



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

CASE NO: AR 161/14

In the matter between:

THE NATIONAL DIRECTOR OF
PUBLIC PROSECUTIONS

APPELLANT

and

ISHWARLALL RAMLUTCHMAN

RESPONDENT

JUDGMENT

Date of hearing: 23 March 2015

Date of judgment: 20 April 2015

D. PILLAY J

[1] 'Benefit' is the word in s 18(1) of the Prevention of Organised Crime Act 121 of 1998 (POCA) that holds the attention of the court in this appeal as it did in *S v Shaik and Others* 2008 (2) SACR 165 (CC). As the first ever decision of the CC on ch 5 of the POCA¹ *Shaik* outlined the scheme of criminal confiscation contemplated in ch 5 of the POCA obviating the need for this court to do so.² Rejecting a narrow interpretation of the word 'benefit' in s 18(1) the CC pronounced unanimously as follows:

¹ *S v Shaik and Others* 2008 (2) SACR 165 (CC) para 50.

² *S v Shaik and Others* 2008 (2) SACR 165 (CC) paras 22- 29; 50-57; *Kockjeu v National Director of Public Prosecutions* 2013 (1) SACR 170 (ECG) paras 19-28.

‘[Section] 12(3) provides that a person will have benefited from unlawful activities if he or she has received or retained any proceeds of unlawful activities. What constitutes a benefit, therefore, is defined by reference to what constitutes “proceeds of unlawful activities”. It is not possible in the light of this definition to give a narrower meaning to the concept of benefit in s 18, for that concept is based on the definition of the “proceeds of unlawful activities”. ... “Proceeds” is broadly defined to include any property, advantage or reward derived, received or retained directly or indirectly in connection with or as a result of any unlawful activity. ... [S]ection (18(2)) expressly contemplates that a confiscation order may be made in respect of any property that falls within the broader definition, and is not limited to a net amount. The narrow interpretation of 'benefit' proposed by the appellants cannot thus fit with the clear language of s 18 and the definition of “proceeds of unlawful activities”.³

[2] Counsel for the appellant submitted that the ‘benefit’ in this case is the equivalent of the ‘proceeds of unlawful activities’, which in this case equalled the amount of the proceeds of the contract for building schools. In defending the conclusion of the learned magistrate that the appellant had proved that the respondent had benefited from fraudulent misrepresentations and corruption but not the amount of the benefit, Counsel for the respondent persisted that the benefit could not be the proceeds of the contract. At most it would be the profit after deducting the costs of construction from the contract price. As the appellant failed to discharge the onus of proving the amount of the benefit the magistrate correctly dismissed the confiscation application. On a question

³ *Shaik* para 60.

primarily of law the crux of the controversy is this: Does 'proceeds of unlawful activities' equal everything 'received'; is everything received equal to 'benefit'; and does benefit equal 'proceeds' or 'gains'?

[3] The evidence and submissions invite this court to take its cue from appellate decisions but to interpret and apply 'benefit' to circumstances different from *Shaik*; *National Director of Public Prosecutions v Rebuzzi* 2002 (1) SACR 128 (SCA); *National Director of Public Prosecutions v Gardener and Another* 2011 (1) SACR 612 (SCA); *Kockjeu v National Director of Public Prosecutions* 2013 (1) SACR 170 (ECG) but similar to *National Director of Public Prosecutions v Mtungwa* 2006 (1) SACR 122 (N).

[4] The statutory context in which 'benefit' calls for interpretation is s 18(1)(a) which provides:

'(1) 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;

...

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 the payment to the State of any amount it considers appropriate and the court may make any further orders as it may deem fit to ensure the effectiveness and fairness of that order.'

[5] Section 12(1) defines 'defendant' to mean

'a person against whom a prosecution for an offence has been instituted, irrespective of whether he or she has been convicted or not, ...'

[6] Chapter 5 is titled 'Proceeds of unlawful activities' which significantly is defined in s 1 to apply to the whole of the POCA. '[P]roceeds 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' is defined in s 1 to mean:

'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] Necessarily⁴ the breath of s 18(1) and the related definitions is designed to cater for a wide range of situations in which the 'proceeds of unlawful activities' can amount to benefits of 'unlawful activity'. In the absence of any qualification of 'conduct', 'crime' and 'any law', 'unlawful activity' is wider than 'proceeds' and 'proceeds of unlawful activities'. Aggregated in

⁴ *Shaik* para 70: 'One of the purposes of the broad definition of "proceeds of unlawful activities" is to ensure that wily criminals do not evade the purposes of the Act by a clever restructuring of their affairs.'

'proceeds of unlawful activities' no crime can escape the reach of ch 5. Offences relating to racketeering activities widen the net and deepen the seriousness of conduct constituting a 'pattern of racketeering activity', the definition of which incorporates any offence in Schedule 1 to the POCA. Schedule 1 lists some 34 offences ranging from the most serious, such as murder and rape, to less serious offences such as malicious injury to property, theft and fraud. It also includes any offence under the Prevention and Combating of Corrupt Activities Act, 12 of 2004.⁵ '[U]nlawful activity' referring to conduct 'which contravenes any law' is broader than the crimes referred to in Schedule 1.⁶ '[D]irectly or indirectly, in the Republic or elsewhere, at any time before or after the commencement of this Act' and various combinations of these terms generously sprinkled throughout the POCA dispel any likelihood of a narrow interpretation of the scope of POCA in time and space.⁷

[8] Given the breadth of the scope of application of the ch 5, how should it be tempered to ensure that it complies with the Constitution of the Republic of South Africa, 1996. Reflexively foreshadowed is the risk to the right to property in s 25 of the Constitution. In what follows it will emerge that the tools of constitutional and statutory interpretation have intrinsic constraints to enable balanced outcomes. Interpretative tools that give effect to constitutional rights and obligations involve considerably more than interpreting the text of the legislation literally. Additional tools of equity,⁸

⁵ See item 12 in Schedule 1 of POCA.

⁶ *Kockjeu v National Director of Public Prosecutions* 2013(1) SACR 170 (ECG) para 23

⁷ *Mohunram and Another v National Director of Public Prosecutions and Another (Law Review Project as Amicus Curiae)* 2007 (2) SACR 145 (CC).

⁸ *National Director of Public Prosecutions v Mtungwa* 2006 (1) SACR 122 (N) at 130B.

fairness⁹ and proportionality¹⁰ guide the court's exercise of its discretion. Equity is generally accepted as being intrinsic to the Constitution. Laws are presumed to be equitable and fair,¹¹ especially laws following upon our democracy.¹² Neither equity nor fairness enjoys an independent life outside the Constitution, in my respectful view.¹³ The Constitution epitomises equity and fairness. To achieve balance the CC has used proportionality 'because the requirement of rationality is indeed a logical part of the proportionality test'¹⁴ having its roots in the 'relation between the limitation and its purpose' in s 36 of the Constitution. Specifically s 18(1) of the POCA imposes a statutory injunction to balance 'effectiveness' with 'fairness' in any order for confiscation.

[9] Adopting a purposive approach to interpretation the court turns to the preamble of POCA. In its introductory paragraphs the preamble acknowledges the constitutional rights and obligations of the State and all its people. Acknowledging the growing threat of organised crime worldwide the preamble bars convicted and other persons from benefiting from the fruits of unlawful activities in the following paragraphs:

⁹ See for example *Laugh it off Promotions CC v SAB International (Finance) BV t/a Sabmark International (Freedom of Expression Institute as Amicus Curiae)* 2006 (1) SA 144 (CC) paras 49 and 50 and *South African Police Service v Solidarity OBO Barnard* 2014 (6) SA 123 (CC) para 98.

¹⁰ *Makwanyane* paras 104 and 105; *First National Bank v CIR*; *First National Bank v Minister of Finance* 2002 (4) SA 768 (CC) para 65; *Law Society of South Africa v Minister of Transport* 2011 2 BCLR 150 (CC) para 37 and *Barnard* para 165..

¹¹ *S v Mhlungu and Others* 1995 (3) SA 867 (CC) para 36.

¹² *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others: In Re Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others* 2001 (1) SA 545 (CC) para 43.

¹³ Rautenbach 'Constitution and Contract: the application of the Bill of Rights to contractual clauses and their enforcement' 2011 *THRHR* 510-520 at 519; See also contrasting minority opinions of Cameron J et al in *Barnard* para 98 and Van der Westhuizen J para 158.

¹⁴ *Law Society of South Africa and Others v Minister for Transport and Another* 2011 (1) SA 400 (CC) para 37.

‘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.

AND WHEREAS no person should benefit from the fruits of unlawful activities, nor is any person entitled to use property for the commission of an offence, whether such activities or offence took place before or after the commencement of this Act, legislation is necessary to provide for a civil remedy for the preservation and seizure, and forfeiture of property which is derived from unlawful activities or is concerned in the commission or suspected commission of an offence’.

[10] These paragraphs inform chapters 5 and 6 of the POCA. This application focuses only on ch 5. The jurisdictional prerequisites for invoking the confiscation of property under ch 5 are threefold:

1. A person must be convicted of an offence.¹⁵
2. That person must benefit from the fruits of that offence.¹⁶
3. That ‘benefit’ must be derived, received or retained.¹⁷

[11] In the Concise Oxford English Dictionary ‘benefit’ means ‘an advantage or profit gained from something’.¹⁸ ‘Benefit’ and ‘advantage’ (which is a synonym for ‘benefit’) are incorporated in the definition of ‘proceeds of unlawful activities’. Mathematically speaking ‘benefit’ is a subset of ‘proceeds of unlawful activities’ partially intersecting with the latter to enrich its meaning

¹⁵ Preamble; s 18(1); *Kockjeu* para 44.

¹⁶ Preamble; s 18 (1); s 12 (3).

¹⁷ Definition of ‘proceeds’ and ‘proceeds of unlawful activities’.

¹⁸ Concise Oxford English Dictionary 12th ed (2011) (my underlining).

without 'benefit' losing its own meaning which includes 'help'.¹⁹ In defining 'benefit' with reference to the definition of 'proceeds of unlawful activities' *Shaik* could not have jettisoned its ordinary meaning. From the perspective of constitutional interpretation the Constitutional Court (CC) has consistently applied a purposive approach²⁰ and shunned a black-letter law method²¹ of interpreting statutes. The variety of factual circumstances in which the ch 5 may arise for consideration would resist an inflexible approach. To straightjacket 'benefit' to mean 'proceeds of unlawful activities' only, as counsel for the appellant asks, would mean applying a literal, black-letter law interpretation to s 18(1) and its application in *Shaik*.

[12] 'Organised crime' is not defined in POCA. Positioned alongside money laundering and criminal gang activities in the preamble it suggests that only large-scale criminal operations are implicated, an inference drawn in *Mtungwa*, a case relied on by the respondent. The learned judge of this division dismissed the application, the following being one of the grounds:

'As I indicated at the outset of my discussion of the terms of the Act, the courts, in dealing with its use and application have turned, in the first instance, to the clear wording of its preamble. I do not consider that the type of offence which this respondent has apparently committed even if it was implicitly repetitious in nature, can be equated to the type of grand-scale larceny for which the Act was designed'²²

¹⁹ <http://www.thesaurus.com>.

²⁰ See for example *S v Zuma* 1995 4 BCLR 401 (CC) para 15 and *S v Makwanyane and Another* 1995 (3) SA 395 (CC) paras 9 and 10.

²¹ *Barkhuizen v Napier* 2007 (5) SA 323 (CC) para 30.

²² At 129C-D.

[13] Respectfully, one should not be quick to draw such an inference given the extensive reach of the POCA outlined above. The preamble permits 'no person' to benefit from the fruits of unlawful activity. Furthermore the definition of 'defendant' for the purposes of ch 5 does not distinguish between persons prosecuted for serious or less serious offences. *Mohunram and Another v National Director of Public Prosecutions and Another (Law Review Project as Amicus Curiae)* 2007 (4) SA 222 (CC) reinforces this interpretation thus:

'Notwithstanding this recurrent theme, the wording of POCA as a whole makes it clear that its ambit is *not* in fact limited to so-called 'organised crime offences', so that the initial impression created by the short and long titles, as well as by most of the paragraphs of the preamble, is incorrect. This is misleading and more than a little unfortunate.'²³

Mohunram also points out that:

'[t]he criminal activities of an efficient and energetic individual miscreant may well have a more extensive reach and a greater negative social impact.'²⁴

Cook Properties Observes:

'[T]he long title, as well as the ninth paragraph of the preamble... show that the statute is designed to reach far beyond "organised crime, money

²³ *Mohunram* para 25; *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) (2004 (8) BCLR 844; [2004] 2 All SA 491) para 65; *Prophet* para 33.

²⁴ *Mohunram* para 74.

laundering and criminal gang activities". The Act clearly applies to cases of individual wrongdoing.²⁵

[14] Following 5 years after *Mtungwa*, *Gardener* injects clarity into the analysis of confiscation law with its three-stage process: First, establish that the defendant has benefitted from the offence for which he has been convicted. Second, determine the value of the benefit. Third, determine the amount of the benefit recoverable from the defendant.²⁶ Inherently logical, applying this staged process avoids conflating the enquiry into whether the POCA applies with what amount of the benefit should be confiscated. The first stage is about establishing the three jurisdictional requirements identified above. If any one requirement is absent, that is the end of enquiry. The POCA would not apply and no benefit can be confiscated.

[15] Establishing whether the jurisdictional prerequisites exist is usually a factual enquiry²⁷ unless legal interpretation is required to determine the meaning of say, 'benefit', 'derived' or 'received' in the context of a particular case. Proving a conviction should pose no difficulty,²⁸ unless for instance, a debate arises as to whether the conviction relates to the offence that generated the benefit. For as long as the enquiry is purely factual, the discretion of the court is muted. If the court has to interpret the law then it may exercise its discretion to say, balance competing rights and obligations in order to achieve consistency with the Constitution or to balance effectiveness

²⁵ *National Director of Public Prosecutions v RO Cook Properties (Pty) Ltd; National Director of Public Prosecutions v 37 Gillespie Street Durban (Pty) Ltd; National Director of Public Prosecutions v Seevnarayan* 2004 (2) SACR 208 (SCA) para 65.

²⁶ *Gardener* paras 17-18.

²⁷ e.g. *Shaik* para 48.

²⁸ e.g. *Shaik* para 44.

with fairness in the context of s 18(1). Referring to the 'inherently intrusive' nature of asset forfeiture under ch 6 of POCA²⁹ in *Prophet v National Director of Public Prosecutions* 2006 (2) SACR 525 (CC) (2007 (2) BCLR 140) in para 46 the CC reminded the courts of their obligations:

'to interpret legislation such as the POCA in a manner that "promote(s) the spirit, purport and objects of the Bill of Rights", to ensure that its provisions are constitutionally justifiable, particularly in the light of the property clause enshrined in terms of s 25 of the Constitution.'

Citing *Shaik* the SCA also reminded of the potentially harsh consequences of a confiscation order, the reach of which extends even to innocent parties who may indirectly and unknowingly have benefited from the proceeds of the offence.³⁰

[16] Typically the CC has turned to proportionality as a means of arriving at balanced decisions as the following two decisions in which the deprivation of property was at issue. For the validity of a deprivation the Court held in *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) that:

' . . . there must be an appropriate relationship between means and ends, between the sacrifice the individual is asked to make and the public purpose this is intended to serve. It is one that is not limited to an enquiry into mere rationality, but is less strict than a full and exacting proportionality examination. Moreover, the requirement of such an appropriate relationship

²⁹ Distinguished below from confiscation under ch 5.

³⁰ *Gardener* para 19.

between means and ends is viewed as methodologically sound, respectful of the separation of powers between Judiciary and Legislature ... and suitably flexible to cover all situations. ' ³¹

[17] In ch 6 proceedings in *Mohunram* the CC had to balance the right not to be deprived of property arbitrarily against civil forfeiture of assets to the State. In distinguishing the use of the property for gambling without a licence from the universally condemned crime of dealing in drugs³² the CC stated:

'[T]he purpose of the proportionality enquiry is to determine whether the grant of a forfeiture order would amount to an arbitrary deprivation of property in contravention of s 25(1) of the Constitution. The interpretation of POCA (and more particularly of 'instrumentality of an offence') as reaching beyond the ambit of 'organised crime' and applying to cases of individual wrongdoing could result in situations of clearly disproportionate (and hence constitutionally unacceptable) forfeiture, and courts must always be sensitive to and on their guard against this.'³³

Furthermore, Sachs J opined:

'In each case, therefore, care needs to be taken to ensure that the purpose of deterrence that the legislation serves does not produce a disproportionate impact on the owner of the forfeited property. It is for this reason that the deterrent purpose of the legislation must be weighed against the effect on the individual owner, in light of the relevant offence. In this respect, the extent to which the forfeiture manifestly is directed

³¹ *First National Bank* para 98; See also *Mohunram* para 62.

³² *Mohunram* para 10.

³³ Para 56 (footnotes omitted).

towards preventing organised crime will be highly relevant. The disjuncture between the basic purposes of POCA and the effect on the individual concerned should never be too great.³⁴

[18] Care must be taken to avoid applying the proportionality test indiscriminately without recognising the fundamental differences between confiscation of the benefits of crime under ch 5 (which this case is about) and the forfeiture of the 'instrumentality of an offence' under ch 6. The crucial enquiry under s 18(1) is whether a defendant derived any benefit from any offence under any law. Although instruments and benefits are two sides of the coin of crime, conceptually they differ. The legislature recognises their differences in two distinct chapters.

[19] Care should also be taken when distinguishing crimes for purposes of ch 5. Applying proportionality to distinguish between serious and less serious offences for the application of ch 5 raises the spectre of challenges based on the rule of law. Everyone is equal before and under the law.³⁵ An interpretation that permits some offenders to retain the benefits of their unlawful activity whilst others are compelled by confiscation orders to relinquish their ill-gotten gains is manifestly unjust, irrational and discriminatory. It would violate the right to equality before and under the law.³⁶ Whether a case is serious or not depends on a range of facts not limited to the prevalence of the offence or the value of the benefit. From a practical

³⁴ Para 146.

³⁵ See for example *Jooste v Score Supermarket Trading (Pty) Ltd (Minister of Labour Intervening)* 1999 (2) SA 1 (CC); *Van der Walt v Metcash Trading Ltd* 2002 (4) SA 317 (CC) and Dlamini 'Equality or Justice? Section 9 of the Constitution revisited – Part II' *Journal for Juridical Science* (2002) vol 27(2) 15-32.

³⁶ *Prinsloo v Van der Linde and Another* 1997 (3) SA 1012 (CC) paras 23-41; *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC) paras 15-19 and Krüger 'Equality and Unfair Discrimination: Refining the *Harksen* Test' *SALJ* (2011) vol 128(3) 479-512.

point imposing an obligation on the appellant to distinguish between serious and less serious offences confers a discretion that will be prone to *in limine* challenges resulting in delays in the speedy recovery of the benefits of crime.

[20] The primary purpose of s 18 also constrains its scope. It is not to punish but to deprive the defendant of any benefit derived from the offence.³⁷ Although the *causa* and the jurisdictional requisites for criminal prosecutions, civil actions for damages to compensate victims of crime and applications for confiscation orders differ, consequentially and incidentally they all have some punitive and deterrent effect. Not every crime triggers all three processes. In some crimes such as drug dealing victims may not be identified; thus civil claims for damages may not be practical or foreseeable. But a confiscation order would deprive the defendant of the benefits of the crime.

[21] Importantly for the purposes of this case *Rebuzzi*³⁸ reminds as follows of a constraint on assessing the amount of the benefit:

‘The primary object of a confiscation order is not to enrich the State but rather to deprive the convicted person of ill-gotten gains. In my view it is therefore not significant that in some cases the State might end up receiving nothing. It is because the purpose of such an order is to prevent the convicted person from profiting rather than to enrich the State that the court’s enquiry in terms of s 18(1) is directed towards establishing the extent of his benefit rather than towards establishing who might have suffered loss.’

³⁷ *Shaik* paras 51 and 57.

³⁸ Para 19.

As the primary aim is to strip the convict of his profits it would be no impediment to confiscation if consequentially the state is enriched.

[22] However, the POCA operates in tandem with the criminal law and procedure and with civil claims for damages and loss by victims of crimes. Following closely upon the conclusion of the criminal trial the same judicial officer has to switch gear into civil mode to decide the confiscation application.³⁹

[23] Just as the sentence imposed by a criminal court is irrelevant to an award of civil damages arising from the commission of a crime, so too it is to an application for a confiscation order. It does not feature in determining whether a defendant has benefitted. Nor is it factored into the calculation of the amount to be confiscated.⁴⁰ Sentencing is influenced by the impact of the crime on the victim. Thus it would count as mitigation if an employer had competent services from an employee who misrepresented his qualifications and aggravation if a fraudulent tenderer constructed defective buildings. The impact of the crime on the victim is irrelevant to the computation of the benefit. Section 30(5) specifically provides for the computation of parallel claims of victims of crime for loss or damage they suffered. That such claims may arise does not suspend confiscation proceedings; it also does not give the state a preferential claim.⁴¹

[24] In *Shaik and others v S* 2007 (2) All SA 150 (SCA) at para 28 the SCA treated 'benefit' as the:

³⁹ Section 13 of POCA.

⁴⁰ *Gardener* para 23.

⁴¹ Section 31(1) of POCA; *Rebuzzi* para 17.

‘value of everything received by the defendant in connection with the crime without taking account of what the defendant had to lay out in order to bring about a particular result.’

The CC tempered the SCA’s approach by acknowledging in principle that proportionality analysis applies to determine the amount of the benefit to be confiscated as follows:

‘Section 18 requires a court to determine an appropriate amount. This exercise requires a court to determine an amount in the light of the direct relationship between the proceeds and the criminal activity concerned, as well as the nature of the criminal activity and its closeness to the purposes of the Act. The question on appeal, as I have described above, is whether the amount confiscated by the court is disturbingly inappropriate. Clearly an amount that is disturbingly inappropriate would be disproportionate and an appeal court would therefore interfere with such an order. It must be emphasised that care must be taken by an appellate court, when applying this test, not to invade the legitimate area of discretion of the court that made the original confiscation order.’⁴²

As a matter of legal interpretation of the Constitution and the POCA, *Shaik* settles the approach and meaning of ‘benefit’. Preceding *Shaik* and enjoying endorsement from the CC *Rebuzzi* declared the ‘purpose of such an order is to prevent the convicted person from profiting...’⁴³ Following on *Shaik*, *Gardiner* at para 23 clarified:

⁴² *Shaik* para 79.

⁴³ Para 19.

‘The main purpose of a confiscation order is to deprive offenders from deriving any benefit from their ill-gotten gains.’

[25] At first blush it would seem that calculating the amount of a benefit would be a straightforward factual enquiry followed by an accounting exercise leaving little scope for the exercise of any discretion. The difficulties arise when the benefit is say, partially legitimate or the evidence of the amount of the benefit is imprecise or unavailable. When a court exercises its discretion in such circumstances its determination of the amount of the benefit must be grounded in fact or law. Unsubstantiated estimates driven by an inclination to punish or even empathise with the defendant would be injudicious. Equally so it would be to apply proportionality to arrive at estimates without a solid factual or legal substratum. The onus to establish the factual matrix, the accounting and the basis for the exercise of any discretion rests on the applicant for confiscation.⁴⁴

[26] ‘Benefit’ must be associated with the defendant’s gain or profit. In *Rebuzzi, Shaik and Gardiner* the facts were such that all the proceeds direct from the unlawful activities and indirectly as returns on the proceeds as investments amount to gains for the defendants. In *Rebuzzi*⁴⁵ the defendant stole the proceeds of cash sales from his employer. In *Shaik* the defendant bribed a government official to acquire shares in a company. In *Gardiner* the defendants deliberately withheld disclosure of their interest in a company, the shares of which they acquired for their international company, to the board of their local company. The payments the two directors received in two offshore

⁴⁴ See for example *National Director of Public Prosecutions v Rautenbach and Others* 2005 (4) SA 603 (SCA) para 66.

⁴⁵ *Rebuzzi* para 9-10.

trusts were confiscated.⁴⁶ Additionally, in *Shaik*⁴⁷ and *Gardiner* the returns on the ill-gotten shares and payments were also confiscated. In *Shaik* the CC declared both the shares and their dividends to be benefits received as a result of a bribe. Both were direct proceeds of unlawful activities, predictably unmitigated by the expense the defendant incurred in paying the bribe. In *Gardiner* the SCA ordered the directors to pay the updated values of the payments they received, with interest from the date of the confiscation order. As will emerge from the facts below, the proceeds the respondent received were not exclusively a profit or gain.

[27] On the facts of this case the respondent was charged with twenty-one counts of fraud under the Criminal Procedure Act 51 of 1977 (CPA) read with section 51 of the Criminal Law Amendment Act 105 of 1997 and one count of corruption in terms of the Prevention and Combating of Corrupt Activities Act 12 of 2004 for giving a benefit. The defendant created false documents that he submitted to the Construction Industry Development Board (CIDB) to support an application for a 6GB Grade by the CIDB. The defendant was not entitled to such grading. Thus he fraudulently misrepresented the status of his business AC Industrials Sales and Service that he registered with the CIDB. This resulted in him and his business being awarded tenders based on fraudulent documentation and information submitted to CIDB.

[28] In respect of the fraud counts the defendant pleaded guilty and was sentenced to a fine of R500 000 or ten years imprisonment and a further five years imprisonment being wholly suspended for five years on condition that

⁴⁶ *Gardiner* para 5-9.

⁴⁷ *Shaik* para 62.

he was not convicted of fraud committed during the period of suspension. In respect of the corruption count, he was sentenced to five years imprisonment without the option of a fine wholly suspended for five years on condition that he was not convicted of corruption committed during the period of suspension.⁴⁸

[29] In the confiscation application the learned magistrate found that the respondent had benefited from the crimes. As for the amount, the appellant pitched an all or nothing battle for the full amount of the contract price. The magistrate rejected the claim reasoning that the benefit was the profit. Exercising her discretion she searched unsuccessfully for the amount of the profit. Although it became common cause that the profit was less than 10% of the contract price, the appellant had failed to establish where in the spectrum of 0 to 10% rested the amount of the benefit. The auditor who deposed to the affidavit for the appellant was aware that better evidence regarding the profit was required. Counsel for the appellant in the magistrates' court conceded that the appellant had not shown exactly what the profits were. The appellant had the full force of the law to obtain audited financial records, the magistrate noted. Consequently she found that the appellant had failed to discharge the onus.

[30] The facts in *Mtungwa* were similar. Mr Mtungwa successfully applied for employment with the Department of Transport as a Provincial Inspector at the Road Traffic Inspectorate, Ixopo. He misrepresented that he had a matriculation certificate. All he had was a standard 8 certificate that was the prerequisite for his appointment. From 1992 to about February 2005 he

⁴⁸ Supplementary Volume 1 Page 727.

rendered exemplary services and was steadily promoted. In February 2005 he faced a disciplinary enquiry for submitting a false matriculation certificate. He was demoted to senior provincial inspector. The appellant prosecuted him. It applied in terms of s 18 of POCA to have assets confiscated to the value of R1.8 million being the equivalent of eleven years earnings. The court found no evidence to establish the value of R1.8 million. On the facts of that case the learned Judge described the confiscation order as ‘nothing short of ludicrous’ and ‘reckless’.⁴⁹

[31] On the material facts I agree *Mtungwa* is foursquare with the facts in this case. The difference that Mr Mtungwa met the qualification requirements for the job when he was first employed does not detract from the fact that he misrepresented his qualifications. Proving that he benefitted unlawfully in those circumstances was more difficult. It would have depended on whether his fraudulent misrepresentation influenced his initial appointment. Benefits from his subsequent elevation that rested on his fraudulent misrepresentation would be from his unlawful activity. Confiscating the whole amount of his salary when the state benefited from his services would have been disproportional and a failure to balance effectiveness with fairness as required in s 18(1).

[32] In view of my analysis of the application of POCA to all offences I respectfully disagree with the remark of the learned judge in *Mtungwa* that the POCA applied to large-scale larceny. Neither party contested the application of POCA to the circumstances in this case. Counsel for the appellant also did not dispute the distinction drawn in *Mtungwa* between ‘large-scale larceny’

⁴⁹ At 130I.

and less serious crimes. This observation emerged in the course of writing the judgment.

[33] Since *Shaik*, *Gardener* and *Rebuzzi* the law on the confiscation of the benefits of crime has been substantially settled. What a benefit is and how to calculate what has to be confiscated were explained in these appellate decisions. Surprisingly therefore the appellant persisted with an interpretation manifestly at odds with these authorities. The appellant sought to persuade the trial court as it does this court that ‘benefit’ means the same as ‘proceeds of unlawful activities’, which in this case was the entire proceeds of the contract. Reasoning in reverse, the contract was the consequence of the crime; depriving the defendant of the proceeds of the contract would eliminate the benefit. With respect, the reasoning is flawed, the approach mechanical for all the reasons advanced above and more. On a purely factual and common sense approach the entire amount received as the proceeds of unlawful activities cannot be a benefit if it is not exclusively a gain or profit. The cost of construction component of the proceeds received cannot rationally be equal to a gain or benefit. To treat it as such and order its confiscation would result in the state unjustly enriching itself at the expense of the respondent. It would be disproportionate and an imbalance between effectiveness and fairness. Furthermore, it would amount to the respondent paying more than the amount by which he benefited which is prohibited under s 18(2)(a). Similarly to *Mtungwa* the appellant failed to prove the value of the benefit the respondent received in this case.

[34] The appeal is dismissed with costs including the costs of two counsel.

I agree.

P Bezuidenhout AJ

It is so ordered.

D Pillay J

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