object like a motor vehicle used to convey stolen goods from the scene of a crime is an obvious contravention of section 35(1)*(b)*, which prohibits the use of a vehicle as transportation or container in connection with theft and unlawfully breaking and entering a premises.[27] However, using a vehicle in terms of subsection *(a)* as either a weapon or an instrument causes some apprehension.

In essence, all three items – a weapon, an instrument and other article – fulfil the instrument function. Any of the listed and contested items must be used as a tool or aid of some kind to successfully effect the offence. In terms of a weapon, holding a firearm is not an offence, but once the firearm forms part of an offence (like illegal hunting, hijacking, robbery), the firearm becomes an instrument.[28] The same logic applies to other types of weapons like knives, pepper sprays, or canes (or any type of instrument).[29] The word "instrument" proved to be somewhat vague as well. One of the oldest cases addressing forfeiture, *R v Swanepoel and Van Wyk*, considers an instrument as something that is either designed or suited to commit an offence, for instance a burglar's tools and items used to procure an illegal abortion.[30] A burglar's tools could include anything ranging from a crowbar to lock picking tools, whereas an illegal abortionist may use medical

27 Section 35(1)*(b)* of the *CPA*. Offences listed in Part 1 of Schedule 2 include illicit dealing in or possession of drugs and strong liquor, illicit dealing in or possession of precious metals and stones; breaking or entering a premises to commit a crime, and theft.

28 *R v Lourens* 1949 1 SA 671 (N) 676-677. Broome J considers a rifle instrumental while trespassing in pursuit of game. To him, the intention to hunt makes the rifle a tool in the offence of trespassing, despite cases like *R v Oosthuizen* 1938 2 PHH 273 and *R v Hurter* 1948 3 SA 1180 (E) deciding the opposite. This line of argument is no longer acceptable; *S v Smith* 1984 1 SA 583 (A) (hereafter *Smith*) makes it clear that intention is not sufficient for forfeiture.

29 *R v Corlett* 1957 4 SA 1 (T) 7.

30 *R v Swanepoel and Van Wyk* 1930 TPD 214 219-220 (hereafter *Swanepoel*).

equipment and their own inventions.[31] Its "nature" made committing the offence possible and repeatable. However, the court had difficulty deciding whether items that were seemingly neither weapons nor a criminal's tools qualified as instruments under "other article". Unlike lock picking tools, a motor vehicle is suited for transportation and not breaking or entering. This led to the question whether a contested object must be read *eiusdem generis* with "weapon" and "instrument", with varying results. Feetham J in *R v Swanepoel and Van Wyk* did not view £5 notes as an instrument in the illegal procurement of rough diamonds, because bank notes were not the same as a burglar's tools.[32] In following Feetham J's decision, Millen J in *R v Green* found that the various parts of a self-constructed yeast manufacturing plant as a whole did not qualify as an instrument of an offence, because the respective parts were not specifically designed to commit an offence and would not necessarily be used in the same manner should they be sold off.[33] De Wet JP in *Bhubezi Boerdery v Minister of Justice* did not consider a truck as an instrument in the illegal importation of biltong, skins and thongs from Botswana.[34] This example was followed by De Wet J in *S v Nkepane* regarding the use of an unregistered vehicle without a valid driver's licence.[35] The court found that the vehicle in question was not an instrument with which this type of offence could be committed.[36]

In time, courts rejected the notion of an instrument's "nature" and suitability and started questioning how it was used to effect an offence. In turn, courts moved away from a restrictive interpretation. Both Muller J and Williamson AJ in *Ex Parte die Minister van Justisie* expressed a court's responsibility rather to determine whether an item could be used more than once to commit the same crime.[37] To them, it was not a question whether a contested item qualified as a weapon or a tool specifically designed for the offence. They endorsed the judgment in *R v Moloto*, which declares that a court must appraise both the offender's potential to repeat the crime with the same instrument as well as the role a contested item plays to effect the offence.[38] For instance, a motor vehicle used to reach a dam for illegal fishing is not an instrument of an offence, but a vehicle used to gain access

31 See also *Green* 210.
32 *Swanepoel* 219-220.
33 *Green* 210-2011.
34 *Bhubezi Boerdery (Edms) Bpk v Minister of Justice* 1965 1 SA 218 (T) 219.
35 *S v Nkepane* 1973 1 SA 331 (O) 332 (hereafter *Nkepane*).
36 Of course, this decision is debatable because the vehicle is in fact used to commit the offence. There is no offence without the unregistered vehicle. The court should rather consider whether forfeiture would be competent. This could lead to absurdity, which sees every validated driver who breaks the speed limit susceptible to forfeiture. See *S v Hlangothe* 1979 4 SA 199 (B) 202-203 (hereafter *Hlangothe*), and once again *Bissessue* 229.
37 *Ex Parte* 388-389, 392.
38 *Moloto*.

to a closed premises by breaking a gate is an instrument of an offence.[39] Money offered as a reward to kill someone is not considered an instrument of an offence when the murderer never received payment (intended use is not the same as actual use), whereas money used to buy rough diamonds illegally does qualify as an instrument of an offence, because without the money there is no transaction.[40]

In addition, a court must decide whether the forfeited item played an important or an incidental role in the offence, and whether the decision exceeds the value of the item in relation to the offence.[41] In a similar vein, courts must consider the circumstances of the offence as well as the impact forfeiture could have on the accused. Furthermore, courts should consider to what extent forfeiture could lead to absurdity. In *S v Noosi*, the accused transported petrol in a separate container that exceeded the allowable quantity.[42] As a result, the court *a quo* declared the petrol forfeited. However, Steyn J disagreed, saying that the petrol was not used as an aid in committing the offence.[43] Likewise, Hiemstra JP decided in *S v Hlangothe* that the stock-in-trade of an illegal shop could not be forfeited, because its commercial value dwarfed the weight of the punishment, and more importantly, the stock was not a tool used to effect the offence.[44] At most, both the sold and existing stock were objects of the crime.[45] In *S v Vermeulen*, the accused was found guilty of possessing five mandrax tablets and because he kept the tablets in his car, the car was confiscated as well.[46] Botha J was not convinced that the accused used his car as an instrument to commit a drug trade; instead, the court saw the car as incidental to the event.[47] Much the same line of thought is present in the case of *S v Knutzen*; the accused stowed their cannabis in their vehicle, but the vehicle was also their dwelling.[48] For this reason, the court saw the

39 *Bissessue* 230.

40 *Smith* 796-597; *S v Cocklin* 1971 3 SA 776 (A) 782, and *Petersen v Minister of Police* 2022 1 SACR 333 (WCC). The latter case is heard in terms of s 31 of the *CPA* and s 38 of the *POCA*. With regard to money paid to traps, please see Kruger *Hiemstra's Criminal Procedure* 34. For a perspective on the forfeiture of "dirty money" used to pay legal fees, see Hamman and Koen 2020 *De Jure* 19-35.

41 *S v Willemse* 1966 3 SA 383 (O) 385-386; see also *Nkepane*.

42 *S v Noosi* 1975 3 SA 521 (O) 521-522 (hereafter *Noosi*).

43 *Noosi* 522.

44 *Hlangothe* 202-203.

45 *Hlangothe* 203. Hiemstra J's decision goes against that of Van Reenen J in *S v Matsane* 1978 4 SA 66 (T) 71-72. Van Reenen J argued that stock-in-trade falls within the ambit of the law and can therefore be confiscated. However, he also made it clear that such a forfeiture could result in severe punishment, which required a court to apply its discretion. As a result, he set the forfeiture aside.

46 *S v Vermeulen* 1995 2 SACR 439 (T) 441 (hereafter *Vermeulen*). This case relates to forfeiture in terms of s 25(1)*(b)*(i) of the *Drugs and Drug Trafficking Act* 140 of 1992.

47 *Vermeulen* 443.

48 *S v Knutzen* 1972 2 SA 488 (E) 489 (hereafter *Knutzen*).

storage of the cannabis in connection with their home, and not their vehicle. Though the forfeiture of the vehicle would be possible, the forfeiture would render the accused homeless.[49]

Most of the cases cited here stress the fact that the court has a discretion and must decide when it is apt to forfeit an item to the state.[50] As Jennett JP indicated in the *Knutzen* case, even if forfeiture could prevent a continuation of the crime, it is neither obligatory nor necessarily competent.[51] Presiding officers in the *Hlangothe* and *Bissessue* cases argued that forfeiture could lead to anomalies, and beg the question where a court should stop once it starts identifying items legally viable to confiscate. That said, before a court can exercise its discretion, it must first determine whether a contested item truly qualifies as an instrument. One way of achieving this, is by applying mechanisms offered by Cognitive Linguistics.

3 Cognitive Linguistics and the action schema

This contribution takes inspiration from Cognitive Linguistics and its use of argument structure and thematic roles. Both are reviewed in short before "action schema" is discussed.

3.1 Cognitive Linguistics

Cognitive Linguistics is viewed as a modern linguistic enterprise that encapsulates a variety of theories and approaches. It started in the 1970s through collaborative work between linguists, psychologists and philosophers and share common assumptions, notably the core belief that language forms part of human cognition. Language offers a glimpse into cognitive function, giving us an impression of how thoughts and ideas are structured and organised.[52] Because language is viewed as an integral part of cognition, language reflects interactions on several levels: social, cultural, psychological, communicative, and functional.[53] Another shared tenet is the notion that language is user-based. This means that language is not viewed

49 *Knutzen* 489.

50 *Attorney-General (Transvaal) v Steenkamp* 1954 1 SA 351 (A); *Moloto*; *Khan*; *S v Willemse* 1966 3 SA 383 (O); *Ex Parte*; *S v Cocklin* 1971 3 SA 776 (A); *S v Matsane* 1978 4 SA 66 (T); *Smith*.

51 *Knutzen* 90.

52 Evans *Cognitive Linguistics* 5. It is important to note that cognitive constructions of language do not shape or recall meaning in the same way for all speakers, especially at different levels of acquisition. A first language speaker has a different experience than an additional language speaker. Someone who learns English as an additional language as an adult has a different view of the patterns that are entrenched by native speakers. That said, legislation in South Africa is usually published in the standard variety of English, which invites statutory interpreters to start their investigation with that variety.

53 Taylor *Cognitive Grammar* 9.

as an autonomous system that people are born with. Instead, language consists of constructions that occur frequently, and which speakers entrench through use. When we learn a language, we observe these frequent occurrences and implement them.[54]

The Cognitive Linguistic approach followed in this contribution is called Cognitive Grammar.[55] Cognitive Grammar views language as symbolic in nature.[56] We use various "bits of language" to represent a particular concept.[57] Symbols usually consist of a phonological structure and a semantic structure. Put differently, the symbolic units are a combination of spoken or written forms and the meanings with which they are associated.[58] Think of the word "dog". It has a specific sound structure and several associated concepts. A symbolic unit is a structure that is entrenched in a language and not only occurs frequently but can easily be recalled by speakers of a language. Consider the examples below:

3.1 The painter painted the walls.

3.2 The winner talked to the reporters.

The sentence in 3.1 can be reduced to the following:

(specified) person did something (in the past) to something (plural).

We can change the information as in 3.2, but the abstraction remains the same:

(specified) person did something (in the past) to something (plural).

This is so because the same clause structure occurs frequently throughout the language. By entrenching symbolic units, language forms patterns. In English, we use the definite article "the" to specify a noun; we add the suffix "-er" to a verb to create a person who does something specific; we add the suffix "-ed" to some verbs to indicate that the activity is in the past. And so on. We combine all these words into a very specific word order. Symbolic units that have the status of entrenched structures are considered

54 Taylor *Cognitive Grammar* 27.

55 Various theoretical applications of Cognitive Grammar are possible, but this study is limited to the theoretical model proposed by Ronald Langacker and a test used by Adele Goldberg. Both authors focussed specifically on argument structure and thematic roles and indicated how certain constructions, like prepositional phrases, represent form-meaning pairs. These pairs can be generalised, which is helpful for forfeiture cases. Furthermore, the application of thematic roles in Cognitive Grammar is very similar to non-cognitive approaches, which makes it familiar. Saeed *Semantics* 152-182. Lastly, the chosen application makes it easier to establish the link between the offender, the offence and the instrument of the offence.

56 Taylor *Cognitive Grammar* 20.

57 Evans *Cognitive Linguistics* 6-7; Taylor *Cognitive Grammar* 20-21.

58 Evans *Cognitive Linguistics* 6; Taylor *Cognitive Grammar* 20-21.

schematic. A schema is defined as a mental model by which experiences are structured.[59] We can represent the verbs "painted" and "talked" through the past tense schema [VERB*ed*].[60] Another relevant term is that of "construction". A construction is a unit that has a complex structure.[61] In other words, it is a unit that consists of more than a single symbol and can vary from complex words to phrases and sentences. With regard to forfeiture cases and instruments, two constructions are observed:[62]

- [$NP_{Subject}$ $V_{Transitive}$ $NP_{Direct\ Object}$]
- [P [NP]]

The first construction is an abstraction of the transitive clause that features a subject, a predicate, and a direct object: "The accused [$NP_{Subject}$] shot [$V_{Transitive}$] the bystander [$NP_{Direct\ Object}$]". The second construction is an abstraction of the prepositional phrase that expresses instrumentality: "The accused shot the bystander with [P] a stun gun [NP]." The latter construction is embedded in the former. Schematically, the construct in forfeiture cases can be represented as [NP V NP [P NP]], or "X does Y to Z with A".[63] When we abstract constructions to a schematic level, we generalise it. By reducing them to symbolic units, we can see the patterns in language much clearer and it enables us to broadly infer the same semantic meaning. The two constructions isolated here can best be explained through the "action schema" and Langacker's "action chain" model. For Langacker, these models help us to understand the world we live in and help us to map the language that underlies sentient and bodily experiences.[64] According to Langacker, there is a natural link between the structure of the imagined event and the grammatical organisation of the finite clause that codes it.[65] This means that the identified constructions occur constantly when certain offences are described and as such, they help to code the offence through predictable language.

To better understand where these constructions fit in, we now review argument structure and thematic roles.

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59 Matthews *Dictionary of Linguistics* 355.

60 Evans *Cognitive Linguistics* 137.

61 Taylor *Cognitive Grammar* 561; Evans *Cognitive Linguistics* 611. This view applies to Cognitive Grammar. Construction Grammar, which is closely related, views "construction" differently. For its definition and application, consider Goldberg *Construction Grammar* 4.

62 Taylor *Cognitive Grammar* 563-565; Evans *Cognitive Linguistics* 135-136.

63 See also Kaplan *Linguistics and Law* 183.

64 Langacker *Concept, Image, and Symbol* 211.

65 Langacker *Concept, Image, and Symbol* 211.

3.2 Argument structure and thematic roles

To understand the value of the applicable grammar and the proposed model for legal interpretation, it is useful to review certain aspects of syntax. What follows is a brief overview of argument structure and thematic roles.[66]

Argument structure and thematic roles centre around the basic sentence pattern of finite clauses: intransitive, transitive and ditransitive constructions. More specifically, argument structure refers to a verb (predicate)[67] and its potential to take objects.[68] The predicate usually represents the semantic core of a sentence; without it there is not much of a sentence. In simple terms, the predicate describes a state, situation, or event. However, for a verb to be truly significant it requires at least a subject and often at least one object to complete its meaning. Because the verb depends on the subject and object(s) to fully express semantic value, the subject, and object(s) function as participants in a sentence. In grammar, we refer to these required participants as "arguments" of the predicate. Arguments are typically noun phrases and can take the first position (that of the subject in a sentence) and the second or third positions (the direct or indirect object in a sentence). Consider the example sentences below:

3.3 John aimed low.

3.4 John shot Ben in the chest.

3.5 John fired Ben by email.

3.6 John kissed Ben on the cheek.

3.7 John heard the news about Ben.

In the examples above, every sentence but 3.3 has two arguments. "John" is the subject argument in each of the examples, while "Ben" is the object argument in examples 3.4 to 3.6. The object argument in 3.7 is "the news". These sentences express something about John and Ben; it says what they are doing or experiencing. None of the examples above contain a third, indirect object.

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66 Please note, this discussion is simplified and not an attempt at exposing the various syntactic approaches to argument structure and thematic roles. This is also not an attempt at distinguishing thematic roles from theta roles. Instead, the brief overview addresses what linguists generally refer to as "participant roles". Radden and Dirven *Cognitive English Grammar* 270.

67 The term "predicate" is used in its Cognitive Linguistic sense. It refers to the finite verb or copula with adjective. This should not be confused with the traditional view that a predicate represents the entire verb phrase.

68 An intransitive verb takes no object ("I eat"), a transitive verb takes one object ("I feed my dogs"), and a ditransitive verb takes two objects, one direct object and one indirect object ("I feed my dogs ice cream").

To better understand the way in which the predicate affects the participants, we can assign a thematic role to each argument.[69] If a participant acts by their own volition, we refer to that participant as the "agent".[70] In the first four examples, John is the agent because he is acting deliberately: he aims, he shoots, he fires, and he kisses. In the last example, John does not act on his own with intention but instead receives stimulus input. The role that John plays here is that of "experiencer". In examples 3.4 to 3.6, Ben undergoes the action. Because the state of Ben changes in 3.4 and 3.5 (he is injured by the shot, he loses his job), we refer to his role as "patient".[71] However, his state does not necessarily change in 3.6 (being kissed), so we refer to this role as "theme".[72] We can assign various roles depending on what the verb expresses. We can also assign roles to the noun phrases that form part of arguments. For instance, the prepositional phrase "in the chest" in 3.4 forms part of the argument "Ben" and tells us where he was shot. This prepositional phrase takes the role of "location". The same applies to example 3.6. The prepositional phrase in 3.5, "by email", tells us what John used to fire Ben. We refer to this role as "instrument".[73] See Table 1 below for a summary of the roles assigned to the example sentences, which includes an abstracted construction.

Table 1: Thematic roles assigned to arguments

Subject argument	Predicate	Object argument	
[NP]	[V]	[NP]	[P [NP]]
X	does Y	to Z	with A
John <agent>	aimed low. <intransitive>		
John <agent>	shot <transitive>	Ben <patient>	in the chest. <location>

69 Thematic roles are also sometimes called "semantic roles", "case roles" and "argument roles", depending on perspective and complexity.

70 Properties of an agent include: volitional involvement, sentience, causing an agent to change, movement, exists independently. Goldberg *Construction Grammar* 116.

71 Properties of a patient include: undergoes change, casually affected by another patient, stationary relative to movement of another patient, does not exist independently of an event. Goldberg *Construction Grammar* 116.

72 In terms of law, an accused who allegedly committed an offence will play the thematic role of "agent", whereas a witness who reports what they saw or heard will likely play the role of "experiencer". Victims will express the role of "patient" because their state changed from pure to violated.

73 One of the reasons why we assign roles, is because the roles can change, which in turn can profile a different semantic aspect. If we say, "John broke Ben's leg with a hammer", "John" is the agent, "Ben's leg" is the patient and "the hammer" is the instrument. However, if we change the sentence to "The hammer broke Ben's leg", then "the hammer" is no longer just the instrument but instead plays the role of the agent as well. By assuming the role of agent, "the hammer" (instead of "John") is profiled. See section 3.3 below.

John <agent>	fired <transitive>	Ben <patient>	by email. <instrument>
John <agent>	kissed <transitive>	Ben <theme>	on the cheek. <location>
John <experiencer>	heard <transitive>	the news <stimulus>	about Ben. <cause>

Returning to the grammar seen in forfeiture cases, the pattern Agent-Instrument-Patient occurs frequently. Consider the examples from case law below.

3.8 The accused bought rough diamonds with £25.[74]

3.9 The accused manufactured yeast with a manufacturing plant.[75]

3.10 The accused transported liquor with his car.[76]

3.11 The accused defamed X with WhatsApp messages.[77]

3.12 The accused broke into a house with a car.[78]

3.13 The accused bought drugs with a gun.[79]

In each of the examples above, the accused is the agent, and the item affected by the agent's actions is the patient. The transitive verb in each suggests that a change takes place. In addition, each object argument has a prepositional phrase that starts with the preposition "with" and indicates an instrument used to commit the offence. The last two examples (3.12 and 3.13) are peculiar because their semantic inference is somewhat different to the aforementioned. The implication of 3.12 is that the accused used his car to break into a house. This means that he had to use the car in some way to open doors, windows or make a hole in a wall. In fact, this is not what happened; the accused did not use the vehicle to gain entrance to the house

74 *Swanepoel*. See also *S v Cocklin* 1971 3 SA 776 (A).

75 *Green*.

76 *R v Dawood* 1947 2 SA 1097 (T). See also *R v Makhubu* 1957 4 SA 256 (C) and *Bhubezi Boerdery (EDMS) Bpk v Minister of Justice* 1965 1 SA 218 (T).

77 *Manyi v* Dhlamini (36077/13) [2018] ZAGPPHC 563 (18 July 2018) para 13. Even though the WhatsApp message service is clearly used as an instrument here, it is not something that can be confiscated in the same sense as objects like vehicles or money.

78 *Moloto*.

79 *Smith v United States* 508 US 223 (1993). This is a famous case in American statutory interpretation. The accused received five years more to his sentence because he used a firearm during a drug trade. The dissenting judgment argued that the applicable law referred to using a firearm to coerce people during a drug transaction, not as a bartering item. A few years later, *Bailey v United States* 516 US 137 (1995) required a full bench to consider very similar facts, but the resultant judgment was very different and more along the lines of the dissenting opinion in *Smith v United States* 508 US 223 (1993). Kaplan *Linguistics and Law* 183-185.

to steal various items.[80] The fact that there is a clear misalignment between the facts and the grammatical representation of the Agent-Instrument-Patient structure is telling of the status of the vehicle as instrument in the housebreaking. In 3.13, the firearm is used to purchase the drugs; the gun has the status of currency here. This did happen; the accused wanted to buy more drugs but did not have the money, so he offered his firearm as a barter item instead.[81]

From these examples it becomes apparent that a pattern, or grammatical construction, is present when we summarise the main event schematically. The next section highlights the core assumptions of Cognitive Linguistics and lays bare Ronald Langacker's "action chain" model, which accounts for instrumentality and specifically the Agent-Instrument-Patient construction.

3.3 Action schema and Langacker's "action chain" model

As mentioned before, verbs often describe situations. According to Radden and Dirven, situations belong to the force-dynamic world.[82] The force-dynamic world can be viewed as events caused by entities, which may have effects on other entities. Radden and Dirven divide the force-dynamic world into four schemas: the action schema, the self-motion schema, the caused-motion schema, and the transfer schema.[83] The action schema describes events that see an agent deliberately act upon another entity; these "deliberate actions" are goal-oriented.[84] This is often likened to a chain of energy, which Langacker explained through the "billiard-ball" and "action chain" models. Langacker uses these models to illustrate motion and force through energy transmission. For instance, in the "billiard-ball" model, physical contact is initiated with any degree of force. The energy is transmitted from the instigator to the affected object, which may cause the latter to move as well.[85] Think of a driver crashing his car into a market stall, causing the apples and oranges on the table to move in different directions, impacting other objects as they move and touch more objects.

Relevant to the action schema is Langacker's "action chain" model. Similar to his other models, his "action chain" relates to human experiences as sentient beings and as manipulators of physical objects.[86] The model

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80 It is important to add that the confiscation of the car was also dealt with in terms of s 360(3) of the *Criminal Procedure Act* 56 of 1955, which determined that a car may be forfeited to the state if it played a major role in the crime, like conveying the stolen goods from the crime scene (see s 35(1)*(b)* in the current *CPA*). *Moloto* 498. Instrumentality was not the only consideration here.

81 *Smith v United States* 508 US 223 (1993).

82 Radden and Dirven *Cognitive English Grammar* 284.

83 Radden and Dirven *Cognitive English Grammar* 284.

84 Radden and Dirven *Cognitive English Grammar* 284.

85 Langacker *Concept, Image, and Symbol* 209.

86 Langacker *Concept, Image, and Symbol* 210.

consists of one participant transferring energy to another, which causes a reaction of some kind and continues to transmit the energy to a third participant, and potentially many others.[87] The last participant is called the "energy sink", because the energy is not transferred any further. According to Langacker, a prototypical transitive clause contains an action chain that originates with an agent (the person who carries out physical activity by their own volition) and terminates with a patient (an object of some kind that absorbs the energy, which is initiated by external physical contact and that leads to some change in the patient; the energy sink).[88] In certain prototypical situations, the agent can transfer energy to an instrument (an inanimate object controlled by the agent) to affect the patient in some way.[89] All participants are involved in the energy flow; it starts with the one (the agent) and terminates with the other (the patient).[90] We say that this is prototypical, because the action chain occurs frequently and its regular usage is reflected in the grammar: the subject does something to effect a goal-oriented change in the object, and sometimes the subject uses an instrument to achieve the desired outcome.

Two features of the "action chain" model are worth stressing for the sake of determining the proximity of an instrument to an offence:

- the possibility to profile different portions of the action chain,[91] and
- the role of the instrument in causing a change in the patient.

When we consider a sentence like "John stabbed Mary with a kitchen knife", the verb "stabbed" profiles the entire chain. The energy flow is Agent-Instrument-Patient. John uses the kitchen knife to effect a change in Mary; the energy flow terminates with Mary.[92] However, when we consider a sentence like "The kitchen knife stabbed Mary", the kitchen knife takes on a new role (that of subject-agent). By changing the kitchen knife's participant role, we profile a different portion of the action chain, which has an impact

87 Langacker *Concept, Image, and Symbol* 215.

88 Langacker *Concept, Image, and Symbol* 215.

89 Langacker *Concept, Image, and Symbol* 210.

90 Langacker *Concept, Image, and Symbol* 221.

91 In Cognitive Linguistics, "profiling" refers to our ability to shift attention from one aspect of a linguistically encoded scene to another. If we say, "John cut down the tree with a chainsaw", the entire sentence is profiled, because both the subject and the object of the sentence participate to expand the verb's meaning; the action chain is clearly visible. However, if we say, "The tree is cut down", or "The chainsaw cut the tree", we shift the attention to the object and instrument of the previous sentence, respectively. By doing so, the attention is focused on various parts of the linguistic scene. Evans *Cognitive Linguistics* 38.

92 If Mary stumbles backwards against a table, causing its contents to tumble off the table, then she is no longer the energy sink, because she transmits energy to other objects. However, if this happens, the action chain moves beyond the finite clause, which means that the table and tumbling items move outside the profiled space.

on the semantics. When the instrument takes on the subject-agent participant role, it highlights the proximity of the instrument to the verb. There is a direct link between the kitchen knife and the stabbing of Mary.

The second feature of the "action chain" model is its value to determine whether the direct object of the finite clause is in fact a patient and not a different participant role (like theme or experiencer). A transitive sentence like "John saw Mary bleeding", does not describe a transmittance of energy from John to Mary. No change is effected in Mary. There is also no instrument present. In a sentence like "John visited the cannabis plantation with his VW Golf", an instrument is clearly present (the VW Golf), and the agent manipulates the instrument through energy transmission. However, the cannabis plantation does not undergo an obvious change through the use of the instrument. The plantation is not suddenly different; its status has not changed. In the case of the stabbing, Mary went from being unharmed to bleeding from a knife wound. In both examples, the object of the sentence (Mary and the cannabis plantation) takes different participant roles. Mary plays the role of patient, and the cannabis plantation takes the role of theme. If we say that an accused used an instrument to manipulate another entity, the implication is that

(1) the entity changed in some way, and

(2) that the instrument effected the change due to a direct energy transfer from the agent.

If we say the accused used his VW Gold to benefit from the cannabis plantation, the consequence is that the accused as the instigator and energy source changed the status of the cannabis plantation by selling/transporting/collecting cannabis by means of the VW Golf.[93] For there to be a chain between the Agent-Instrument-Patient, the sentence must look like this:

3.14 The accused sold cannabis with his car.

3.15 The accused transported cannabis with his car.

3.16 The accused collected cannabis with his car.

There is another way to determine patienthood. Similar to Langacker, Goldberg uses thematic roles to study argument structure.[94] Her application is complementary in that she views the object-argument as a resultative

93 This is not entirely true, because the plantation does not change much. Unless all the cannabis was harvested, leaving the plantation barren.

94 Although the work of Goldberg and Langacker share common points, Langacker describes grammar in terms of cognitive models that underlie clause structures; Goldberg focuses on the grammatical construction itself. Evans *Cognitive Linguistics* 689-690.

construction. She generalises it as: "Resultatives can only be applied to arguments which potentially undergo a change of state as a result of the action denoted by the verb."[95] This means the direct object of a finite clause must take a patient role. She uses the following traditional test for patienthood:[96]

(a) What X did to <patient> was…

(b) What happened to <patient> was…

If applied to the example sentences above, it will look something like this:

3.17 What the accused did to the cannabis was to sell it.

- What happened to the cannabis was it got sold.

3.18 What the accused did to the fish was to catch it.

- What happened to the fish was it got caught.

In each of these examples, the verb clearly signifies a goal-oriented result that terminates in a change of state. The cannabis changed ownership and went from unsold to sold. The fish went from swimming freely to being caught. The result is an achievement or accomplishment of some kind.[97]

What about the instrument, expressed through a prepositional phrase? Well, the prepositional phrase fuses with the patient argument. This is necessary to complete the semantic frame. The expression "John caught the fish" can stand on its own, but the question remains "with what?". The instrument is clearly implied. Therefore, we can say: "what happened to the fish was it got caught with a net"; "what the accused did to the fish was catch it with a net".

In the next section, we consolidate the steps for analysis and apply them to a number of examples from case law.[98]

4 Discussion

If prosecutors, litigants or presiding officers are expected to work out whether, in terms of section 35(1)*(a)* of the *CPA*, an item used to effect an offence should (not) be forfeited to the state, the following steps could be of assistance. Motivated by Langacker's "action chain" model, and complemented by Goldberg's patienthood test, these steps should aid in

95 Goldberg *Construction Grammar* 188.

96 Goldberg *Construction Grammar* 189.

97 Goldberg *Construction Grammar* 189. Goldberg says that the predicate must only code a "potential" change of state; the change of state is not a definitive requirement.

98 Some examples were taken from Dutch cases, simply to see whether the grammatical construction works cross-linguistically.

identifying whether the contested instrument was directly involved in the offence and, as a result, qualify for forfeiture within a court's discretion.

4.1 Step 1: Abstraction

The first step requires an investigator to abstract the event (the offence) schematically to the construction [NP V NP [P NP]]. Each of the examples below are abstracted this way and serve as a core summary of the main offence.

4.1 The accused[NP] illegally imported[V] (from Bechuanaland) biltong, skins and thongs[NP] with[P] his truck[NP].[99]

4.2 The accused[NP] (allegedly) runs[V] a drug business[NP] with[P] R480 000[NP].[100]

4.3 The accused[NP] (tried to) hunt[V] a rhinoceros[NP] with[P] an unregistered firearm[NP].[101]

Likewise, we can abstract it even more by using the "X does Y to Z with A" construction:

4.4 The accused[X] threatened[Y] the victim[Z] with a sharp object[A]/screwdriver.[102]

4.5 The accused[X] delivered[Y] cocaine[Z] with his car[A].[103]

4.6 The accused[X] commissioned[Y] the murder of her husband[Z] with R10 000[A].[104]

A summary of potential abstractions is presented in Table 2 below.

Table 2: Semantic abstraction of offence			
Agent (subject argument)	Action (predicate)	Patient (object argument)	Instrument
[NP]	[V]	[NP]	[P [NP]]
X	does Y	to Z	with A
The accused	imported	biltong, skins and thongs	with his truck

99 *Bhubezi Boerdery (Edms) (Bpk) v Minister of Justice* 1965 1 SA 218 (T).
100 *Petersen v Minister of Police* 2022 1 SACR 333 (WCC).
101 *S v Muharukua* (CR 28/2020) [2020] NAHCNLD 65 (8 June 2020).
102 ECLI:NL:GHAMS:2019:3713. Original: "*De verdachte bedreigde het slachtoffer met een puntig voorwerp/schroevendraaier.*"
103 ECLI:NL:GHARL:2022:8980. Original: "*De verdachte heeft afgeleverd cocaïne met een personenauto*."
104 *Smith*.

The accused	threatened	the victim	with a sharp object
The accused	delivered	cocaine	with his car

So far, it has been stressed that the prepositional phrase, starting with the preposition "with", is central to identifying the applicable instrument used to effect a change in the patient. However, people do not always use this particular prepositional phrase when describing instrumentality. We can also say "John used the hammer to break the door". In this instance, "the hammer" is both the instrument and an object argument. This might seem like a departure from the [P [NP]] construction, but this is not the case. It can be reverted to reflect the patterns we have discussed up to this point: "John broke the door with the hammer".

It is also worth mentioning that instrument prepositional phrases are not always headed by the preposition "with", but can sometimes be headed by other prepositions, like the examples that follow.

4.7 John travels by boat.

4.8 John reaches the café on foot.

4.9 John becomes stronger through physical exercise.

4.10 The novel was written by John.

In each of the above, none of the prepositional phrases are headed by "with", yet all of them still indicate the relevant instrument: boat, foot, physical exercise. Because the sentence in 4.10 is passive, "John" is both the agent and the instrument. That said, the use of these prepositions is primarily idiomatic. For instance, we often use "by" and "on" to indicate transportation (by plane, by car, on horseback), or to highlight instrumentality (murder by breadknife, suffocation by pillow). It is important to realise that the semantics is the same: "he reached his destination with a horse"; "she was suffocated with a pillow".

Lastly, it is worth remembering that prepositions may have an immediate semantic impact on a sentence.[105] There is a big difference between selling cannabis "with" a vehicle and selling cannabis "from" a vehicle. The former indicates instrumentality whereas the latter indicates direction and location. Another example includes being suffocated "with" a pillow as opposed to "near" a pillow.

105 Carney *Linguistics for Legal Interpretation* 18.

4.2 Step 2: Determine patienthood

During the second step, the investigator determines whether the use of the instrument resulted in an observable change within the patient (the object argument). This can be achieved either by retracing the action chain, or by applying the test for patienthood proposed by Goldberg. I will start by using examples 4.11 to 4.13:

4.11 The accused bribed a police officer with a laptop.[106]

- What the accused did to the police officer was to bribe him (with a laptop).
- What happened to the police officer was he got bribed (with a laptop).

4.12 The accused harmed the fiscus with false invoices.[107]

- What the accused did to the fiscus was to harm it (with false invoices).
- What happened to the fiscus was it got harmed (with false invoices).

4.13 The accused transported 14 bags of dagga with his vehicle.[108]

- What the accused did to the 14 bags of dagga was to transport it (with his car).
- What happened to the 14 bags of dagga was it got transported (with his car).

What we see in the sentences above, is a change from one state to another. The police officer's integrity was intact, but it became threatened by the bribery; if the officer took the bribe, their integrity went from unblemished to tarnished.[109] Furthermore, there is a proposed exchange in ownership, moving from the accused to the officer. More importantly, we can say that the laptop is used to silence the police officer. Here, the state changes from knowing something/reporting a crime to being unaware/unreported. Regarding the use of false invoices, the fiscus changes from being unharmed to being damaged, more specifically impoverished. Simultaneously, the accused's state changes from being impoverished (or, out of pocket) to being financially better off. As for the 14 bags of dagga,

106 ECLI:NL:HR:2012:BX9542. Original: "*De verdachte heeft omgekocht een politieagent met een laptop / peilzender.*"

107 ECLI:NL:PHR:2015:2567. Original: "*De verdachte heeft benadeeld de fiscus met valse facturen*."

108 *R v Makhubu* 1957 4 SA 256 (C).

109 It would be more accurate to assign the "experiencer" role to the police officer. The bribe itself does not affect their status immediately. Once the bribe is accepted, it leads to other actions like turning a blind eye.

their whereabouts change from source location to target location, and their ownership from seller to buyer.

It is possible to retrace the action chain as well, because in each of these examples the accused is the agent that transfers energy to the instrument. The instrument is used to effect a change in the object. The car is used to transfer the dagga to different locations and ownerships; the false invoices are used to steal from the fiscus and to enrich the accused; the laptop is used to buy the police officer's silence, which means the crime goes unreported. In each case, the energy terminates with the object.

Another way to view this, is by profiling different parts of the action chain. We can highlight the link between the instrument and the event by changing the instrument's role to that of agent.[110]

4.14 The false invoices harmed the fiscus.

4.15 The car transported the 14 bags of dagga.

4.16 The R480 000 runs the drug business.

Alternatively, we can choose to highlight the patient only. By doing this, we can see whether a change is present in the patient.

4.17 The fiscus was harmed.

4.18 The 14 bags of dagga were transported.

4.19 The drug business was run.

Despite these tests, the patienthood might not always be obvious when the agent and the instrument are considered. Study the following two examples:

4.20 The laptop bribed the officer.

4.21 The unregistered firearm hunted the rhino.

Both sentences look strange. A laptop cannot bribe a police officer in the same way that falsified invoices can harm the fiscus. In 4.20, the officer is more of an experiencer than a patient. The officer experiences the bribe, which leaves their status unaltered, unless the officer takes the bribe. Once that happens, a different action is profiled: looking the other way, keeping quiet. The laptop remains an instrument of the bribe, even though no physical energy is necessarily transferred from the agent (the accused) to the laptop. Here, the laptop is also a motivator, the carrot instead of the stick. We can therefore say the instrument is abstract. In 4.21, the verb "hunted" misaligns with the subject, "the unregistered firearm". However, if we changed the verb to "shot", it is no longer that strange: the unregistered

110 Langacker *Concept, Image, and Symbol* 218; Evans *Cognitive Linguistics* 630.

firearm shot the rhino. One reason for the misalignment is because the word "hunt" implies more than "shoot". Hunting involves tracking, hiding, waiting, and shooting. The firearm is not an active instrument in all of these. As can be seen, the applicable verb might necessitate more interrogation if the other tests seem unreliable as well.

There might also be a misalignment between the patient and the instrument. In the examples that follow, the object of each sentence takes a patient role. What is obvious; however, is that the identified instrument is ill equipped to effect the change within the patient.[111]

4.22 The accused imported cocaine with a boarding pass and flight ticket.[112]

- What the accused did to the cocaine was to import it (with a boarding pass).
- What happened to the cocaine was it got imported (with a boarding pass).

4.23 The accused sent radio communication signals with a wireless camera.[113]

- What the accused did was to send radio communication signals (with a wireless camera).
- What happened to the radio communication signals was it got sent (with a wireless camera).

4.24 The accused removed the items with a sharp object.[114]

- What the accused did to the items was to remove them (with a sharp object).
- What happened to the items was they got removed (with a sharp object).

If we use Goldberg's proposed test, it is still apparent that the objects undergo a change of state. The cocaine not only changed locations, but the verb implies that it crossed borders. The radio communication signals went from unsent to transmitted. The victim's items were removed and also

111 Naturally, the proposed analysis is not conducted divorced from the facts or claims of a case.

112 ECLI:NL:PHR:2010:BN0030. Original: "*De verdachte heeft ingevoerd cocaïne met een vliegticket en instapkaarten*."

113 ECLI:NL:PHR:2009:BJ6965. Original: "*De verdachte zond radiocommunicatiesignalen uit met een draadloze camera*."

114 ECLI:NL:GHAMS:2019:3713. Original: "*De verdachte heeft weggenomen enig goed met een puntig voorwerp*."

changed location (and ownership). Yet, the instrument in each example seems unlikely and unfit for the job. In 4.22, the court declared the drug mule's plane ticket and boarding passes to be instruments and as a result, forfeited.[115] This implies the accused translocated the cocaine by means of the ticket and boarding pass. If this were true, the accused must have used the ticket and boarding pass to carry or drag the cocaine onto the plane/across the border. The same absurdity is present in 4.23. The accused was found guilty of transmitting radio signals illegally by means of a home-made radio, and had his camera confiscated as well.[116] This particular wireless camera was not used to transmit any communication signals. The sentence in 4.24 is an example of a colloquial way of expressing what happened. The accused actually removed various items from the victim's car during a robbery.[117] However, they used a sharp object to coerce the victim to hand over possessions and to allow them to search the vehicle for more valuable objects.[118] The sharp object was not used to physically remove items from the car or the victim. Based on the facts of these cases, the energy chain is unclear. It is possible to retrace the energy transmission from the agent to the patient, but it is unclear what instrument the agent used to effect the change. Obviously, a radio transmitter was used to transmit a radio signal. Both a suitcase and the plane (and even the accused themselves) were used to transport the cocaine. As for 4.24, the event must be abstracted more accurately; it would be more truthful to say that the accused threatened the victim with a sharp object, or used the sharp object to coerce the victim to hand over the items, or to allow the accused to take the items by hand.[119] Evidently, the phrasing/abstraction of the offence should reveal a logical relationship between the three actors: Agent-Instrument-Patient.

Lastly, in some cases the court initially decided that an item was not an instrument of an offence, but once the "action chain" model is applied it becomes questionable. Let us revisit *S v Noosi* and *S v Nkepane*:[120]

4.25 The accused broke/defied the law with 20 litres of petrol.[121]

- What the accused did to the law was to break/defy it (with 20 litres of petrol).

115 ECLI:NL:PHR:2010:BN0030 paras 3 and 8.
116 ECLI:NL:PHR:2009:BJ6965 paras 3 and 5.
117 ECLI:NL:GHAMS:2019:3713.
118 ECLI:NL:GHAMS:2019:3713 page 4 (unnumbered). The sharp object was forfeited as an additional punishment.
119 ECLI:NL:GHAMS:2019:3713. The court does actually use the word "threatened" a number of times, as well as "robbery" as opposed to "theft".
120 *Noosi*; *Nkepane*.
121 *Noosi*.

- What happened to the law was it got broken/defied (with 20 litres of petrol).

4.26 The accused broke/defied the law with an unregistered vehicle.[122]

- What the accused did to the law was to break/defy it (with an unregistered vehicle).
- What happened to the law was it got broken/defied (with an unregistered vehicle).

In *S v Noosi*, the accused disobeyed the law by transporting a greater quantity of petrol than was allowed (20 litres as opposed to ten).[123] The court *a quo* confiscated the petrol, but the high court returned it to the accused, because the 20 litres was not considered an instrument of the offence. Yet, the petrol was the instrument with which the accused broke the law. He had more petrol in his possession than was permitted. By carrying an increased load, he defied the law. The petrol becomes both the instrument and the object of the offence. The same applies to the facts of *S v Nkepane*. The accused was arrested for driving an unregistered car without a valid licence.[124] Once again, the car was confiscated by the court *a quo* and returned by the high court, because the car was not seen as an instrument in the offence. This begs the question once more; how did the offender break the law? By using the unregistered car. This is where a court's discretion plays a very important part. We do not expect a court to confiscate a vehicle because someone broke the speed limit or drove a vehicle without valid paperwork (unless that vehicle breaks numerous laws and proves unroadworthy and dangerous), even if the car is the instrument of the offence. But, before a court can apply its discretion and decide whether forfeiture would lead to absurdity and an unbusinesslike result, it must know what the instrument of the offence is. Abstracting the events to a grammatical construction that clearly reflects the instrument role, and testing the patienthood of the object argument, could offer helpful guidance.

5 Conclusion

Admittedly, this type of analysis can be very technical and perhaps even intimidating at a first glance. It is worth acknowledging that not all statutory interpreters will be comfortable applying the proposed steps or they might not have the necessary skill to attempt an investigation of this kind.

Should presiding officers and legal practitioners undertake an analysis of this kind, it is probably unnecessary to employ an elaborate analysis such

122 *Nkepane*.
123 *Noosi* 522.
124 *Nkepane* 331.

as the one offered here. On the one hand, the purpose of this particular analysis was to reveal language's schematic nature and speakers' patternicity.[125] On the other, the purpose was to provide a background explanation to the existence and the potential usefulness of the instrument prepositional phrase present in forfeiture cases. By isolating the instrument role in the relevant argument structure, the proximity of an instrument to an offence can be determined. It is also possible to establish what qualifies as an instrument in a particular case and what does not.

Due to the sometimes-technical nature of grammatical analysis, it is probably advisable for legal practitioners to approach linguists or grammarians (or legal experts with linguistic training) for assistance. A collaborative effort should yield promising results, especially where the language consultant remains in touch with the legal practitioner during the investigation. Ideally, linguistics courses should form part of law degree programmes, which would enable legal practitioners and presiding officers to tackle more complex linguistic analyses by themselves and assist them to know when a more technical examination would be fruitful and linguistic consultation preferable.

Evidently, a statutory interpreter can infer a lot by studying the grammar present in the facts of an offence. Needless to say, it could be worth an investigator's time and effort to consider how grammar may support interpretation and construction, especially as an evaluative test where necessary. A grammar analysis like the one offered here reconfirms the ideal marriage between language and law. It is trite to say that language is the best vehicle through which law is practiced and understood. Yet, it remains true and somewhat of a sin to ignore the full spectrum that language and linguistics offer.

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125 "Patternicity" here refers to the human tendency to see patterns where none were previously noticed.

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List of Abbreviations

CPA	Criminal Procedure Act 51 of 1977
POCA	Prevention of Organised Crime Act 121 of 1998
TGG	transformational generative grammar
TRW	Tydskrif vir Regswetenskap
TSAR	Tydskrif vir Suid-Afrikaanse Reg