IN THE HIGH COURT OF SOUTH AFRICA

(SOUTH GAUTENG HIGH COURT, JOHANNESBURG)

CASE NO: 06/134

In the matter between:

KEVIN NAIDOO

Appellant (Accused 2)

and

THE STATE Respondent

J U D G M E N T

BLIEDEN, J:

1. The appellant is Accused 2 in the trial which came before Saldulker J in 2007. Originally there were five Accused before the court, however the charges were withdrawn against Accused 4 while Accused 3 pleaded guilty to some of the charges after a plea and the sentence

agreement was concluded between him and the State and he no longer features in the proceedings.

2. Immediately prior to the hearing of the trial the appellant raised an objection to the indictment served on him. He claimed that there was a misjoinder as he had not been charged with all the counts which had been brought against the accused 1. After hearing argument the Judge rejected the objection raised. He appeals with the leave of the court a quo against this ruling.

The Indictment:

3. The appellant and his co-accused were charged with 55 counts. Looked at as a whole and as supplemented by the summary of substantial facts which is attached to the indictment, the accused before the Court are charged with contravening various sections of the Prevention of Organised Crime Act, number 121 of 1998 (POCA). It is alleged that they were associated together in an illegal enterprise that had as its main aim the illegal procurement of precious metals, the unlawful dispatch of these metals from South Africa to the United Kingdom and money laundering as regards the remittances and proceeds unlawfully earned as consequences of the first two activities.

4. With special reference to accused 1 and the appellant, the former was at all material times alleged to be stationed in the United Kingdom and

it was to him, and the company controlled by him, Just Refiners and Technology UK, that the illegal property was alleged to have been dispatched while the appellant, being accused number 2, was in South Africa. He is alleged to have been the party who stole or otherwise illegally caused the property to be acquired and thereafter with the assistance of the other accused illegally exported such property to the United Kingdom.

The scope of POCA:

5. Before dealing with the appellant's objection to the indictment it is necessary to refer to POCA and the sections thereof which are of relevance to the present appeal. The preamble to POCA reads as follows:

"*To introduce measures to combat organised crime, money laundering and criminal gang activities; to prohibit certain activities relating to racketeering activities; to provide for the prohibition of money laundering and for an obligation to report certain information; to criminalise certain activities associated with gangs; to provide for the recovery of the proceeds of unlawful activity; for the civil forfeiture of criminal property that has been used to commit an offence, property that is the proceeds of unlawful activity or property that is owned or controlled by, or on behalf of, an entity involved in terrorist and related activities; to provide for the establishment of a Criminal Assets Recovery Account; to amend the Drugs and Drug Trafficking Act, 1992;*

to amend the International Co-operation in Criminal Matters Act, 1996; to repeal the Proceeds of Crime Act, 1996; to incorporate the provisions contained in the Proceeds of Crime Act, 1996; and to provide for matters connected therewith." The substitution of the preamble in the schedule to Act 33 of 2004 read with section 27(1) thereof did not derogate from the stated intention therein).

6. The sections of POCA which are relevant to this appeal are sections 2 (1) ; 4 and 6 and they read

" 2. Offences - (1) Any person who –

(a) (i) receives or retains any property derived, directly or indirectly, from a pattern of racketeering activity; and

(ii) knows or ought reasonably to have known that such property is so derived; and

(iii) uses or invests, directly or indirectly, any part of such property in acquisition of any interest in, or the establishment or operation or activities of, any enterprise;

(b) (i) receives or retains any property, directly or indirectly, on behalf of any enterprise; and

(ii) knows or ought reasonably to have known that such property derived or is derived from or through a pattern of racketeering activity,

(c) (i) uses or invests any property, directly or indirectly, on behalf of any enterprise or in acquisition of any interest in, or the establishment or operation or activities of any enterprise; and

(ii) knows or ought reasonably to have known that such a property derived or is derived from or through a pattern of racketeering activity;

(d) acquires or maintains, directly or indirectly, any interest in or control of any enterprise through a pattern of racketeering activity;

(e) whilst managing or employed by or associated with any enterprise, conducts or participates in the conduct, directly or indirectly, of such enterprise's affairs through a pattern of racketeering activity;

(f) manages the operation or activities of an enterprise and who knows or ought reasonably to have known that any person, whilst employed by or associated with that enterprise, conducts or participates in the conduct, directly or indirectly, of such enterprise's affairs through a pattern of racketeering activity; or

(g) conspires or attempts to violate any of the provisions of paragraphs (a), (b), (c), (d), (e) or (f),

within the Republic or elsewhere, shall be guilty of an offence".

"4. Money Laundering. - Any person who knows or ought reasonably to have known that property is or forms part of the proceeds of unlawful activities and –

(a) enters into any agreement or engages in any arrangement or transaction with anyone in connection with that property, whether such agreement, arrangement or transaction is legally enforceable or not; or

(b) performs any other act in connection with such property, whether it is performed independently or in concert with any other person,

which has or is likely to have the effect –

(i) of concealing or disguising the nature, source, location, disposition or movement of the said property or the ownership thereof or any interest which anyone may have in respect thereof; or

(ii) of enabling or assisting any person who has committed or commits an offence, whether in the Republic or elsewhere-

(aa) to avoid prosecution; or

(bb) to remove or diminish any property acquired directly, or indirectly, as a result of the commission of an offence,

shall be guilty of an offence".

"6. Acquisition, possession or use of proceeds of unlawful activities. – Any person who –

(a) acquires;

(b) uses; or

(c) has possession of,

property and who knows or ought reasonably to have known that it is or forms part of the proceeds of unlawful activities of another person, shall be guilty of an offence".

In reading the three sections of POCA above, the following definitions as contained in sec 1 thereof are important:

"Enterprise" includes any individual, partnership, corporation, association, or other juristic person or legal entity, and any union or group of individuals associated in fact, although not a juristic person or legal entity;

"Pattern of racketeering activity" means the planned, ongoing, continuous or repeated participation or involvement in any offence referred to in Schedule 1 and includes at least two offences referred to in Schedule 1, of which one of the offences occurred after the commencement of this Act and the last offence occurred within 10 years (excluding any period of imprisonment) after the commission of such prior offence referred to in Schedule 1;

"Proceeds of unlawful activities" means any property or any service, advantage, benefit or reward which was derived, received or retained, directly or indirectly, in the Republic or elsewhere, at any time before or after the commencement of this Act, in connection with or as a result of any unlawful activity carried on by any person, and includes any property representing property so derived;

"Unlawful activity" means any conduct which constitutes a crime or which contravenes any law whether such conduct occurred before or after the commencement of this Act and whether such conduct occurred in the Republic or elsewhere.

7. As is plain from what has been quoted, in a nutshell POCA has been designed to deal with the organised racketeering of entities irrespective of the particular parts played by persons associated with such enterprise in achieving the object of their collective conspiracy to commit a particular crime or a series of crimes.

The appellant's objection to his being joined in the proceedings:

8. On behalf of the appellant reference was made to 19 alternative counts and 3 main counts against accused 1 where the appellant has not been charged. It was submitted on the appellant's behalf that as it has not been shown by the State that accused 1 and the present appellant are implicated in the "same offence" in relation to these counts it is irregular and impermissible that such persons be tried together in respect of each offence in which each and everyone is not so implicated. As authority for this proposition counsel for the appellant referred to sections155 and 156 of the Criminal Procedure Act as well as the following cases:

   State v Chawe and Another 1970 (2) SA 414 at 416 E.

   State v Ramgobin and Others 1986 (1) SA 68 at 80 D and E.

   State v Stellios Orphanou and six others, unreported judgement of Leveson J delivered on 18 October 1985 in the Witwatersrand

Local Division. Special reference is made to page 97 line 10 and page 101 lines 20 – 30 of that Judgement.

S v Makganje 1993 (2) SACR 621 (B) at 622 e and f.

9. For the sake of completeness sec 155 and 156 of the Criminal Procedure Act are quoted:

" 155 - Persons implicated in same offence may be tried together.

(1) any number of participants in the same offence may be tried together and any number of accessories after the same fact may be tried together or any number of participants in the same offence and any number of accessories after that fact may be tried together, and each such participant and each such accessory may be charged at such trial with the relevant substantive offence alleged against him.

(2) A receiver of property obtained by means of an offence shall for purposes of his section be deemed to be a participant in the offence in question ".

"156 – Persons committing separate offences at same time and place may be tried together.

Any number of persons charged in respect of separate offences committed at the same place and at the same time or at about the same time, may be charged and tried together in respect of such offences if the prosecutor informs the court that evidence admissible at

the trial of one of such persons will, in his opinion, also be admissible as evidence at the trial of any other person or such persons".

10. The facts in each of the four cited cases graphically demonstrates the approach of our courts in regard to the objections raised because of the provisions of section 155 of the Criminal Procedure Act.

In the ***Chawe*** case two accused were found in possession of stolen meat, which could not be linked to the same theft incident. However, the two accused incriminated each other. The court ruled that where accused persons commit separate offences it constituted a misjoinder to charge them together.

In the ***Ramgobin*** case (at 80D – E) the following is recorded:
"Counts 2, 4 and 5 are not laid against all the accused: nor can it even be said that the same accused are involved on each of these charges. Counts 2 and 5, furthermore, cover a completely different period from count 4. I hold therefore that it is irregular and impermissible to join the accused in counts 2, 4 and 5 either with each other or with any other counts."

In the ***Stellios Orphanou*** case only the first six accused (and not the seventh accused) were charged with the first count, which was a main count of public violence. Accused 7 was charged with 2 main counts and the other accused were charged with 3 main counts.

The court, per Leveson J found that because one accused had been charged with 2 counts while his co-accused were charged with 3 counts, the last of which had nothing to do with the first two and the objecting accused was not alleged to have in any way been involved in the last count there had been a misjoinder.

In **State v Makganje** one of the two accused had been charged with raping a 12 year old girl on a particular date and time. The second accused had been joined in the trial as he had been charged with raping the same complainant a day after the first rape. Other than having a common complainant neither offence was connected to the other. This was held to be a misjoinder.

11. The four cases quoted above, are authority for the proposition that where there is no connection either in time, space or fact between the charges facing accused 1 and the appellant, it is irregular and impermissible that such persons be tried together in respect of offences in which each and everyone is not implicated. I agree with the appellant's counsel that alternative charges rank as alternative counts which are on their own separate offences charged.

12. As is plain from the above quoted two sections of the Criminal Procedure Act the prejudice that an accused would suffer if the relevant two sections were not applied is clear. An accused could spend weeks in court while evidence affecting his or her co-accused

was dealt with which had nothing whatsoever to do with the objecting accused and the charges faced by him or her, merely because on other counts he was charged with an offence in which his co-accused was connected. This the Criminal Procedure Act does not permit.

This is plainly demonstrated by the facts in the four cases on which the appellant relies. However it should be mentioned that in none of these cases was POCA an issue. As can be gathered from what is stated below, the facts in all four of the quoted cases are distinguishable form those which apply in the present proceedings. In each of the four cases quoted the various co-accused were charged with various offences some of which could not be linked to all of them in time or by act of participation. It was submitted on behalf of the state that the situation is different in this case, as all the accused are involved in the same transaction which constitutes the main count each of them faces. They however played different roles in achieving it.

Applying the provisions of POCA to the present indictment:

13. The starting point in considering the issues in this appeal is the fact that the State case is postulated on the provisions of the various subsections of sec 2 (1) of POCA, namely that the various accused

were all in different capacities involved in the illegal enterprise to which reference has already been made. Various criminal activities were undertaken, all having as their ultimate purpose the facilitation of various crimes referred in schedule 1 of POCA, for the benefit of the criminal enterprise formed by all the accused.

14. The evidence on which the State will rely, as stated in the indictment itself and the summary of substantial facts attached to it, if proved to be correct, will justify the conviction of some of the various accused on a number of counts which may differ from those relating to other accused, depending on the specific activity of the accused concerned. For example on count one all the accused are charged with being employed by or associated with an enterprise involved in " a pattern of racketeering activities" as defined in POCA. However only accused one is referred to in the second alternative count. He is charged under subsection 2(1)(b) of POCA. This subsection relates only to the receiving of property derived through a pattern of racketeering activities.

15. Both counts have as their common factor the requirement that racketeering activity by the members of the group would have to be proved in order for a conviction to follow. In the circumstances the evidence on all the counts will be relevant to cover the same issues.

16. The reason why Accused 1 is charged separately in the alternative is that according to the indictment he was not directly involved in the thefts or frauds involved. However if these are not proved by the State he would still be guilty of an offence in terms of Section 2(1)(b) of POCA, but only if he knew or should have known that the proceeds received by him were as consequence of unlawful activities.

What has been said above applies to all 19 alternative counts to which the appellant has objected. In each and every one of them Accused one by himself and as an alternative to the main count of theft and fraud has been charged either under section 2(1)(b) or section 6 of POCA. Both sections being limited to the possession or use of property unlawfully obtained.

17. What the argument of appellant's counsel loses sight of is the fact that ultimately the charge against each of the appellants is one of racketeering and being part of a conspiracy to achieve a criminal result, whether it be theft, fraud or the contravention of certain statutes and/or regulations relating to the mining of minerals or customs and excise or currency control.

18. For each of the main counts, and the alternatives thereto, there is only one set of facts which might result in a conviction on the main counts or on one of the alternatives. What is clear is that in relation to each count, or alternative thereto, the evidence relied upon by the

prosecution relates to the ongoing, continuing or repeated participation of each of the accused, and in particular accused 1 and the appellant in the illegal rackets in which they are all participants. Despite the fact that the nature of the part played by each accused could be different from that of another accused, the evidence would remain the same to prove the conspiracy between them or the individual counts on which Accused 1 has been charged in the alternative.

19. One has but to read the various charges in the indictment to be convinced of this fact.

20. Bearing the above considerations in mind there is no possibility that any of the Accused runs the risk of being in a situation that any evidence led will not be relevant to the case he has to meet. Each of the Accused is being tried for the same offence. The fact that Accused 1 alone is charged with the contravention of certain sections of POCA in the alternative does not detract from the fact the main charge against each and every one of them is that they are guilty of contravening section 2(1)(e) of POCA. The evidence on which the State will have to rely on in proving a contravention of section 2(1)(e) has recently been defined by the Supreme Court of Appeal in Eyssen v The State (2008) JPL 22417 (SCA). Paragraphs 5 -10 of that judgement are relevant to the present case and are quoted below:

" [5] The essence of the offence in subsection (e) is that the accused must conduct (or participate in the conduct) of an enterprise's affairs. Actual participation is required (although it may be direct or indirect). In that respect the subsection differs from subsection (f), the essence of which is that the accused must know (or ought reasonably to have known) that another person did so. Knowledge, not participation, is required. On the other hand, subsection (e) is wider than subsection (f) in that subsection (e) covers a person who was managing, or employed by, or associated with the enterprise, whereas subsection (f) is limited to a person who manages the operations or activities of an enterprise. "Manage" is not defined and therefore bears its ordinary meaning, which in this context is:

> *" be in charge of; run. 2 supervise (staff). 3 be the manager of (a sports team or a performer)".* See Concise Oxford Dictionary 10th edition s v manage.

"[6] The word "enterprise" is defined in section 1 as follows:

> *"'enterprise' includes any individual, partnership ,corporation, association, or other juristic person or legal entity, and any union or group of individuals associated in fact, although not a juristic person or legal entity."*

"It is difficult to envisage a wider definition. A single person is covered. So it seems is every other type of connection between persons known to the law or existing in fact; those which the Legislature has not included specifically would be incorporated by the introductory word "includes". Taking a group of individuals associated in fact, which is the relevant part of the definition for the purposes of this appeal, it seems to me that the association would at least have to be conscious; that there would have to be a common factor or purpose identifiable in the association; that the association would have to be ongoing; and that the members would have to function as a continuing unit. There is no requirement that the enterprise be legal, or that it be illegal. It is the pattern of racketeering activity, through which the accused must participate in the affairs of the enterprise, that brings in the illegal element; and the concepts of "enterprise" and "pattern

of racketeering activity" are discrete. Proof of the pattern may establish proof of the enterprise, but this will not be inevitably be the case".

"[7] It is a requirement of the subsections in question that the accused (in subsection (e)) or the other person (in subsection (f)) must participate in the enterprise's affairs (Paragraph [14] below illustrates the point.) It will therefore be important to identify what those affairs are. It will also be important for the State to establish that any particular criminal act relied upon, constituted participation in such affairs….. The participation may be direct, or indirect".

"[8] It is a further requirement that the participation must be through a "pattern of racketeering activity". That concept is defined as follows:

> *"'pattern of racketeering activity' means the planned, ongoing, continuous or repeated participation or involvement in any offence referred to in Schedule 1 and includes at least two offences referred to in Schedule 1, of which one of the offences occurred within 10 years (excluding any period of imprisonment) after the commission of such prior offence referred to in Schedule 1."*

The word "planned" cannot be read eiusdem generis with "ongoing, continuous or repeated" and accordingly qualifies all three. The relevant meaning of "pattern" is given in the Oxford English Dictionary as "an order or form discernible in things, actions, ideas, situations, etc. Frequently with ***of as pattern of behaviour = behaviour pattern****…". In my view, neither unrelated instances of proscribed behaviour nor an accidental coincidence between them constitute a "pattern" and the word "planned" makes this clear".*

" [9] The participation must be by way of ongoing, continuous or repeated participation or involvement. The use of "involvement" as well as the word "participation" widens the ambit of the definition. So does the use of the words "ongoing, continuous or repeated". Although similar in meaning, there are nuances of difference. "Ongoing" conveys the idea

of "not as yet completed". "Continuous"(as opposed to "continual") means interrupted in time or sequence. "Repeated" means recurring".

"[10] Some limitation is introduced into the definition by the requirement that the participation or involvement must be in any Schedule 1 offence. The limitation is, however, not substantial. Schedule 1 lists a considerable number of offences, both statutory and common law, and includes (as item 33):

> *"Any offence the punishment wherefor may be a period of imprisonment exceeding one year without the option of a fine".*

21. As can be seen from the passages in Eyssen, quoted above, it is necessary for the State to prove all the elements in the common law offences which make up the illegal enterprise which comprise the main charge against them before each can be convicted on count 1. In the circumstances there can be no question of them claiming that they are not being charged with the "same offence". The greater offence of necessity includes the lesser.

22. As regards the three main counts which are only directed against accused 1 and 3 and not against the appellant, being counts 27, 29 and 51, the following considerations apply.

23. The prosecutor in the court a quo and in his heads of argument has made it known that these charges relate to a trap which had been set against accused 1 and 3 and which resulted inter alia in a tape recording being made of a conversation between these two accused in which the modus operandi of the enterprise in conducting its affairs

was alluded to. More specifically the conversation dealt with the illegal export of the unwrought precious metals which had by then occurred and which was to continue.

24. On behalf of the State, counsel at the trial and in his heads of argument now, has further submitted that the evidence to be tendered on these counts is not only relevant because it provides proof of knowledge of unlawfulness on the part of accused 1 in regard to these counts, but also because it provides proof of accused 1's state of mind in general and his "mens rea" when he imported material from the appellant in the past. This refers to counts 2 – 26 of the indictment. This also refers to what occurred later and this is dealt with in counts 27 – 55. More pertinentally he further submitted that it is also relevant to prove his interaction and dealings with the appellant in general which is relevant to proving count 1 (racketeering) charges against all the accused.

25. Counsel further argued that proving evidence relating to the trap, and the taped conversation, will be akin to the state proving a previous conviction which is tendered to prove "mens rea" and is permissible in terms of sec 197 (d) of the Criminal Procedure Act as well as sec 22 of POCA. In the circumstances, so it was submitted, if a previous conviction is admissible to prove "mens rea" of one accused, so should the proving of the commission of an individual offence be. It ought to be admitted in the interests of justice because of relevancy and

because it is admissible as it provides proof of the elements of “mens rea” against accused 1 and the other accused as regards the other transactions charged in the indictment .

26. I agree with these submissions. The evidence is relevant and it is difficult to conceive what kind of prejudice the appellant would suffer as a consequence of such evidence being admitted.

27. Various other aspects relating to the interpretation of sec 155 and 156 of the Criminal Procedure Act, and in particular the meaning of the words “same offence” as it appears in section 155 were argued on behalf of the State. In the circumstances of the present case it seems to me that it is unnecessary to decide these further issues in the light of what has already been said.

In the circumstances in my view the present appeal cannot succeed and it falls to be dismissed. The following order is made:

The appeal is dismissed.

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P BLIEDEN
JUDGE OF THE HIGH COURT

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NF KGOMO
JUDGE OF THE HIGH COURT

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FJ BASHALL
ACTING JUDGE OF THE HIGH COURT

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