REPORTABLE

Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA
CAPE OF GOOD HOPE PROVINCIAL DIVISION

CASE NO: 67 / 2005

In the matter between:

THE STATE

versus

SELWYN WINSTON DE VRIES	Accused number 1
VIRGIL LENNITH DE VRIES	Accused number 2
JULIAN MICHAEL VAN HEERDEN	Accused number 3
VERNON NOEL VICTOR	Accused number 4
ALEX ANNA	Accused number 5
GARY WILLIAMS	Accused number 6
LLEWELLYN SMITH	Accused number 7
FRANCIS JAMES NGARINOMA	Accused number 8
EDWARD MOAGI	Accused number 9
DARRYL PITT	Accused number 10
ACHMAT MATHER	Accused number 11

RULING DELIVERED ON 18 FEBRUARY 2008

BOZALEK, J:

[1] The eleven accused in this matter are standing trial before this court on 25 charges. These include contraventions of the Prevention of Organised Crime Act, 21 of 1998 ("POCA"), various common law offences as well as contraventions of the Firearms Control Act, 60 of 2000. The trial commenced on 15 August 2005 and has run for approximately 137 court days. Shortly before the trial was ready to re-commence on 15 October

2007, after a term's adjournment, accused eleven gave notice of an application to declare invalid and of no force and effect the authorisation issued by the National Director of Public Prosecutions (the "NDPP") dated 10 August 2005 purporting to authorise charges against him in terms of s 2(4) of POCA. Accused eleven sought, furthermore, an order declaring the charges brought against him to have been invalidly instituted and set aside. Similar applications were then brought on behalf of the remaining accused.

[2] By this stage of the trial the State had long completed its case and all of the accused had closed their case save for accused eleven. He had earlier closed his case but had a further opportunity to lead evidence following the State's successful application to re-open its case against him and pursuant to which it led certain evidence regarding aerial photography of the accused's business premises.

[3] Given the wide scope of accused eleven's application and the short notice to the State, together with intimations from all of the other accused that they intended to bring similar applications, all the accused were afforded an opportunity to file papers setting out the nature of the applications and the relief which they sought. To the extent that they might wish to rely on facts which were outside of the record they were also afforded an

opportunity to file affidavits in support of the applications. Similarly the State was afforded an opportunity to file opposing affidavits. After an adjournment the applications were argued over a period of three days. Mr. Uijs, SC, together with Mr. Spannenberg, appeared for accused eleven whilst Mr. Webster and Ms. Booysen appeared on behalf of the State. The balance of the accused retained their existing legal counsel.

[4] By the time the matter was argued accused eleven had widened his challenge to include the directive issued in terms of s 111 of the Criminal Procedure Act, 51 of 1977 ("the Code") in terms of which the prosecution against the accused had been centralized in this court. Accused eleven sought an order setting aside that directive as being *ultra vires* and invalid. Accused one to ten filed similar applications seeking the same declarations as accused eleven in respect of the POCA authorization and the centralization directive and orders that, in effect, all the counts brought against them "be declared to have been invalidly instituted and be set aside".

[5] During the course of argument counsel for the accused did not touch on the implications of the relief sought but, presumably, if granted this trial would to all intents and purposes be at an end.

[6] All of the accused filed affidavits. In the cases of accused one to ten no facts were contained in such affidavits, merely legal argument and submissions. In accused eleven's case a few factual averments were made, none of which were relevant to the issues.

[7] The opposing affidavits filed by the State were, potentially at least, of more assistance in the determination of the questions facing the Court. The main opposing affidavit was furnished by Ms. Booysen, counsel for the State throughout this trial. She described the process involved in obtaining the s 2(4) POCA authorization and the centralization directive (hereinafter referred to respectively as "the authorization" and "the directive") in which process she played a central role. Confirmatory affidavits were filed by other persons involved in the process of issuing the documents namely the NDPP, Mr. Vusumzi Pikoli, and a Deputy NDPP, Mr. Jan Henning SC. Attached as an annexure to the affidavit was a portion of the transcript of these proceedings dealing with the handing up to Court of the two documents on 15 August 2005.

[8] That transcript revealed that the matter first came before Court on 1 August 2005 when the State requested a postponement of two weeks because it did not yet have permission from the NDPP to institute a prosecution in terms of POCA and nor did it have a s 111 centralization

directive. On resumption on 15 August 2005 the prosecutor handed up both the authorization and the directive. The transcript records that all of the accused had enjoyed an opportunity to make submissions to the office of the NDPP regarding the proposed centralization of the charges and prosecution in the Cape Town High Court. The DNDPP apparently refused to prosecute the then accused 11, a Mr. Denzil Boyles, with the result that the State withdrew charges against him. The then accused twelve, Mr. A Mather, became accused eleven following the withdrawal of charges against Mr. Denzil Boyles. No objections were made by counsel on behalf of any accused upon these two documents being handed up and made exhibits of court. This followed an enquiry specifically directed to them by the Court in this regard.

[9] The POCA authorization reads as follows:

> ***"I, VUSUMZI PATRICK PIKOLI, National Director of Public Prosecutions of South Africa, do hereby, in terms of section 2(4), read with sections 1 and 2 of the Prevention of Organised Crime Act, No 121 of 1998, authorize the institution of prosecution in respect of contraventions of sections 2(1)(e) of the Prevention of Organised Crime Act, No 121 of 1998, against the above named accused. I also authorize the institution of prosecution in respect of contraventions of sections 2(1)(f) of the Prevention of Organised Crime Act, No 121 of 1998, against accused numbers 1, 2 and 11 as mentioned above."***

[10] The introduction to the s 111 directive reads as follows:

> ***"Whereas I, JAN SAREL MARTINUS HENNING SC, Deputy National Director of Public Prosecutions, deem it in the interests of the administration of justice that the offences***

of…"

Thereafter follows a listing of the 25 charges preferred against some or all of the accused. The factual details of the charges are not given, only a short description and in each case details of which accused was charged, as for example:

> "Robbery with aggravating circumstances as intended in s 1 of the Criminal Procedure Act, Act 51 of 1977 (Accused numbers 1, 2, 3, 4, 5, 8, 9 and 11)".

[11] After the listing of the charges the certificate continues:

> ***"allegedly committed by***
>
> 1. ***Selwyn Winston de Vries***
> 2. ***Virgil Lennith de Vries***
> 3. ***Julian Michael van Heerden***
> 4. ***Vernon Noel Victor***
> 5. ***Alex Anna***
> 6. ***Gary Williams***
> 7. ***Llewellyn Smith***
> 8. ***Francis James Ngarinoma***
> 9. ***Edward Moagi***
> 10. ***Darryl Pitt, and***
> 11. ***Achmat Mather***
>
> ***at or near KINKELBOS in the district of PORT ELIZABETH within the area of jurisdiction of the Director of Public Prosecutions of the Eastern Cape Provincial Division of the High Court, and***
>
> ***at or near ENNERDALE in the district of VEREENIGING within the area of jurisdiction of the Director of Public Prosecutions of the Transvaal Provincial Division of the High Court, and***
>
> ***at or near LENASIA in the district of SOWETO within the area of jurisdiction of the Director of Public Prosecutions of the Witwatersrand Provincial Division of the High Court,***
>
> ***be tried within the area of jurisdiction of the Director of Public Prosecutions of the Cape Provincial Division of the High Court,***
>
> ***I HEREBY DIRECT that the criminal proceedings against said persons in respect of the said offences, be commenced in the area of jurisdiction of the Director of Public Prosecutions of the Cape Provincial Division of the High Court of South Africa."***

[12] The full charge sheet and evidence led at the trial revealed that two of the counts of robbery (counts 15 and 18) and two counts of kidnapping (counts 16 and 17) were alleged to have taken place at Kinkelbos in the district of Port Elizabeth. A further kidnapping, count 19, is alleged to have commenced near Kinkelbos and continued into Gauteng. Furthermore, the attempted murder charge, count 20, as well as related contraventions of the Firearms Control Act (counts 21 and 22) are alleged to have taken place *inter alia* in the district of Vereeniging. Counts 23 to 25, being contraventions of s 4 of POCA, and referred to as "the money laundering counts", were alleged to have taken place at or near Lenasia in the district of Soweto.

[13] The POCA charges comprised counts 1, 2 and 23 to 25. Counts 1 and 2 were respectively contraventions of ss 2(1)(f) and 2(1)(e) of POCA, namely, managing an enterprise conducted through a pattern of racketeering activities and conducting an enterprise through a pattern of racketeering activities.

[14] All of the accused were charged with conducting such an enterprise whilst accused one, two and eleven were charged with managing the enterprise. Counts 1 and 2 alleged *inter alia* that the "pattern of racketeering activity"

relied on by the State was as set out in annexure “A”. Annexure “A” sets out the criminal acts alleged in counts 3 to 25 i.e. all the counts save the two main POCA charges of managing or conducting an enterprise through a pattern of racketeering activities. The money laundering charges, counts 23 to 25, were raised against only accused numbers one, two and eleven.

[15] Counsel for the accused were far from clear as to the nature of the application they were making and pursuant to which they sought the relief referred to above. Their approaches varied and were inconsistent. At one stage it was contended that the court was dealing with the determination of a special plea raised in terms of s 106(1)(f) of the Code to the effect that the court had no jurisdiction to try the offences. Mr. Banderker, on behalf of accused number two, argued the matter as if this Court was engaged in a civil review of administrative acts performed by the NDPP and the DNDPP in issuing the authorization and directive. Reliance was also placed on the provisions of s 173 of the Constitution as empowering the court, through its inherent power to protect and regulate its own process, to deal with the application on a *sui generis* basis. Finally, it was also contended that the court was, as far as accused eleven was concerned, seized with an application for discharge at the end of the State’s case in terms of s 174 of the Criminal Procedure Act notwithstanding that this stage of the proceedings had long passed.

[16] In effect all of the applicants are asking this Court to consider not the merits of the evidence adduced by the State and the accused, but to rule on technical points. Should the challenges prove successful the Court is being asked to disregard all of the evidence that has been led since the inception of the trial on those counts in respect of which the relief is sought. In this sense the court is being asked to review the regularity of its own proceedings. This is a power which this court does not have and cannot arrogate to itself. Under the common law the High Courts have inherent power to review the decisions or proceedings of quasi-judicial bodies and it also has review powers in respect of lower courts, regulated by statute. In addition there is a general power of review by the High Court which may be involved where none of the other procedures are appropriate. None of these powers are exercised by the High Court in or through original criminal proceedings such as the present matter and these review powers do not extend to any power to review its own proceedings.

[17] Section 35(3)(o) of the Constitution, Act 108 of 1996, gives every accused person the right of appeal to, or review by, a higher court. The latter right is embodied, principally, in s 317 of the Code which makes provision for a special entry of irregularity or illegality as the basis for an appeal. It is

therefore a form of review although not so called. To found a special entry the irregularity must have been of such a nature as to have breached the accused's right to a fair trial.

[18] In my view the only possible remedy available to the accused seeking at this late stage to challenge the validity of the authorization and directive which were handed up, without objection on the first day of trial, is to seek a special entry of irregularity or illegality in terms of s 317 of the Code. Such an application, if successful, would then be determined by a court of appeal which alone has the power to determine whether any such alleged irregularity or illegality in the proceedings is of such a nature that it resulted in a failure of justice. See *S v Alexander and Others* (1) 1965 (2) SA 796 (A) 809 C – D and *S v Mushimba en Andere* 1977 (2) SA 829 (A) 844 H.

[19] Had there been an immediate challenge to either of the authorization or the directive the State would then have enjoyed an opportunity to reconsider them and, in the event it saw fit, to either tender fresh, amended or expanded certificates or to tender evidence or argument relating to their validity. This court would then have been in a position to have ruled on the validity of the certificates before any evidence was heard. Given, however, the eleventh hour at which the challenges were

made, any ruling on the certificates would in my view amount to this court impermissibly reviewing its own proceedings.

[20] It is significant moreover that the challenges to the certificates appear to have arisen in the following manner. Some time in October 2007 Nicholson J and Ntshangase J gave judgment in certain review proceedings in the Natal Provincial Division in the case of *Moodley and Others v The National Director of Public Prosecutions and Others* (Case number AR 189 / 2007). The matter involved a review brought by the applicants against the decision of a regional magistrate refusing an application by the applicants, accused in a regional court trial, to declare certain charges brought against them unlawful and setting them aside. That application was in turn founded upon an attack on the authorization of the NDPP in terms of s 2(4) of POCA sanctioning certain charges under that Act. It appears that the basis of the challenge raised by the applicants in that matter was the fact that when the charge sheet was first handed to them authorization for the charges had not been given by the NDPP in terms of s 2(4). The other main point raised in the review was that the authorization had not been granted before the applicants first appeared in court in December 2003. In other words the challenge to the certificate centred around the timing and obtaining of the authorization. During argument, however, the court *mero motu* raised the question of the form

and adequacy of the authorization the terms of which were very similar to those *in casu*. It found, ultimately, that the authorization terms were too broad and lacked the necessary specificity required. The Court ruled, therefore that the authorization was invalid and of no force and effect. Certain of the charges brought against the applicants were declared to have been invalidly instituted and set aside. I should add that on 9 November 2007 Nicholson J granted the State leave to appeal to the SCA against the whole judgment and the whole order notwithstanding that the applicants abandoned that part of the order made by the court declaring the NDPP's authorization in terms of s 2(4) of POCA to be invalid and of no force and effect.

[21] Quite apart from the statement in accused eleven's founding affidavit as to how he came to hear of the decision in Moodley's case, the timing of the challenge to the POCA authorization in the present matter, indicates clearly that it was a response to discovering that judgment. It did not arise out of any longstanding concern that the

s 2(4) authorization may not have been valid. As far as the attack on the s 111 centralization directive is concerned, no explanation is furnished by accused eleven or any other accused for that matter as to why the challenge was not made when the certificate was handed into Court. It would appear that, once a decision was taken to challenge the POCA

authorization, the directive was also scrutinised and found wanting.

[22] Assuming the Moodley judgment to be correct, I consider that it cannot be directly applied to the present matter for a number of reasons. In the first place the challenge to the validity of the authorization in Moodley took place prior to the commencement of the trial. It appears that the accused had not pleaded and no evidence had been led. The judgment in Moodley was, moreover, given in review proceedings instituted following the refusal of a regional court magistrate to declare the decision of the NDPP invalid. These distinctions reinforce the conclusion, outlined above, that, assuming there to be some merit in the attack on the s 2(4) authorization, that challenge can, at this late stage of the proceedings, be made only by way of an application for a special entry to a higher court and cannot be determined by this court. For these reasons alone the various applications brought by the accused must, in my view, fail.

[23] It may be, however, that I am incorrect in this conclusion and there may also be other reasons why this Court should express its views on the validity of a challenge to the s 2(4) authorization and the directive. In these circumstances I propose to do so although I should not be understood as prejudging any application in terms of s 317 for a special entry. No application for any such entry has yet been made.

[24] The underlying rationale for the order made in Moodley's case appears to be that the wideness of the authorization, given its failure to specify in the body thereof the particulars of the charges being authorized under s 2(4) of POCA, could lead to abuse. In this regard the court noted that the authorization could be read as covering any act or omission of the applicants prior to the date of the notice and did not even expressly exclude offences committed after the date of issue. It appears to me, however, with respect, that the Court in Moodley placed insufficient reliance on the role of the charge sheet, that being the document with which the authorization must be read. The sequence of events in the present case, and no doubt in the Moodley case, is that the handing up of the authorization precedes the putting of the indictment to the accused. That indictment would be received by the accused earlier and would reflect the particulars of the charges. Should the charges be incongruent with the terms of the authorisation either may be challenged.

[25] Furthermore, at least in the present case, the terms of the authorisation by no means amount, in my view, to a "blank cheque". Firstly, the authorization specifies the particular case or prosecution by setting out the names of the eleven accused in the present matter and the sequence in which they are charged. The NDPP then specifies that he is authorizing

the institution of a prosecution in terms of s 2(1)(e) against all of the accused. He adds that he authorizes a prosecution in respect of s 2(1)(f) of POCA against three of the accused and names them by reference to their number as accused. It will be noted, furthermore, that the citation and numbering of the accused in the authorization coincides exactly with the particulars and numbering of the accused as they are cited in the indictment. The indictment reflects that, just as the authorisation reads, accused numbers one, two and eleven are charged with contravening s 2(1)(f) of POCA and accused numbers one to eleven are charged with contravening s 2(1)(e) thereof. The inescapable conclusion is that the NDPP, in deciding whether to grant the authorization under s 2(4) of POCA, considered the matter in relation, at the least, to the indictment or a draft indictment prepared by the State and the authorization is constrained thereby. This procedure and conclusion renders the authorization's analogy to a "blank cheque" somewhat exaggerated.

[26] If there were any doubt regarding this procedure, the State's opposing affidavits not only confirms its outlines but makes it clear that the request for authorization for a POCA prosecution was an even more rigorous process. The request was forwarded to the NDPP under cover of a letter summarising the form and content of the charge sheet, setting out a detailed background to the charges and summarising the evidence.

[27] The NDPP himself confirms by way of his confirmatory affidavit that it was this information to which he applied his mind prior to granting the authorization in terms of s 2(4) of POCA. Because they have no direct knowledge of the process and because they did not challenge the issue of the authority timeously, the accused in this matter are unable to gainsay that this was the procedure followed by the State and the NDPP. Counsel for some of the accused then argued that if the NDPP had, by his own account, not read the entire docket he could not have taken a valid or informed decision on whether to authorise changes under POCA. In my view to require the NDPP to read the contents of an entire docket before making a decision whether to authorize charges under POCA is both unnecessary and impractical. In the present case and no doubt, in many other similar cases, reading the entire docket would have been a hugely time-consuming exercise. It has been held, albeit in a different context, that in considering the adequacy of the material available to an executive decision-maker in arriving at his/her decision, the Court has to adopt a realistic and pragmatic approach. In *Robinson v Minister of Justice and Constitutional Development* 2006 (6) SA 214 Davis J, Moosa J concurring, after reviewing the authorities at some length, stated as follows at p 225 [H] – [J]:

> "A balance needs to be struck between the interests of the affected party

> and the operational requirements of the State which is obliged, in terms of the Constitution, to play an active role in the development of the country. The demand that decision-makers act in the same fashion as an appellate tribunal would be to place an excessive burden on the Executive arm of the State. It could overwhelm the capacity of the Executive to perform its mandated functions. In short, a measure of proportionality must be adopted in the evaluation of the interests of the affected party and the burdens placed on the decision-maker to arrive at a reasonable decision."

[28] In my view these remarks apply equally to the situation in which the NDPP finds himself in considering requests for POCA authorizations. In reading a letter summarizing the form and content of the charge sheet, setting out a detailed background to the charges and summarising the evidence, the NDPP followed reasonable procedures and methods in arriving at his decision.

[29] It is with some hesitation that I rely on the affidavits filed by the State and I only do so on two assumptions. The first is that I am incorrect in holding that the challenge to the authorization cannot, at this stage, be determined by this court and must, at best for the applicants, be the subject of a special entry. The second assumption is that it is not already clear that the authorization must be read with the full indictment in which event there are clear and definite limits to the reach of the authorization. Be that as it may, had the challenge been brought timeously, it appears to me that one of the avenues open to the State may well have been to place an affidavit before the court in which the NDPP described the process whereby he came to

issue the authorization.

[30] In the recent matter of *NDPP and Others v Zuma and Others* [2007] SCA 137 (RSA), the SCA was called upon to deal with the validity of warrants relating to search and seizure. In the majority judgment, at page 73, Nugent JA stated as follows:

> ***"We are concerned with warrants that are issued under statutory powers. It is the statute that must dictate what is required for a warrant to be valid and not the warrant that must dictate to the statute. Whether or not a warrant is defective depends upon whether or not it meets the requirements of the statute and that is in turn a matter for construction of the statute. It would be quite wrong for the courts to devise what they consider to be a satisfactory form of warrant and then to test the validity of a particular warrant against that self-devised template."***

[31] In the court *a quo* it had been found that the failure to set out the offences under investigation in the warrant in question meant that the scope of authority and terms of the warrant were vague. At paragraph 94 Nugent JA stated:

> "The learned judge said that the failure to specify what was under investigation meant that the terms of the warrant were vague. I do not think that is correct. Merely because one needs to look outside a written instrument to establish what it relates to in concrete terms does not mean that instrument is vague. As pointed out by Watermeyer CJ in Rottcher's Sawmills 1948 (1) SA 983 (A) 990 – 991 (in relation to a written contract but it applies as much to the warrant) it is always necessary, in one way or another, to look outside a written instrument to translate the "abstraction" that it expresses to the "concrete thing in a material world. If the outside source that must be looked to for its interpretation establishes with certainty what the instrument means then the instrument is not vague at all.".

[32] In my opinion the views of the court as expressed above are equally applicable to the question of the validity of the authorization in the present matter. In fact those views apply with even greater force to the present situation. In the *Zuma* matter the court was concerned with the validity of a search warrant, the first intimation of which for the recipient thereof would be when it was presented to him/her as authority for an imminent search. The recipient would therefore not be able, in the ordinary course of events, to test the scope of warrant against any other document available to him/her. Not so in the case of the accused. Upon being presented with the NDPP's authorization they could immediately compare it to the indictment served upon them or, at the very least, could do so prior to pleading to the charges contained in the indictment. Any such comparison would immediately alert them to any possible over-straying of the boundaries of the authorization by the NDPP or, for that matter, to any vagueness in its terms.

[33] This brings me to the provisions of s 2(4) of POCA. That section simply requires that racketeering charges in terms of s 2(1) of POCA be authorised in writing by the NDPP. It does not describe the form which such authorisation should take. In my view the authorisation issued by the NDPP in the present matter complies with s 2(4). It identifies the persons who are to be charged and further specifically identifies with which

offences in terms of s 2(1) they are to be charged. It is not the purpose of the authorisation, in my view, to detail the nature and extent of the prosecution; the charge sheet or indictment serves that purpose.

[34] For these reasons I consider that, irrespective of the timing of the challenge to the authorization of the NDPP in terms of s 2(4), it has no merit. In my view this conclusion can be reached without any regard to the evidentiary material placed before the court on behalf of the State relating to the process which the NDPP followed in issuing the authorization. If regard is had to that material, however, the matter is placed beyond any doubt.

[35] Various other criticisms were raised by the accuseds' counsel which reflect on the validity of the POCA authorization but they concern its timing in relation to the centralization directive. I propose to deal with those aspects when I consider the challenge to the centralization directive.

[36] The terms of the directive have been set out above. The main complaints against the directive are set out in paras 39 – 43 of accused eleven's founding affidavit. These are that the directive is *ultra vires* and invalid in that it precedes the POCA authorization by two days. It is further alleged that the DNDPP failed to apply his mind when issuing the directive in that

it did not state where the offences which were to be centralised were committed; further, that an accused twelve was to be prosecuted on three counts of contravening s 4 of POCA whilst only eleven accused were listed in the directive. In addition, it was contended, the directive stipulated that accused number eleven was to be prosecuted on certain charges whereas a proper reading of the docket would have shown that no evidence existed against him on most of these charges and on which, ultimately, he was not indicted. Accused eleven also complained that he was indicted for contraventions of s 5 and 6 of POCA, this being a reference to the alternative charges on counts 23 to 25, whereas the centralisation directive did not authorize any such prosecution.

[37] As far as the other accused are concerned their main complaint is similarly that the directive is *ultra vires* in that it was issued prior to the POCA authorization. A further point raised in argument by the accused's counsel, although not anticipated in their affidavits, is that the DNDPP did not have the authority to issue the centralisation directive. It was contended that, on a proper interpretation of the relevant statutory provisions, namely s 111 of the Code, s 179(1)(a) of the Constitution and s 22(3) of the National Prosecuting Authority Act, 32 of 1998, only the NDPP could have issued the directive or, at best for the State, the DNDPP but subject to proof that he was authorised in writing to exercise such power. The argument

continues to the effect that the State, despite an opportunity to do so, had failed to prove any such authority with the result that it had failed to prove the directive's validity.

[38] Before dealing with these arguments it is necessary to set out the relevant statutory prescriptions. S 111 of the Code, insofar as it is relevant, reads as follows:

> ***"Minister may remove trial to jurisdiction of another attorney-general:***
> ***1 (a) The direction of the National Director of Public Prosecutions, contemplated in s 179(1)(a) of the Constitution of the Republic of South Africa, 1996 shall state the name of the accused, the relevant offence, the place at which (if known) in the Director in whose area of jurisdiction the relevant investigation and criminal proceedings shall be conducted and commence.***
> ***(b) A copy of the direction shall be served on the accused and the original shall, save as provided in subsection 3 be handed in at the court in which the proceedings are to commence.***
> ***(2) The court in which the proceedings commence shall have jurisdiction to act with regard to the offence in question as if the offence had been committed within the area of jurisdiction of such court.***
> ***(3) …."***

It will be noted, firstly, that the heading of the section is incongruent with its content. Secondly, the apparent purpose of the section, is not clearly spelt out namely, to furnish a court with jurisdiction over offences where, in the ordinary course, it does not enjoy such jurisdiction by reason that they were allegedly committed within the jurisdiction of another court.

[39] The reasons for these anomalies appears to lie in the history of the section which was amended by s 60 of Act 26 of 1987 and by Act 32 of

1998. In its original form the section provided that only the Minister could, in appropriate circumstances, order in writing that an offence committed within the jurisdiction of one attorney-general be tried within the jurisdiction of another attorney-general. Section 6 of the Criminal Procedure Amendment Act, 26 of 1987, amended s 111 of the Code whilst the National Prosecuting Authority Act, 32 of 1998, by means of s 44, further amended s 111 by deleting subsection 1 and substituting subsections 2, 3 and 4. In the process, it would appear, the drafters neglected to change the heading and to retain the equivalent of the old subsection 1 which made the purpose of the overall section quite clear. S 111(1) formerly read:

> "Waar die Minister dit in belang van die regspleging ag dat 'n misdryf wat in die regsgebied van een prokureur-generaal gepleeg is, binne die regsgebied van 'n ander prokureur-generaal bereg word, kan hy skriftelik gelas dat strafregtelike verrigtinge ten opsigte van so 'n misdryf in 'n hof op 'n plek binne die regsgebied van bedoelde ander prokureur-generaal 'n aanvang neem."

Notwithstanding the poor draftmanship, using a purposive approach to the interpretation, I consider that the purpose and intent of s 111, as it stands on the statute book today, is reasonably clear.

[40] S 179 of the Constitution deals with the prosecuting authority and, insofar as it is relevant, reads as follows:

> ***"(1) There is a single national prosecuting authority in the Republic, structured in terms of an Act of Parliament and consisting of –***

a. a National Director of Public Prosecutions, who is the head of the prosecuting authority and is appointed by the President, as head of the national executive; and

b. Directors of Public Prosecutions and prosecutors as determined by an Act of Parliament.

(2) The prosecuting authority has the power to institute criminal proceedings on behalf of the state, and to carry out any necessary functions incidental to instituting criminal proceedings."

[41] Subsection 7 provides that "all other matters concerning the prosecuting authority must be determined by national legislation". That national legislation is the National Prosecuting Authority Act, 32 of 1998, which deals, in s 22, with the powers duties and functions of the National Director. Insofar as it is relevant, the section reads:

(1) The National Director, as the head of the prosecuting authority, shall have authority over the exercising of all the powers, and the performance of all the duties and functions conferred or imposed on or assigned to any member of the Prosecuting Authority by the Constitution, this Act or any other law. …

(3) Where the National Director or a Deputy National Director authorised thereto in writing by the National Director deems it in the interests of the administration of justice that an offence committed as a whole or partially within the area of jurisdiction of one director be investigated and tried within the area of jurisdiction of another Director, he or she may, subject to the provisions of s 111 of the Criminal Procedure Act, 1977 (Act 51 of 1977), in writing direct that the investigation and criminal proceedings in respect of such offence be conducted and commenced within the area of jurisdiction of such other Director."

[42] It is therefore clear that the power to transfer an investigation and prosecution of offences committed within the jurisdiction of one director to that of another may be authorised by a deputy national director. For the lawful exercise of such a power he or she must be authorised in writing by

the NDPP to issue such a directive and furthermore such directive must comply with the provisions of ss 111(1)(a) and (b) of Act 51 of 1977.

[43] The directive itself does not state that the Deputy National Director of Public Prosecutions, Mr. JSN Henning, SC, was so authorised in writing. It does not follow, however, that this authority was lacking. In this regard it must be noted, furthermore, that the challenge on this basis was only made in the heads of argument filed on behalf of the eleventh accused on or about 23 November, three days before the commencement of argument in this application. The point was not raised in the eleventh accused's founding affidavit in which event one would have expected the matter to have been addressed by the State in their opposing affidavits.

[44] Besides making these points, Mr. Webster, on behalf of the State, argued that from a procedural point of view it was not open to the accused to challenge the validity of the directive on this basis at this late stage. He contended that the point had in effect been lost. I shall revert to this argument after discussing further criticisms of the directive made on behalf of the accused.

[45] Notwithstanding various criticisms, it would appear that, apart from the question of the DNDPP being authorized in writing, there was compliance

with the provisions of s 111(1)(a) and (b) of the Code. The directive sets out the names of the accused, all of the charges and the areas of jurisdiction of the various Directors of Public Prosecutions where the offences were wholly or partially committed other than that of the Director in whose jurisdiction the DNDPP directs the criminal proceedings to be commenced i.e. the Director of Public Prosecutions in the Cape Provincial Division of the High Court of South Africa. Where the directive can be criticized is that the DNDPP sets out all of the charges rather than simply specifying those which are alleged to have been committed outside the jurisdiction of the local DPP. Nonetheless, such charges were by definition included in the full list of charges and no challenge was made to the directive on this ground at the time that it was handed in to court. Furthermore, on the same reasoning which I have set out in relation to the POCA authorization, the certificate should not be looked at in isolation but must be read with the indictment which the accused were required to plead to shortly after the directive was handed in to court. That indictment would moreover have been handed to the accused sometime prior to the directive being handed up in order for them to prepare to plead thereto. The indictment sets out in greater detail the substance of each charge and details where each offence is alleged to have been committed. Accordingly, by having regard to the indictment (as well as the summary of substantial facts) the accused would be apprised of which offences were

allegedly committed outside of this court's jurisdiction.

[46] A major complaint by accused eleven was that the discrepancies between the charges against him as stipulated in the directive, contrasted with those actually preferred against him in the indictment indicated that the DNDPP had failed to apply his mind to the subject matter of the directive as it applied to accused eleven.

[47] There is a simple explanation for these discrepancies. When the matter was first called before court on 1 August 2005, to be adjourned for a period of two weeks, there were twelve accused before court. The eleventh accused was a Mr. Denzil Boyles and the present accused number eleven was then accused number twelve. On the resumed date, 15 August 2005, the State withdrew charges against Mr. Denzil Boyles pursuant to the DNDPP having declined to prosecute him in relation to the centralized charges in this Court. In order to "avoid confusion" the prosecutor re-numbered the accused with accused number twelve (Mr. Mather) becoming accused number eleven. As the prosecutor put it at the time: "*Any reference to accused number twelve previously is now referred to as accused number eleven*".

[48] On reading the directive, however, although eleven accused are named in

the directive, twelve are referred to by number when the charges are listed together with an indication of against whom such charges are to be brought. The accused number twelve is not identified by name but may be an erroneous reference to accused eleven (Mather), at the time when he was accused twelve. Ultimately Mather, as accused eleven, was charged with and pleaded to counts 1, 2, 4, 10, 15, 18, 23, 24 and 25. Of these counts numbers 1, 2, 15, 18, 23, 24 and 25 were wholly or partially extraterritorial to this court's jurisdiction but the latter three counts, charges of money laundering, are not listed in the directive as charges to be centralised *vis a vis* accused eleven (Mather). Accused eleven now seeks to rely on the confusion caused by the careless drafting of the s 111 directive in contending that only certain of the extraterritorial charges he faced were properly centralised in this court by the directive. I shall deal with this argument when I discuss the provisions of s 110(1)(b) of the Code but must record the court's displeasure that this important document was handed up apparently without even being checked by the State's legal representatives.

[49] Accused eleven also contends that the failure of the State to lead any evidence against him on certain of these charges leads to the conclusion that the DNDPP could not have read the docket and applied his mind. I do not consider that this inference follows inescapably nor, in my view, for the reasons set out earlier in relation to the process followed by the NDPP before making his authorization decision, do I consider it necessary that the DNDPP read the entire docket

[50] In my view, the challenge to the directive on the grounds that the DNDPP did not have or failed to prove that he had the necessary authority in writing to issue the directive may, if timeously raised, have had some merit. However, given the lateness of the challenge, it appears to me that the point has lost whatever weight it once might have had by virtue of the provisions of s 110(1)(b) of the Code. It reads as follows:

> ***"Accused brought before court which has no jurisdiction –***
>
> ***(1) Where an accused does not plead that the court has no jurisdiction and it at any stage -***
> ***(a) after the accused has pleaded a plea of guilty or of not guilty; or***
> ***(b) where the accused has pleaded any other plea and the court has determined such plea against the accused,***
> ***appears that the court in question does not have jurisdiction, the court shall for the purposes of this Act be deemed to have jurisdiction in respect of the offence in question."***

In the present matter all of the accused, could have entered a plea under s 110(1)(b) to the effect that this Court lacked jurisdiction *inter alia* because of deficiencies in the directive. However, they did not do so but instead pleaded not guilty. It now appears, some two-and-a-half years later, that as a result of apparent defects in the directive, this court might, in the ordinary course not have had jurisdiction to deal with certain of the offences in question. This does not assist the accused since, to the extent that this Court might have lacked jurisdiction, they must be deemed, following their plea in terms of s 110(1)(a) to in effect having consented to the jurisdiction of this Court. In terms of subsection (1)(b) this Court is

deemed to have jurisdiction over the accused and the relevant offences.

[51] Mr. Uijs's only answer to this point, on behalf of accused eleven, was to contend for an obtuse meaning of the relevant section and to argue that the accused were in effect now raising a plea under s 110(1)(b). Neither argument has any merit.

[52] Inasmuch as there may have been confusion regarding whether accused eleven was properly described or referred to in the directive, the provisions of s 110(1)(b) likewise provide the answer. Similarly, to the extent that the State may once have borne a duty to prove that the DNDPP was authorised in writing by the NDPP to issue a directive in terms of s 111, but failed to do so, any such failure is rendered moot by the provisions of s 110(1)(b) of the Code and the passing of time.

[53] A further objection raised by the accused generally was that the directive is invalid, at least in respect of counts 1 and 2 referred to therein, namely, contraventions of ss 2(1)(f) and 2(1)(e) of POCA, because such charges were only approved or authorised by the NDPP in terms of s 2(4) of POCA on 10 August 2005 whilst the directive was issued on 8 August 2005. Since the aforementioned charges did not exist in law on 8 August the centralisation directive could not purport to cover them.

[54] In its opposing affidavits the State points out the practical reasons why there was an elapse of two days between the issuance of the directive and the POCA authorisation:

> "***It is once the charges have been centralised that the documentation, including an indictment listing all accused and all charges can be considered by the NDPP for purposes of the POCA authorisation. It is that package of documentation, presenting a centralised picture, which is considered by the NDPP for purposes of authorising a prosecution in terms of s 2 of POCA. In this instance both requests were sent together to the NDPP's office."***

In argument Mr. Webster pointed out that, short of arranging a ceremony when the DNDPP and the NDPP signed the directive and the POCA authorisation simultaneously, a notional problem had to arise. Had the NDPP signed first, it could well have been argued that the POCA authorisation was invalid for want of the directive permitting the prosecution of those charges in this court when other courts had territorial jurisdiction over them.

[55] In any event, in my view, the time at which the validity of the directive must be tested is when it is handed up to court in order to validate the proceedings that follow and similarly with the POCA authorisation. That took place simultaneously on 15 August 2005. The charges in terms of s 2(1)(e) and 2(1)(f) of POCA were then shown to be authorised by the NDPP and thus the assumptions upon which the DNDPP had in effect

based his directive, had been realised.

[56] For these reasons the applications by all the accused for the declarations of invalidity and the setting aside of charges are refused.

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LJ BOZALEK, J