IN THE HIGH COURT OF SOUTH AFRICA /ES

(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES / NO.
(2) OF INTEREST TO OTHER JUDGES: YES / NO.
(3) REVISED. ✓
DATE 19/8/14 **SIGNATURE**

CASE NO: A626/2013

DATE: 22/8/14.

IN THE MATTER BETWEEN

YORK TIMBERS PROPRIETARY LIMITED APPELLANT

AND

THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS RESPONDENT

JUDGMENT

PRINSLOO J et MOSEAMO AJ

[1] This is an appeal against a confiscation order granted against the appellant by the learned regional magistrate of Nelspruit on 4 April 2013 in terms of the provisions of section 18 of the Prevention of Organised Crime Act no 121 of 1998 ("POCA").

[2] Before us, Mr Cilliers SC appeared for the appellant and Mr Labuschagne SC assisted by Mr Van der Walt appeared for the respondent.

Background and introduction

[3] During or about 0ctober 2010 the appellant was charged in the Mbombela regional court for nine alleged separate contraventions of the National Environmental Management Act, Act 107 of 1998 ("NEMA"). The matter went to trial in that court under case no SH865/10.

[4] The appellant initially pleaded guilty to two of the charges and the remaining seven charges were withdrawn by the state. Later, the appellant was also acquitted on one of the remaining charges.

[5] 0n 23 June 2011 the appellant pleaded guilty to the remaining charge, count 8, and was duly convicted after the plea was accepted by the state.

[6] It is convenient, for illustrative purposes, to quote the appellant's plea of guilty to count 8 as it is formulated in a plea statement handed in by the appellant in terms of section 112(2) of the Criminal Procedure Act, Act 51 of 1977 ("the CPA"):

> "*Ad* count 8:
>
> I admit that the accused is guilty of a contravention of the provisions of section 24F(1)(a) read with section 24F(2)(a) of the National Environmental Management Act, Act 107 of 1998 and *Government Notice*

R386 dated 21 April 2006 (item 15) in that during or about the period 27 June 2008 and August 2008 and at the farms Grootfontein in the Regional Division of Mpumalanga, the accused unlawfully and intentionally commenced with the construction of a road that is wider than 4 metres on its property without environmental authority issued by a competent authority."

[7] Incorporated in this plea statement was a statement in mitigation of sentence deposed to by Mr David Malloch-Brown a manager of the appellant who appeared in court standing in for the juristic person appellant company which was the actual accused. Malloch-Brown, who also signed the plea statement to which I have referred, specifically incorporated the statement in mitigation which I am about to quote from in the plea statement in the following terms:

"4. I respectfully pray that the content of the Statement in Mitigation appended hereto be incorporated as if specifically repeated herein.

5. The accused admits the facts that are set out in the statement in mitigation and that the accused's plea of guilty in respect of counts 1 and 8 is based upon those facts."

Where the state accepted the plea incorporating the statement in mitigation it is trite that it cannot be seen at a later stage to offer evidence which is not in harmony with the evidence set out in the plea statement and the statement in mitigation. See *S v Nqubane* 1985 (3) SA 677 (A) at 683D-F; Hiemstra,

Suid-Afrikaanse Strafproses 7th ed p349; *S v Moorcroft* 1994[1] SACR 317 (T) at 320a-g.

[8] We proceed to quote extracts from the statement in mitigation:

"4. I wish to record the following facts and circumstances in mitigation of sentence:

Introduction:

5. **The identity of the accused and its ownership and control of the Sabie Sawmill:**

5.1 The accused is York Timbers (Pty) Ltd which owns and operates a sawmill and plywood plant at Sabie in the Mpumalanga province.

5.2 York Timbers (Pty) Ltd is a wholly owned subsidiary of York Timber Holdings Ltd ('York'),

5.3 In order to distinguish York Timbers (Pty) Ltd from its parent company, York Timber Holdings Ltd, York Timbers (Pty) Ltd will be referred to further as 'the Sabie Sawmill'.

5.4 York acquired the shares and took over the management of the Sabie Sawmill in July 2007. Prior to that date the Sabie Sawmill was owned and managed by Global Forest Products ('GFP').

6. **York's commitment to social and environmental responsibility:**

6.1 York is the biggest private sector employer in Sabie and as such contributes heavily to the economy of the town in which it operates.

6.2 York is a socially conscious and equal opportunity employer.

6.2.1 York sponsors medical clinics to serve its employees as well as the local communities within which it operates. York has a dedicated team of nurses who reach out to and educate local communities about current health issues and combat the spread of AIDS.

6.2.2 York strives to create additional employment opportunities and improve the living standards of four local communities. It allows local communities to harvest thatching grass, mushrooms and firewood and provides grazing for the cattle of local farmers.

6.2.3 York sponsors the development of outdoor recreation activities, environmental education initiatives, and makes donations to primary schools.

6.3 At York environmental conservation and the sustainable management of its forestry operations are central to its corporate responsibility.

6.3.1 York Timbers promotes its commitment to the environment through its sustainable forestry practices, protection of biodiversity, preservation of natural heritage sites and sponsorship of several environmental education initiatives.

6.3.2 York takes pride in its membership of the Forest Stewardship Council and wholly supports the Forest Stewardship Council's principles of environmentally appropriate, socially beneficial and economically viable forestry management.

6.3.3 York has certification from SGS Qualifor for all its plantations and chain-of-custody certification for all of its processing operations.

6.3.4 York Timbers ensures that all of its products are produced in a manner that is economically, environmentally and sociologically sustainable and strives to service today's needs while protecting resources for future generations.

6.3.5 York actively promotes biodiversity by setting aside and managing areas suitable for rare animals and plant species to live and grow.

6.3.6 Over 60 Red Data Species (species that are classified as Endangered, Vulnerable or Rare) have been identified and are closely monitored on the 24,000 hectares of land that York Timbers has set aside specifically for this purpose. In addition, at least 25% of the total land holdings will never be planted to trees, so that there is plenty of room for the other not-so-rare species and for sharing the renewable resources with our employees and rural neighbours.

6.3.7 York protects and manages seven natural heritage sites, areas designated by the South African government as having environmental or national significance. The sites located on York's property include a tree fern reserve, caves as well as rock art paintings. The natural heritage sites provide environmental educational opportunities for organisations such as schools, bird-watching clubs and lepidopterist societies. York is ensuring that

these national treasures will be around for the enjoyment of future generations.

6.4 The accused has no previous conviction for the contravention of any environmental or any other law.

Ad count 8:

10. **Introduction:**

10.1 This count relates to the commencement of listed activity identified in terms of section 24 of the National Environmental Management Act 1996 (*sic*) (NEMA) and more specifically 'the construction of a road that is wider than 4 metres or that has a reserve wider than 6 metres, excluding roads that fall within the ambit of another listed activity or which are access roads of less than 30 metres long'.

10.2 This particular activity was 'listed' in terms of *Government Notice* no R386, published in the *Government Gazette* of 21 April 2006.

10.3 The road in question is depicted in the Google Earth image annexed hereto, marked 'DMB10' as 'the proposed new road', the existing ramp road, that it was intended to replace.

10.4 As appears from 'DMB10', the existing ramp road links the Sabie-Lydenburg road with the 'old Lydenburg road', where the Sabie Sawmill is located.

10.5 The existing ramp road is used for the transport of timber from the plantations, which lie to the south and west of Sabie town, to the Sabie Sawmill. If it were not for the ramp road this timber would have to be transported through Sabie town causing noise, polution and traffic congestion and might also damage the roads through the town.

10.6 The proposed new road would change the course of the existing ramp road. It would start and finish at the same points but would detour the traffic further west and further away from the Sabie town. For most of its route it would follow an existing forestry road through the plantation.

10.7 A stretch of that existing forestry road, some 800 metres in length, was widened with a road grader in late 2007, but without the requisite environmental authorisation, preparatory to the construction of the proposed new road.

10.8 This widening is clearly visible on the Google image, annexed hereto, marked 'DMB11', depicted by 'X' to 'Y'.

11. **The circumstances that led to the widening of the road:**

11.1 Both the existing ramp road and the proposed new road are on York owned land.

11.2 As appears from 'DMB10', the existing ramp road is close to a residential area in Sabie town.

11.3 The road is used by heavy trucks. The trucks are noisy and raise considerable amounts of dust into the air when it is dry and at night the headlights are a source of significant light polution.

11.4 As appears from photographs, appended hereto, marked 'DMB12' and 'DMB13', the ramp road is within direct line of sight of a residential area in Sabie.

11.5 In order to mitigate the impact of the road on the nearby residents of Sabie it was proposed to re-route the ramp westwards over the horizon and out of sight of Sabie town. This would bring about a significant reduction in the amount of noise and dust and light polution to which residents of Sabie town would be subjected.

11.6 The immediate spur to the construction of the proposed new road were the catastrophic forest fires of 2007. Thousands of hectares of plantations were burnt and it became necessary within a very short period of time to harvest the burnt timber and to transport it to the sawmill before it dried.

11.7 This emergency led to a substantial increase in the volumes of timber that had to be transported to the Sabie Sawmill along the existing ramp road and required that the trucks operate day and night. This would have the effect of increasing noise, dust and light polution for the residents of Sabie town. The situation was aggravated by the fact that the forest flanking the ramp road, which dampened the noise, dust and light generated by road traffic, also burnt down.

11.8 York would derive no benefit from re-routing the existing ramp road, in fact it would increase the distance that the trucks would have to travel to the sawmill and therefore costs. The construction of the road (which includes gravelling) would have cost York over R1 million. (Our emphasis).

11.9 The reason that York decided to move the road further away from Sabie was to mitigate the environmental impact of the road on local residents.

11.10 The re-routing of the ramp road was discussed with the forester responsible for the maintenance of forest roads and he was requested to survey and to mark out the route of the proposed new road.

11.11 The forester did so but, in his enthusiasm, he also instructed a roads contractor, who was on contract to York, to begin clearing the area adjacent to the existing forest road with a road scraper. The contractor scraped a stretch of road some 800 metres long and 3 metres wide.

11.12 When York's then environmental manager, Mr Sean McCarthy became aware of the scraping activity he immediately directed the contractor to stop and directed that the work should not continue until such time as an environmental authorisation was obtained.

11.13 York then appointed a consultant, V&L Landscape Architects, to apply for an environmental authorisation.

11.14 In accordance with the law and the proper procedures, the consultant gave the authorities notice of the Sabie Sawmill's intention to apply for an environmental authorisation, took steps to ensure that the requisite notices were posted and published and carried out a proper public participation exercise. A basic assessment report was submitted to the environmental authorities on 6 June 2008.

11.15 On 18 July 2008 the consultants made further submissions in response to a letter of objection received from the single objector, the Lone Creek River Lodge, and the various reports filed by them.

11.16 On or about 4 August 2008 inspectors from the Department of Environmental Affairs who were carrying out a compliance inspection at the Sabie Sawmill noted that the forest road had been scraped wider and initiated the process that culminated in these criminal proceedings.

11.17 Four years after the Basic assessment report was filed the environmental authorities have yet to grant an authorisation for the construction of the proposed new road. In the circumstances York has been obliged to continue to use the existing ramp road.

12. **The environmental impact of the widening of the road**

12.1 Annexed hereto, marked 'DMB14' and 'DMB16' are photos of the proposed new road when it was widened, and depict how it appears today.

12.2 As appears from the said annexures, the road that was widened was an existing forestry road within a commercial pine plantation.

12.3 Pine trees are not endemic to South Africa and are of no natural value.

12.4 No stream, nor wetland nor any natural forest was damaged by the widening of the road.

12.5 The widening of the road therefore had no significant environmental impact.

13. **Other considerations:**

13.1 *Government Notice* R366 has been replaced by *Government Notice* R544 which was published in the *Government Gazette* of 18 June 2010.

13.2 Item 47 of *Government Gazette* R544 provides that an environmental authorisation is required where:

'... an existing road is widened by more than 6 metres, or is lengthened by more than 1 kilometre, where the existing reserve is wider than 13,5 metres; or, where no reserve exists, where the existing road is wider than 8 metres and excluding widening or lengthening occurring inside urban areas.'

13.3 As the proposed new road had no existing reserve and was less than 8 metres wide, no environmental authorisation would be required if the widening of the proposed new road took place today.

Conclusion:

14. I admit that Sabie Sawmills (York Timbers (Pty) Ltd) contravened the law in respect of count 8.

15. However the contraventions have had no significant detrimental effect upon the environment, or upon the community, within which the Sabie Sawmill conducts its operations.

17. The widening of the proposed new ramp road:

17.1 When the Sabie Sawmill embarked upon the construction of the proposed new ramp road it did so in order to mitigate the negative environmental impacts associated with the use of the existing (and lawful) ramp road upon the residents of Sabie town. It derived no benefit from this activity. (Our emphasis.)

17.2 When the management of the Sabie Sawmill became aware that the widening of the proposed new ramp road had started without the requisite environmental authorisation it immediately ceased the activity and followed the prescripts of the law by applying for the necessary authorisation.

17.3 The impugned activity, if carried out today would not constitute an offence.

18. The accused is a first offender."

It was signed by Malloch-Brown in June 2011.

[9] After the conviction but before sentence was handed down, the respondent filed an application for a confiscation order in terms of section 18 of POCA. It appears that on 16 September 2011 the regional court ordered that a confiscation enquiry be held in terms of this statutory provision into any benefit that the appellant may have derived out of its criminal activity and, if so, to determine the amount of the confiscation order.

[10] The application for a confiscation order was opposed by the appellant.

[11] 0n 11 July 2012 the regional court ordered that the respondent serve and file their founding affidavits in terms of section 18(6)(a)(iii) of POCA on or before 14 September 2012, that the appellant serve and file their opposing papers on or before 5 0ctober 2012 and that both parties serve and file their replying papers, if any, on or before 26 0ctober 2012.

[12] 0n 4 April 2013 the appellant was sentenced to a fine of R180 000,00 in respect of the offence to which it had pleaded guilty. An application for leave to appeal against this sentence was granted by the learned regional magistrate on 29 April 2013. This appeal is still pending.

[13] Also on the same date, 3 April 2013, the learned regional magistrate granted a confiscation order under section 18 of POCA, in the amount of R450 000,00 and

ordered the appellant to pay the costs of the application on the scale as between attorney and client.

[14] A notice of appeal was filed against the grant of the confiscation order under POCA on 19 April 2013. This is the appeal which came before us.

The nature of the proceedings involving applications for confiscation orders

[15] The position is governed by the provisions of section 13 of POCA which reads as follows:

> "13. **Proceedings are civil, not criminal** –
>
> (1) For the purposes of this Chapter (our note: Chapter 5: proceeds of unlawful activities) proceedings on application for a confiscation order or a restraint order are civil proceedings, and are not criminal proceedings.
>
> (2) The rules of evidence applicable in civil proceedings apply to proceedings on application for a confiscation order or a restraint order.
>
> (3) No rule of evidence applicable only in criminal proceedings shall apply to proceedings on application for a confiscation order or restraint order.
>
> (4) No rule of construction applicable only in criminal proceedings shall apply to proceedings on application for a confiscation order or restraint order.

(5) Any question of fact to be decided by a court in any proceedings in respect of an application contemplated in this Chapter shall be decided on a balance of probabilities."

[16] In the light of these provisions, it was argued by Mr Cilliers for the appellant that there was an *onus* on the applicant for a confiscation order to prove his or her case on a balance of probabilities.

It was also argued that, particularly in view of the provisions of section 13(2), disputes of fact, if any, where the application is to be decided on affidavit (as was the case here) should be decided in terms of the so-called "*Plascon-Evans* rule". In *Plascon-Evans Paints v Van Riebeeck Paints* 1984 3 SA 623 (AD) the following is said by the learned Judge of Appeal at 634H-I:

> "It is correct that, where in proceedings on notice of motion disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred in the applicant's affidavits which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order."

Inasmuch as this "rule" may find application in the present case, it seems to us that the submissions made on behalf of the appellant are sound and ought to be accepted. On behalf of the respondent it was argued by Mr Labuschagne, if we understood him correctly, that, because the proceedings are in the nature of

"an enquiry" there is no question of an *onus* resting on either party. He also argued that the *Plascon Evans* rule cannot be applied in these proceedings. In view of the provisions of section 13, *supra*, we see no basis for rejecting the approach advanced on behalf of the appellant.

The judgment of 4 April 2013 of the learned regional magistrate granting the confiscation order, which is the subject of the appeal

[17] The judgment is a relatively condensed, two page affair.

[18] In her judgment, the learned regional magistrate summarised the case of the respondent (as applicant) which is based on the proposition that certain expenses saved by the appellant (as respondent) amounted, in this case, to benefits flowing from the unlawful activities in respect of which the plea of guilty was tendered.

In a nutshell, these benefits alleged to have accrued to the appellant, at the time of the commission of the offence, can be equated, so the respondent argued, to the costs that it saved:

1. by failing to employ the services of an environmental expert to conduct and produce a required EIA (Environmental Impact Assessment) before commencing with the listed activity of the widening of the road;
2. by failing to employ the services of environmental experts to compile a proper application to be submitted to the relevant authorities, before commencing with the listed activity of the widening of the road;

3. failing to submit a compulsory application for rectification in terms of section 24G of NEMA "for the environmental damage that they caused by the widening of the road in issue";
4. by not being fined by the relevant authorities in terms of section 24G "for the environmental damage that they caused by the widening of the road";
5. in respect of specific design requirements in the widening of the affected road "that would likely have been detailed as conditions of the authorisation by the relevant authority".

[19] These perceived saved expenses and benefits were listed by the main witness employed by the respondent, Mr Sean O'Beirne, a director of an environmental consulting company.

[20] The expenses were calculated by Mr O'Beirne ("O'Beirne") as amounting to R450 000,00 consisting of the following:

(i) the fees of the experts to produce the required EIA and to compile the proper application – R300 000,00;

(ii) the probable fine that would have been imposed in terms of section 24G, R150 000,00;

(iii) total R450 000,00.

[21] After dealing with the evidence of O'Beirne, the learned regional magistrate turned to the definition of "proceeds of unlawful activities" in section 1 of POCA,

which defines these proceeds as "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".

[22] The learned regional magistrate then concluded her judgment in the following terms:

> "I have taken into consideration all facts before this court and I am satisfied that the applicant has satisfied the requirement of confiscation. The order of confiscation is therefore granted."

[23] The learned regional magistrate, in our view, did not state the grounds for coming to her conclusion so that, in entertaining what we consider to be an appeal on fact in a civil matter, we are at large to reconsider the dispute.

The notice of appeal and the grounds of appeal

[24] The grounds as to the confiscation order itself are the following, namely that the learned regional magistrate erred:

1. in finding that the appellant had derived any benefit from the commission of the offence;
2. in not finding that the appellant had not derived, received or retained, any property, service, advantage, benefit or reward, whether directly or

indirectly, in connection with or as a result of the commission of the offence as contemplated in the definition, *supra*, of "proceeds of unlawful activities" to be found in section 1 of POCA;

3. in equating ostensible savings achieved by the appellant with the proceeds of crime and/or the benefits accruing from the commission of the offence;
4. in finding that the appellant realised a benefit by commencing with the widening of the road before having obtained an environmental authorisation;
5. in finding that the appellant realised a benefit by failing to employ an environmental expert to conduct and produce an EIA before commencing with the road widening activities;
6. in finding that any benefit (if there was one, which is denied) derived by not employing an environmental expert to conduct and produce an EIA before commencing with the road widening activities was a benefit derived from the offence;
7. in finding that an application for rectification in terms of section 24G of NEMA was compulsory;
8. in finding that the appellants derived any benefit from its election not to apply for a rectification in terms of section 24G by avoiding the imposition of the administrative fine flowing from such a rectification;
9. in finding that the election not to apply for the rectification amounted to a benefit derived from the offence;
10. in failing to apply the "*Plascon-Evans* rule".

[25] As to the *quantum* of the benefit and the award made by the learned regional magistrate the following appeal grounds are advanced by the appellant, namely that the learned regional magistrate erred:

1. in considering the sum of R450 000,00 to be an appropriate amount to be paid by the appellant;
2. in finding that the proceeds of the crime and/or the benefit accruing to the appellant from the commission of the offence was R450 000,00;
3. in not taking into account relevant circumstances when determining an appropriate amount to be paid by the appellant, more particularly in failing to take into account:
   (i) the fine imposed in respect of the offence;
   (ii) the absence of any significant environmental harm;
   (iii) that no third party was prejudiced by the conduct complained of;
   (iv) that the appellant pleaded guilty;
   (v) that the appellant stopped the unlawful activity when it became aware of it;
   (vi) that the appellant applied, of its own volition, for an appropriate environmental authorisation for the road widening activities;
   (vii) that the unlawful conduct at issue would not be unlawful if committed today, in that the relevant regulation has been repealed;

(viii) that the appellant was motivated by the interests of the neighbouring Sabie community, when it committed the offence and not by any financial advantage to itself;

(ix) that the appellant is liable on vicarious grounds, in that the offence was committed without the knowledge or consent of the appellant's senior management and direction;

(x) in failing to have regard, or sufficient regard, to the evidence adduced by the appellant in its answering affidavits disputing the *quantum* of the benefits, as alleged by the respondent (as applicant in the application) and her failure to apply the *Plascon-Evans* rule relevant to application proceedings.

[26] With regard to the costs order the ground advanced was that the learned regional magistrate erred in making a punitive costs order on the attorney and client scale. The appellant argues that there were no extraordinary circumstances justifying such an award in that, for example, the appellant was not *mala fide* neither did it conduct itself recklessly, abuse the legal process or make itself guilty of any misconduct in the course of the litigation.

[27] So much for the grounds of appeal.

Is it procedurally in order to file replying affidavits?

[28] Section 18(6) of POCA read with section 21 thereof provide for a certain number of affidavits or statements that may be filed by the contesting parties. What follows is a short summary of statements provided for in this regard:

1. The Public Prosecutor may or, if so directed by the court, shall tender to the court a statement in writing under oath or affirmation by him or her or any other person in connection with any matter which is being enquired into by the court under section 18(1) or which relates to the determination of the value of a defendant's proceeds from unlawful activities. Section 21 also goes under the heading "statements relating to proceeds of unlawful activities". This statement by the prosecutor is also referred to in section 18(6)(a)(iii).

   In this case, the applicant tendered such an affidavit, in terms of section 18(6)(a)(iii) by its expert witness Sean O'Beirne. It is dated 14 September 2012. It deals exclusively with the alleged benefit derived by the appellant from saving expenses, broadly speaking, by failing to employ the services of an environmental expert to conduct and produce the required EIA, by failing to employ the services of an environmental expert to compile a proper application to be submitted before commencing with the listed activity of widening the road; and by failing to submit a compulsory application for rectification in terms of section 24G of NEMA and, in the process, avoiding the inevitable fine which would have been imposed in terms of that subsection – we consider it convenient to refer to

this as the "founding statement" and it was filed in terms of section 21(1)(a) of POCA read with section 18(6)(a)(iii) thereof.

2. The defendant may dispute the correctness of any allegation contained in the founding statement and if the defendant does so dispute the correctness of any such allegation he or she shall state the grounds on which he or she relies. We will refer to this as "the opposing affidavit". The opposing affidavit is dated 5 0ctober 2012 – this was filed in terms of section 21(2)(a) of POCA.

3. A defendant may or, if so directed by the court, shall tender to the court a statement in writing under oath or affirmation by him or her or by any other person in connection with any matter which relates to the determination of the amount which might be realised in contemplation of section 20(1) – this is in terms of section 21(3)(a). We will refer to this as "the opposing *quantum* statement" because, on a general reading of section 21(1)(a) the prosecutor is entitled, in the founding statement, to deal with matters raised in the enquiry "or which relates to the determination of the value of a defendant's proceeds of unlawful activities".

In this case, the prosecutor's witness, O'Beirne, dealt with the "merits" describing the nature of the benefits allegedly received and also with the "*quantum*" of those benefits. This, in our view, would cover the full ambit of what the prosecutor was permitted to do in terms of section 21(1)(a).

[29] In the opposing affidavit, the appellant dealt with the "merits" namely the question whether or not a benefit was received and also with the *quantum* of the alleged benefits so that, in our view, the appellant made use of the opportunity provided in section 21(2)(a) and section 21(3)(a) by covering, in a single document, the two statements provided for.

[30] There is no provision for any party to file a replying affidavit. Normally, and considering the provisions of section 13(2), *supra*, that the rules of evidence applicable in civil proceedings apply to proceedings on application for a confiscation order or a restraint order, there would, as a matter of course, be provision for the applicant to file a replying affidavit dealing with the opposing affidavit.

In our view, if the legislature, after having gone to these lengths to prescribe exactly what statements may be filed, intended to provide for replying affidavits, it would have said so.

[31] In the records, we found two orders given by the learned regional magistrate with regard to the statements to be filed and the relevant time frames. The first one is dated 15 November 2011 (record bundle 4 p362) and the latest order is dated 11 July 2012. In the first order there is clear provision for both parties to file replying affidavits "to the opposing papers filed" by 18 November 2011. In the latest order, the same provision is probably contained, although the relevant page

(volume 8 p699) is missing. During the proceedings before us, we recall counsel mentioning the fact that replying affidavits were provided for in the court order and it was even stated that the appellant's counsel at the time did not object to such an arrangement. Before us, Mr Cilliers for the appellant argued that the appellant cannot be bound by its counsel's failure to object to a procedure not covered by the Act. In our view, there is much to be said for this submission. See, generally, *S v Van Zyl* 1991 1 SA 804 (A) at 808F-810E.

The wording in the order that both parties can file replying affidavits "to the opposing papers filed" is also not understood because, understandably, the prosecutor filed no opposing papers, so that there was no opportunity for the appellant, despite the provisions in the court order, to file a replying affidavit, neither did it do so.

[32] Against this background, we are of the view that the correct, albeit somewhat strict, approach under these circumstances ought to be for the court to disregard the contents of any replying affidavits irregularly filed.

[33] Nevertheless, where the respondent filed a replying affidavit, running into some 40 pages, and did so on the strength of a court order, which, generally, would remain in force until set aside, we proceed to make a few brief comments about the replying affidavit:

1. It is replete with legal argument such as the proper interpretation of section 24G of NEMA, the type of offences covered by the POCA provisions and so on. In our view it was inappropriate for the environmental consultant deponent to offer these arguments in the replying affidavit.

2. It covers new matter, not dealt with in the founding papers, a practice which is generally not allowed to bolster the case of an applicant – see, generally, *Titty's Bar and Bottle-store v ABC Garage and others* 1974 4 SA 362 (TPD) at 368G-H.

An example is the submissions made by the deponent, in strong and somewhat derogatory terms, in an effort to discredit the appellant's deponent with reference to the question as to whether or not the alleged offence in contravention of NEMA [commencement with the grading of the road before approval had been obtained from the authorities following submission of an Environmental Impact Assessment (EIA) or a Basic Assessment Report (BAR)] had been committed before or after the EIA or the BAR had been lodged at all. This argument did not feature in the founding papers.

The chronological sequence of events appears to be the following: the appellant already obtained a quotation from the landscape architects, V&L to undertake the basic assessment for the particular project as long ago as

11 February 2008. The necessary advertisements were placed in the *Lowvelder* newspaper on 11 March 2008 (the deponent to the appellant's opposing affidavit, incorrectly, uses the date 2011, and repeatedly uses wrong dates to the appellant's own detriment). Another advertisement calling for a public meeting in the spirit of a consultative process was published in *Ulusaba News* dated 14 March 2008 (again the deponent, for no apparent reason, uses the date 2012). The Basic Assessment Report ("BAR") was submitted to the environmental authorities on 6 June 2008. 0n 18 July 2008 the consultants made further submissions in response to a letter of objection received from the single objector, the Lone Creek River Lodge, whose objections are also generously embroided upon by the respondent's deponent to the replying affidavit, having done nothing about this in the founding papers. All these dates, illustrating the chronological sequence of events, are undisputed.

Attached to the founding papers, and dated 21 January 2010, is an affidavit by Ms Robyn Pamela Luyt, one of the witnesses supporting the respondent, and employed by the Mpumalanga Provincial Government, in which she says the following:

> "I received a notice of intent to build a ramp road from York Timbers, also known as Sabie Sawmills, on 4 March 2008, and conducted an on site inspection on 2 April 2008. I was accompanied by a member of V&L Landscape Architects,

> Mr Steve Henwood. We inspected the road area, as indicated to me by Mr Steve Henwood, that York Timbers has indicated in their application, they wanted to widen. As we drove along the road I could not see any disturbances of the existing road or its adjacent surroundings." (Emphasis added.)

In the opposing affidavit, the deponent on behalf of the appellant records that the appellant's intention to submit a BAR was already filed with the authorities by the appellant's experts on 4 March 2008. Documentary evidence supports this. The deponent then goes on to say that Ms Luyt conducted her inspection on 2 April 2007. This, of course, is intended to refer to the 2008 inspection, *supra*, mentioned by Ms Luyt in her affidavit, and another example of repeated, and inexplicable mistakes made by the appellant's deponent in the opposing affidavit, particularly when it comes to dates. These repeated, silly mistakes lead to confusion and calls for extra effort on the part of the reader of the record and amounts to nothing short of slap-dash sloppy workmanship on the part of the deponent and/or his attorney who drafted the affidavit. This sort of work should be frowned upon and condemned by a court, as we do.

From the aforegoing chronology, it is clear that the appellant instructed the experts, and at least filed a notification of its intention to present a BAR to the authorities, and also advertised meetings for the public participation

process, before the grading of the road was commenced with. This is supported by the respondent's own witness, Ms Luyt. The only hint to be found in the record that the grading could have taken place earlier, was a single remark in the mitigation statement attached to the plea of guilty, quoted earlier, to the effect that the grading took place "in late 2007". This was said by the same deponent who, as we explained, appears to be a compulsive miss quoter of dates. This date flies in the face of all the other dates which we have referred to. Nevertheless, the deponent to the replying affidavit cottoned on to this date and used it as a basis for repeatedly accusing the appellant's representatives of falsehoods. Much of these allegations are argumentative and, for the reasons mentioned, ought not to be taken into serious consideration.

Moreover, the charge-sheet prepared by the respondent for the criminal court and on which the appellant pleaded guilty, alleges, in count 8, the only relevant count in respect of which there was a conviction, that "during the period 27 June 2008 to August 2008 at Portion ... farm Grootfontein ... the accused engaged in the construction of a road that is wider than 4 metres without an Environmental Authorisation issued by a competent authority" (emphasis added). These are the dates in respect of which the appellant pleaded guilty in the section 112(2) plea statement, *supra*, and which plea was accepted by the respondent (prosecutor at the

time) so that the respondent cannot now be seen to make submissions in conflict with those facts.

3. The deponent to the replying affidavit repeatedly states that the appellant's deponent is not an expert so that his evidence is "irrelevant". In our opinion, the deponent, who also deposed to the mitigation statement, which was fully quoted in this judgment, gave evidence of a factual nature, rather than opinion evidence which may, in most cases, be reserved only for experts. 0f course, courts have a discretion to accept opinion evidence by lay persons as well. See, for example, the *South African Law of Evidence*, 2nd edition by Zeffertt and Paizes at 339.

Where this witness offers the opinion that the *quantum* of the amount allowed in terms of the confiscation order is not based on any acceptable evidence, he only gives the factual evidence that the appellant only paid some R55 000,00 for the BAR which is a far cry from the estimated amount of R300 000,00 which the respondent's deponent proposed as a "saving" by the appellant for not instructing an expert to prepare the BAR or EIA, and the resultant "benefit" flowing therefrom as intended by POCA. In the same vein, the deponent attacks the estimated "saving" of R150 000,00 for not following the section 24G rectification procedure provided for in NEMA, therefore avoiding the inevitable administrative fine in this "likely" amount. The appellant's deponent merely suggests that there is no basis laid for calculating this particular amount.

In our view, this objection about the fact that the deponent of the appellant is not an expert is misplaced for the reasons mentioned.

[34] So much for the replying affidavit.

Was the appellant legally obliged to apply for rectification in terms of section 24G of NEMA?

[35] The mainly uncontested evidence of the appellant, already referred to at some length in this judgment, reveals the following: the appellant (meaning its directors and/or authorised officials, including the deponent to the mitigation statement and the opposing affidavit) were well aware of the prohibition contained in section 24F of NEMA against the commencement of a listed activity as described in section 24F(a) and the fact that it is an offence to do so, as described in section 24F(2)(a). The appellant had no intention to unlawfully contravene these provisions but every intention to comply therewith. To this end, and in order to obtain the required environmental authorisation, and to prepare the necessary BAR, the appellant employed the services of a fully qualified Environmental Assessment Practitioner ("EAP"), Mr Craig Gebhardt, a certified EAP as defined in NEMA and the holder of a B.Sc (honors) in environmental science and therefore qualified and competent to prepare the BAR. The expert's quotation was already rendered to the appellant in February 2008 and it is common cause that his fee of some R55 000,00 was duly paid, that the EAP already filed his notice of the appellant's intention to submit a BAR on 4 March 2008 (confirmed

by the respondent's witness, Ms Luyt who also exhibited the supporting documentation), published the necessary invitations to bring about a public participation exercise in two newspapers on 11 March 2008 and 14 March 2008 respectively and, indeed, submitted the BAR to the environmental authorities on 6 June 2008. The BAR is a lengthy, impressive affair, comprising at least volume 6 of the record and running into more than 90, mainly printed, pages.

According to the respondent's witness, Ms Luyt, whose evidence has already been quoted, she conducted a site inspection with one of the EAP's colleagues, Mr Henwood, on 2 April 2008, after having received the notification of the intention to build the ramp road and, on that date, the listed activity had not yet been commenced with. Ms Luyt, in fact, says in her affidavit that the "EIA application and Basic Assessment Report from York Timbers" was already received by her department on 3 June 2008.

As explained, it is common cause that the listed activity (widening and grading of the road) took place between 27 June 2008 and August 2008. This is according to the charge formulated by the respondent (or the prosecutor) and to which the appellant pleaded guilty. The plea was accepted.

[36] The following, in our view important, facts are also not disputed:

1. The listed activity was undertaken on the initiative of an over-keen forester who had only been instructed to survey and to mark out the route

of the proposed new ramp road (part of which was the existing road which had been widened by the grading). When the activities of the forester were discovered, the grading was immediately stopped. As pointed out, the grading took place after the EIA and the BAR had been lodged with the authorities. A later survey conducted by the appellant's engineer demonstrated that the actual length graded was only 430 metres and 4 metres wide, and not 800 metres as originally thought.

2. Indeed, there may be something to be said for the appellant's argument on appeal (included in one of the grounds of appeal) that the appellant cannot be held vicariously liable for the actions of the forester who commissioned the activity in clear contravention of specific instructions given to him. We express no firm view on this issue.

3. The stretch of forestry road that was scraped or graded constitutes only "the tiniest fraction of the work and expense required to construct the road. The suggestion therefore that the defendant was at any time intent upon saving money by not appointing an EAP to carry out a basic assessment is preposterous. At all times the defendant was aware that it required an environmental authorisation to build the new ramp road and did in fact apply for environmental authorisation for the construction of the said road." – Paragraph 53.7 of the opposing affidavit.

4. In the event, the authority was never granted. The project was abandoned, and the appellant carried on using the old ramp road.

5. The project of re-routing the existing ramp road was planned with the best of intentions, and aimed at protecting and benefiting the neighbouring community, as well as the environment. All this is explained fully in the mitigation statement which has been quoted.

The grading, of course, took place on the appellant's own property. The existing forestry road was within a commercial pine plantation and as such the impact of the widening on the natural environment and ecology is trivial.

We re-emphasise the uncontested evidence contained in the mitigation statement which was quoted in full earlier in the judgment. The appellant would derive no benefit from the re-routing of the existing ramp road. The distance which the trucks had to travel to the Sabie Sawmill would be greater and the construction was projected to cost approximately R1 million.

[37] Almost three years after the grading took place, in June 2011, the appellant was convicted (following its plea of guilty) of contravening the provisions of section 24F(1) and 24F(2) of NEMA for commencing the listed activity without environmental authorisation. A fine of R180 000,00, presently the subject of an appeal, was imposed.

[38] Still later, in September 2011, the prosecutor applied for a confiscation order in terms of section 18 of POCA. This was only granted in April 2013, some five years after the appellant had allegedly received a "benefit" as intended by POCA for, *inter alia*, not instructing experts to apply for and obtain environmental authority as intended by the provisions of section 24F of NEMA.

[39] Against this background, the question to consider is whether it can be said that the appellant was legally obliged to apply for rectification in terms of section 24G of NEMA.

[40] Extracts from relevant portions of section 24G read as follows:

> "(1) 0n application by a person who has committed an offence in terms of section 24F(2)(a) the Minister, Minister of Minerals and Energy or MEC concerned, as the case may be may direct the applicant to –
>
> (a) compile a report containing -
>
> (i) an assessment of the nature, extent, duration and significance of the consequences for or impacts on the environment of the activity, including the cumulative effects;
>
> (ii) a description of mitigation measures undertaken or to be undertaken in respect of the consequences for or impacts on the environment of the activity;

(iii) a description of the public participation process followed during the course of compiling the report ...

(iv) an environmental management program; and

(b) provide such other information or undertake such further studies as the Minister or MEC, as the case may be, may deem necessary.

(2) The Minister or MEC concerned must consider any reports or information submitted in terms of subsection (1) and thereafter may-

(a) direct the person to cease the activity, either wholly or in part, and to rehabilitate the environment within such time and subject to such conditions as the Minister or MEC may deem necessary; or

(b) issue an environmental authorisation to such person subject to such conditions as the Minister or MEC may deem necessary.

(2A) A person contemplated in subsection (1) must pay an administrative fine, which may not exceed R1 million and which must be determined by the competent authority, before the Minister or MEC concerned may act in terms of subsection (2)(a) or (b). (Emphasis added.)

(3) A person who fails to comply with a directive contemplated in subsection (2)(a) or who contravenes or fails to comply with the condition contemplated in subsection (2)(b) is guilty of an offence and liable on conviction to a penalty contemplated in section 24F(4)." (Our note: this contemplated penalty is a fine not exceeding R5 million or imprisonment for a period not exceeding ten years or both.)

[41] We have difficulty in upholding the submission made on behalf of the respondent that the appellant was legally obliged to apply for a section 24G rectification in these circumstances: the project had already been abandoned years earlier. There is no evidence that the appellant intended re-activating the proposed activity, namely the construction of a 2 kilometre re-routed ramp road. If it did so, it would have to obtain the necessary environmental authorisation. If it pressed on without the authority, its conduct would fall foul of the provisions of section 24F of NEMA and it would be liable to a fine, as explained, not exceeding R5 million or imprisonment not exceeding ten years, in terms of section 24F(4).

Moreover, if the appellant was obliged to move for the rectification, despite having years ago abandoned the project, it would have to incur the expenses flowing from compiling the report prescribed by the provisions of section 24G(1)(a) and (b). This despite having, years ago, incurred the expense of obtaining a comprehensive EIA and filing that document with the authorities.

Finally, it would be forced to pay the administrative fine of up to R1 million, determined by the competent authority, and, probably, not subject to an appeal.

All this, despite having, years after the event, been charged with contravening section 24F of NEMA and convicted and sentenced.

[42] On the approach contended for by the respondent, someone in the position of the appellant can therefore be forced to embark upon a rectification of an abortive procedure abandoned long ago and to incur useless expenses which can render no practical result. The person would also be forced to subject itself to double punishment for the same offence. Something which would probably be unlawful and unconstitutional – see the provisions of section 35(3)(m) of the Constitution, Act 108 of 1996.

[43] It seems to us that the correct approach would be that someone in the position of the appellant, in these particular circumstances, could not be legally obliged to apply for the section 24G rectification. The position would be different, if the appellant wanted to continue with the unlawfully commenced activity. Unlawful operations, flying in the face of the prohibitions contained in section 24F of NEMA would lead to prosecution and sentencing as provided for in that subsection.

Was a proper case made out by the respondent, on a balance of probabilities, for a confiscation order as intended by the provisions of POCA?

[44] The purpose of POCA is described as follows by the legislature in the long title just before the preamble:

> "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 ... and to provide for matters connected therewith."

[45] These are some extracts from the lengthy preamble of POCA:

> "and whereas there is a rapid growth of organised crime, money laundering and criminal gang activities nationally and internationally and since organised crime has internationally been identified as an international security threat;
>
> and whereas organised crime, money laundering and criminal gang activities infringe on the rights of the people as enshrined in the Bill of Rights;

and whereas it is the right of every person to be protected from fear, intimidation and physical harm caused by the criminal activities of violent gangs and individuals;

and whereas organised crime, money laundering and criminal gang activities, both individually and collectively, present a danger to public order and safety and economic stability, and have the potential to inflict social damage ...;

and whereas effective legislative measures are necessary to prevent and combat the financing of terrorist and related activities and to effect the preservation, seizure and forfeiture of property owned or controlled by, or on behalf of, an entity involved in terrorist and related activities;

and whereas there is a need to devote such forfeited assets and proceeds to the combatting of organised crime, money laundering and the financing of related activities;

and whereas the pervasive presence of criminal gangs in many communities is harmful to the well-being of those communities, it is necessary to criminalise participation in or promotion of criminal gang activities."

[46] Section 18 of POCA, in terms of which the confiscation order was granted, resorts under chapter 5 with the heading "proceeds of unlawful activities". This is the chapter singled out by the learned regional magistrate in her judgment.

[47] Chapter 3 of POCA is headed "offences relating to proceeds of unlawful activities" and must clearly, in our view, be linked to chapter 5.

Three offences or categories of offences "relating to proceeds of unlawful activities" are listed in sections 4, 5 and 6 (and falling under chapter 3) of POCA. They are:

section 4 – money laundering

section 5 – assisting another to benefit from proceeds of unlawful activities

section 6 – acquisition, possession or use of proceeds of unlawful activities.

In respect of each of these offences or categories of offences, the legislature makes it clear that the necessary *mens rea* or intent or blameworthy state of mind must be present on the part of the perpetrator singled out as "any person who knows or ought reasonably to have known that property is or forms part of the proceeds of unlawful activities ..."

It is trite that, also in the case of statutory offences, the *onus* is on the state to prove the existence of the necessary blameworthiness, culpability, fault, guilt or *mens rea* on the part of the perpetrator. - See, in general, Hiemstra *Suid-Afrikaanse Strafproses* 7th ed p413, Snyman *Strafreg* 6th ed p154 and *Amalgamated Beverage Industries Natal (Pty) Ltd v City Council of Durban* 1994[1] SACR 373 (AD).

[48] There are also "offences relating to racketeering activities" – chapter 2, and "offences relating to criminal gang activities" – chapter 4.

[49] For purposes of her judgment, the learned regional magistrate referred to the definition in POCA of "proceeds of unlawful activities" which 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". (Quoted earlier, but repeated for easy reference.)

[50] The word "benefit" is not defined in POCA, but "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".

[51] The only "unlawful activity" on the part of the appellant, in this case, and which "contravenes any law" must be the grading of the appellant's own existing forestry road within its own commercial pine plantation to the tune of some 430 metres by an over-zealous forester who had only been requested to survey and mark out the route of the proposed new ramp road. As soon as the grading, before the environmental authorisation had been obtained, was observed, it was stopped immediately. This evidence is undisputed. It is also undisputed that where it was

the grading of an existing road, the impact thereof on the natural environment and ecology is trivial. As explained, it is not disputed that the grading took place after the appellant had engaged the services of an expert EAP and after the EIA had been lodged with the authorities. The fact that the appellant paid the expert for these services is also undisputed.

The "unlawful activity" concerned has to be this offence of which the appellant was convicted on a plea of guilty, because this is what triggers the opportunity for the respondent to apply for a confiscation order. Section 18(1) reads, in part, as follows:

> "Whenever a defendant is convicted of an offence the court convicting the defendant may on the application of the public prosecutor, enquire into any benefit which the defendant may have derived from –
>
> (a) that offence
>
> (b) any other offence ... and
>
> (c) any criminal activity ...
>
> and, if the court finds that the defendant has so benefited, the court may, in addition to any punishment which it may impose in respect of the offence, make an order against the defendant for payment to the state of any amount it considers appropriate ..." (Emphasis added.)

From this it appears that the granting of the confiscating order by the court is not mandatory but discretionary.

[52] The proceeds of unlawful activities, in this case, must therefore be the "benefit" derived by the appellant in failing to instruct or pay an EAP to apply for the environmental authority (the undisputed facts indicate that this is not correct) and the evasion of the administrative fine which inevitably had to be imposed during the section 24G of NEMA rectification process. We have found that, in this particular case, the appellant was not legally obliged to apply for the rectification.

In this regard it is also convenient to revisit the evidence of the appellant in the opposing affidavit:

> "The 800 metre (our note: actually only about 430 metres) stretch of forestry road that was scraped or graded constitutes only the tiniest fraction of the work and expense required to construct the road. The suggestion therefore that the defendant was at any time intent upon saving money by not appointing an EAP to carry out a basic assessment is preposterous. At all times the defendant was aware that it required an environmental authorisation to build the new ramp road and did in fact apply for environmental authorisation for the construction of the said road."

[53] All this must be considered against the background of the fact that the *onus* is on the respondent to make out a case for a confiscation order. In this instance, the evidence of the appellant is, for practical purposes, undisputed. It is also

undisputed that the appellant derived no benefit whatsoever from the grading operation: the grading was done with the noble purpose of accommodating the neighbouring community and considering the environment, and the whole new ramp road would cost the appellant some R1 million.

[54] Moreover, what the appellant did in this case, cannot, in our view, resort under the ills which the legislature sought to control and eliminate when enacting POCA. This appears from the long title and extracts quoted from the preamble. The premature road grading activity also, in our view, cannot be compared to the "offences relating to proceeds of unlawful activities", *supra*, defined in chapter 3 of POCA.

Having said this, we have taken respectful note of the judgment in *National Director of Public Prosecutions v R O Cook Properties (Pty) Ltd; National Director of Public Prosecutions v 37 Gillespie Street Durban (Pty) Ltd and another; National Director of Public Prosecutions v Seevnarayan* 2004[2] SACR 208 (SCA). Where necessary, we shall refer to the three cases (all dealt with in the same judgment) as "*Cook*", "*Gillespie Street*" and "*Seevnarayan*" respectively.

Counsel for the respondent referred us to what was said at 239c-i. From these passages it appears that the learned Judge *a quo* in *Seevnarayan* also relied, as we did, on the long title (and, in our case the preamble) of the Act when finding that evasion of personal income tax (in *Seevnarayan*) could not be considered as

"organised crime" and that the Act was never intended to be applied in such situations. We take respectful note of the response to these submissions by the learned Judges of Appeal, at 239f-g:

> "We cannot agree with this construction, which radically truncates the scope of the Act. It leaves out portions of the long title, as well as the 9th paragraph of the preamble. These show that the statute is designed to reach far beyond 'organised crime, money laundering and criminal gang activities'. The Act clearly applies to cases of individual wrongdoing."

The 9th paragraph of the preamble reads as follows:

> "And whereas no person convicted of an offence should benefit from the fruits of that or any related offence, whether such offence took place before or after the commencement of this Act, legislation is necessary to provide for a civil remedy for the restraint and seizure, and confiscation of property which forms the benefits derived from such offence."

We remain of the respectful view that these words cannot be interpreted to mean that the object of the Act, what was said in the long title and what was said in the preamble, can be ignored for purposes of considering and adjudicating upon disputes arising from the provisions of the Act.

We are also of the respectful view that each case must be treated on its own merits to decide whether the ill complained of falls inside the ambit of what the Act

seeks to prevent and what the legislature had in mind when passing this legislation. At the very least, it must be proved, in this case on a balance of probabilities, that the appellant "derived, received or retained, directly or indirectly," "any property or any service, advantage, benefit or reward" as a result of the unlawful activity carried on by the person in question (from the definition of "proceeds of unlawful activities", previously quoted in full).

We have held, for the reasons mentioned, that the respondents failed to discharge the *onus* of proving that such a "benefit" was derived by the respondent.

In *Cook* and the other cases the SCA considered an appeal by the National Director of Pulic Prosecutions ("NDPP") against the refusal by the courts *a quo* to grant forfeiture orders, following upon preservation orders, as intended by the provisions of Chapter 6 of the Act. The definition in the Act of "instrumentality of an offence" meaning "any property which is concerned in the commission or suspected commission of an offence ..." applied to *Cook* (alleged use of certain premises as a brothel) and *Gillespie Street* (alleged commission of drug and prostitution offences on a certain property). In the case of *Seevnarayan* (alleged evasion of income tax and investments made under false names) the definition of "proceeds of unlawful activities" came into play with reference to the proceeds of the aforesaid investments. All three the appeals failed, with the SCA holding that the alleged conduct in the three cases did not fall inside the ambit of the relevant definitions.

[55] It has also not been proved that the appellant (in this case the forester) had the necessary *mens rea* or blameworthiness to commit an offence, let alone an offence that falls inside the ambit of chapter 3 of POCA.

[56] In her two page judgment, the learned regional magistrate paid no attention whatsoever to the undisputed evidence of the appellant, which, in our view, is of crucial importance, for reasons which should appear from this judgment. She merely dealt with the alleged "benefits" or cost savings enjoyed by the appellant, as suggested by the respondent's expert witness, and came to the following conclusion:

> "I have taken into consideration all facts before this court and I am satisfied that the applicant has satisfied the requirement of confiscation."

She gives no reasons for coming to this conclusion.

[57] In our view, there was a material misdirection on the part of the learned regional magistrate in the sense that she ostensibly ignored the evidence of the appellant (which is undisputed) and also altogether failed to deal with any important aspects of the case, barring the evidence of the respondent's expert witness.

Conclusion and order

[58] In all the circumstances, we have come to the conclusion that the appeal must be upheld.

[59] The costs should follow the result.

[60] We make the following order:

1. The appeal is upheld with costs which will include the costs of senior counsel.
2. The confiscation order is set aside.
3. The order of the learned regional magistrate is set aside and replaced with the following: "The application is dismissed with costs."

W R C PRINSLOO
JUDGE OF THE GAUTENG DIVISION, PRETORIA

A626-2013

P D MOSEAMO (Ms)
ACTING JUDGE OF THE GAUTENG DIVISION, PRETORIA

HEARD ON: 25 MARCH 2014
FOR THE APPELLANT: J G CILLIERS SC
INSTRUCTED BY: RICHARD SPOOR ATTORNEY
FOR THE RESPONDENTS: E C LABUSCHAGNE SC
ASSISTED BY S J VAN DER WALT
INSTRUCTED BY: STATE ATTORNEY