REPORTABLE

Republic of South Africa

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

CASE NO: SS 67 / 2005

In the matter between:

THE NATIONAL DIRECTOR OF PUBLIC PROSECUTION	Applicant
versus	
SELWYN WINSTON DE VRIES	1st Defendant/Respondent
VIRGIL LENNITH DE VRIES	2nd Defendant/Respondent
ACHMAT MATHER	3rd Defendant/Respondent
LENASIA FRESH PRODUCE AND WHOLESALER CC	4th Respondent

In re: S v SW De Vries and Others

JUDGMENT : 27 FEBRUARY 2009

BOZALEK, J:

[1] First to third defendants were respectively accused 1, 2 and 11 in criminal proceedings in this court which commenced before me in August 2005. The defendants were convicted of various offences on 10 June 2008 and sentenced on 26 August 2008. On 18 August 2008, after conviction but before sentence, the State applied for a

confiscation order enquiry to be held in terms of s 18(1) of the Prevention of Organised Crime Act 121 of 1998 ("the Act") into any benefits the defendants may have derived from unlawful activities. By agreement the court ordered the institution of the proceedings but postponed the enquiry to 1 December 2008 in order not to delay sentencing proceedings. Further terms of the order made provision for the filing by the parties of the various statements and affidavits which ss 18 and 21 of the Act envisage.

[2] By the time of hearing all three defendants were represented by counsel and fourth respondent, a close corporation in which the third defendant was said to possess a substantial interest, had been joined. Counsel for first and second defendants advised that they had only just received instructions and were not ready to proceed. Accordingly the enquiry in respect of these defendants was postponed but proceeded in relation to the third defendant.

POINTS IN LIMINE

[3] On behalf of the third defendant, Mr. Spangenberg raised three points in limine. Firstly, he contended that the applicant had failed to prove his authority to conduct the proceedings. Secondly, he disputed the court's jurisdiction to hear the enquiry and, thirdly, he argued that any right which the applicant may have had to a confiscation order had prescribed.

[4] Before dealing with these points it is appropriate to quote the provisions of s 18:

18 Confiscation orders

(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;

(b) any other offence of which the defendant has been convicted at the same trial; and

(c) any criminal activity which the court finds to be sufficiently related to those offences,

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.

(2) The amount which a court may order the defendant to pay to the State under subsection (1)-

(a) shall not exceed the value of the defendant's proceeds of the offences or related criminal activities referred to in that subsection, as determined by the court in accordance with the provisions of this Chapter; or

(b) if the court is satisfied that the amount which might be realised as contemplated in section 20 (1) is less than the value referred to in paragraph (a), shall, not exceed an amount which in the opinion of the court might be so realised.

(3) A court convicting a defendant may, when passing sentence, indicate that it will hold an enquiry contemplated in subsection (1) at a later stage if-

(a) it is satisfied that such enquiry will unreasonably delay the proceedings in sentencing the defendant; or

(b) the public prosecutor applies to the court to first sentence the defendant and the court is satisfied that it is reasonable and justifiable to do so in the circumstances.

(4) If the judicial officer who convicted the defendant is absent or for any other reason not available, any judicial officer of the same court may consider an application referred to in subsection (1) and hold an enquiry referred to in that subsection and he or she may in such proceedings take such steps as the judicial officer who is absent or not available could lawfully have taken.

(5) No application referred to in subsection (1) shall be made without the written authority of the National Director.

(6) A court before which proceedings under this section are pending, may-

(a) in considering an application under subsection (1)-
(i) refer to the evidence and proceedings at the trial;

(ii) hear such further oral evidence as the court may deem fit;

(iii) direct the public prosecutor to tender to the court a statement referred to in section 21 (1) (a); and

(iv) direct a defendant to tender to the court a statement referred to in subsection (3) (a) of that section;

(b) subject to subsection (1) (b) or (3) (b) of section 21, adjourn such proceedings to any day on such conditions not inconsistent with a provision of the Criminal Procedure Act, 1977 (Act 51 of 1977), as the court may deem fit.

JURISDICTION

[5] It was contended on behalf of the third defendant that the court lacked jurisdiction since the former resided in Gauteng, possessed no property within the court's jurisdiction and because the cause of action did not arise within the jurisdictional area of the court.

[6] Section 18(1) of the Act makes it clear that the primary jurisdictional requirement for a confiscation order enquiry is that the defendant has been convicted of an offence in terms of the Act. It is common cause that the third defendant was convicted of money laundering and participating in the affairs of an enterprise through a pattern of racketeering activities in terms of the Act.

[7] In *Shaik v The State* 2008 8 BCLR 834 (CC)[1], in discussing the nature of the discretion exercised by a trial court in terms of s 18 of the Act, the Constitutional Court held that it was analogous to the discretion to determine the proper sentence to be imposed in criminal proceedings.[2] This observation underlines that the court best placed to conduct any such enquiry and make any confiscation order is that which has convicted the defendant. There is no suggestion in this matter of the

[1] *S v Shaik and Others* (CCT 86/07) [2008] ZACC; (29 May 2008).
[2] At page 857 C – D, para 65.

court exercising extraterritorial jurisdiction in the sense of going beyond this country's borders. Furthermore, the prosecution against the third defendant and his fellow accused was centralized in this court in terms of s 111 of the Criminal Procedure Act, 51 of 1977. In these circumstances, and having regard to the provisions of s 18 of the Act, the questions of where in South Africa the third defendant is ordinarily resident, where the offences were committed and where his/her assets may be situated in the country, are irrelevant.

[8] I should mention that in the criminal trial the third defendant similarly challenged the jurisdiction of the court notwithstanding the issuance of a certificate by the applicant in terms of s 111 of the Criminal Procedure Act.[3] That challenge was held to have no merit and it is no stronger for being raised again in this different context. Regard being had to the provisions of s 18(1) of the Act, it is this court alone which may consider an application for a confiscation order.

LACK OF AUTHORITY

[9] Section 18(5) of the Act provides that no confiscation order application may be made without the written authority of the National Director of Public Prosecutions. In his opposing affidavit the third defendant points out that the deponent to the founding affidavit, an investigator in the employ of the South African Police Services stationed at the Asset Forfeiture Unit, does not allege that the application is brought with the

[3] *S v De Vries* 2008 (1) SACR 582 (C).

written authority of the National Director, nor is any written authority attached to the founding affidavit.

[10] When the application was launched in court on 18 August 2008, counsel for the Asset Forfeiture Unit handed up a copy of an authority entitled "Authorisation in terms of s 18(5) of Act 121 of 1998". In the heading of the authority first, second and third defendants were cited. The authority purported to have been signed by Mr. WA Hofmeyr in his capacity as Deputy National Director of Public Prosecutions and head of the Asset Forfeiture Unit. It reads as follows:

> **"I, William Andrew Hofmeyr, National Deputy of Public Prosecutions, duly appointed as such in terms of s 11 of the National Prosecuting Authority Act, 32 of 1998, and duly authorised by the National Director of Public Prosecutions, to authorise the institution of an application referred to in s 18(1) of the Prevention of Organised Crime Act, 121 of 1998, do hereby authorise the institution of such application in the matter of The State v Selwyn De Vries and Others: case no. 67 / 2005."**

[11] Although s 18(5) of the Act refers to the written authority of the National Director, s 23 of the National Prosecuting Authority Act, 32 of 1998 provides that:

> **"(a)ny Deputy National Director may exercise or perform any of the powers, duties and functions of the National Director which he or she has been authorised by the National Director to exercise or perform."**

Section 11 of the said Act provide for the appointment of Deputy National Directors. Furthermore, s 1(c) of the Prevention of Organised Crime Act 121 of 1998 provides by implication that, for the purposes of s 18(5), the National Director "*includes any functionary referred to in section 1 of… (Act 121 of 1998) …which is under the control of the National Director and authorised thereto by the National Director in a specific case or in general…*". Again, Mr. Hofmeyr, the signatory to the authority, fits the description of one such functionary, namely, a Deputy

National Director appointed under section 11 and acting under a general authority to institute confiscation order enquiry proceedings.

[12] Counsel for the various defendants were either furnished with a copy of the authority or were entitled to access to the copy which was handed up to court. At the same time counsel for the Asset Forfeiture Unit was advised by the court that a copy would not suffice and that the original must be filed at the earliest opportunity. Three days later the original of the authority was filed. Similarly, counsel were, and remain, entitled to access to the original. The original authority is on the face of it proper and no suggestion to the contrary is made on behalf of the third defendant.

[13] After it was pointed out to the third defendant's counsel that both a copy of and the original written authority had been lodged with the court, the objection was reduced to the contention that, as there was no reference in the investigator's sworn affidavit to the authority, no cognisance could be taken of it. I do not consider that there is any merit in this point. The written authority is, on the face of it, regular, and the only challenge to its validity relates to the manner in which it was put before court. The Act does not stipulate how the National Director's authority must be proved. In my view, the original authority having, in effect, been handed up to court without objection, there is no need for the deponent to the founding affidavit to specifically refer to and/or confirm such authority under oath in such affidavit. Third defendant's

counsel emphasised that, in terms of s 13(1) of the Act, applications for a confiscation order are civil proceedings and he argued that, as a consequence, the National Director's authority must be proved in a founding affidavit. I do not see that this follows as a matter of logic, not least because applications for confiscation orders are, in truth, unique proceedings. They can only be triggered by a criminal conviction and are dealt with by the presiding officer in the criminal trial who may have regard to any relevant evidence in the trial notwithstanding that it does not feature in the affidavits.

[14] I can see no reason, therefore, why the written authority of the National Director to bring this confiscation order application cannot be proved in the manner which it has been in the present matter.

PRESCRIPTION

[15] In his opposing affidavit the third defendant avers that inasmuch as any benefits which he allegedly obtained emanated from criminal activities committed between June and October 2003, and given that the indictment was only served on him in the beginning of 2005, the National Director's claim for recovery of the alleged benefits has prescribed. Implicit in the third defendant's argument is that a three year period of prescription applies. It was also contended that the State could have interrupted the running of prescription by seeking a restraint order against the third defendant in terms of s 25(1) of the Act.

[16] The Act does not establish any time limit within which the State, represented by the prosecuting authorities, may bring an application for a confiscation order. It is clear, however, that no such application can be made before a defendant is convicted of an offence in terms of the Act. At best for the third defendant, the State would have to bring the application within three years of the date of conviction. It did so within days of the convictions. The State could hardly have brought the application at an earlier stage, the conviction of an offence in terms of the Act being a jurisdictional requirement for such a step. Whilst it is correct that the prosecuting authority or the Asset Forfeiture Unit could have sought a restraint order at a much earlier stage, in anticipation of a later application for a confiscation order, the suggestion that the State was obliged to do so in order to interrupt prescription is clearly untenable. Thus the third and final point in limine must also fail.

THE CONFISCATION ORDER APPLICATION

[17] The primary focus of a confiscation order enquiry is the extent of the benefits which the defendant may have derived from defined criminal offences or activities. Upon making a finding on this score the court has a discretion in terms of s 18(1) to make an appropriate order for payment against the defendant provided that such amount does not exceed "*the value of the defendant's proceeds of the offences or related criminal activities or the realisable value of the benefits, whichever is the lower*". The term "confiscation order" is used in its

broadest sense since an order is not made in respect of any particular property or contraband but for payment of an appropriate amount.

[18] The majority of the third defendant's co-accused in the criminal trial were convicted of three armed robberies of British American Tobacco South Africa (hereafter referred to as "BATSA") vehicles containing consignments of cigarettes. These robberies took place in June, August and October 2003 in Rawsonville and Darling in the Western Cape and in Kinkelbos in the Eastern Cape. The value of the stolen consignments were R826 271, 96, R735 157, 81 and R581 197, 85 respectively, a total of R2 142 627, 62. The third defendant was not directly involved in any of the robberies, rather his role was to purchase the consignments of cigarettes from the co-accused after they had been transported to Gauteng. He was particularly well placed to play this role since his primary business, Lenasia Fresh Produce and Wholesale CC, was, amongst other things, a wholesaler of cigarettes.

[19] In relation to the Rawsonville and Darling robberies, the third defendant was found guilty of theft and also of contravening s 2(1)(e) of the Act, namely, that whilst associated with the enterprise, he conducted or participated in the conduct, directly or indirectly, of the enterprise's affairs through a pattern of racketeering activities. He was also found guilty on charges of money laundering in relation to the aforesaid two robberies in terms of s 4 of the Act in that his conduct in purchasing the cigarettes had the effect of concealing or disguising the source,

disposition or movement of the said property or the ownership thereof. With regard to the Kinkelbos robbery the third defendant was acquitted on all counts, in essence by reason of a lack of any direct evidence that he had in fact purchased that consignment of cigarettes.

THE STATE'S CASE

[20] The State's case in these proceedings was firstly that all three stolen consignments were the proceeds of unlawful activities. Since the third defendant was convicted, in effect, of receiving the first two consignments a confiscation order in respect thereof was competent in terms of s 18(1)(a) of the Act. As regards the consignment stolen in the Kinkelbos robbery, a confiscation order in terms of s 18(1)(c) was justified since it was proven, on a balance of probabilities, that the third defendant had received that consignment as well and had therefore benefited from "criminal activity" "sufficiently related" to the other two robberies. As far as the quantum of the confiscation order was concerned, the State's case was that the third defendant had benefited to the full extent of the market value of the three consignments. Since on the third defendant's own papers the value of property belonging to or held by him and available for realisation amounted to R2 022 000,00, just less than the aforesaid market value, an order for payment of a sum not exceeding this amount should appropriately be made.

THE THIRD DEFENDANT'S DEFENCES

[21] The third defendant raised three defences on the merits of the application. It was contended firstly that the court could have no regard to the Kinkelbos robbery in making any confiscation order because the third defendant had been acquitted on all counts relating thereto and, in any event, the State had failed to prove on a balance of probabilities that he had derived any benefits from that robbery. Secondly, it was submitted that, in making any confiscation order the court must, on the available evidence, have regard to what benefit the third defendant actually derived from his involvement in the crimes; more specifically the court had to take into account that even on the State's version the third defendant must have paid large considerations for the consignments and thus did not enjoy the full benefit of their market value. Finally, the third defendant took issue with the State on aspects of how the consignments were to be valued.

[22] I shall deal with each of these arguments in turn, commencing with that relating to the proper value of the three consignments of cigarettes. In the criminal trial the value of the three stolen consignments was accepted as being the figures mentioned in para 18 above. In this enquiry a representative of BATSA filed an affidavit as part of the State's papers explaining that the aforementioned values reflected the price at which BATSA would have sold the product at the time, inclusive of VAT. For the purpose of quantifying BATSA's losses these figures were then broken down into the excise paid on the quantity of

cigarettes and their estimated replacement cost. Somewhat puzzlingly, the sum of these two components are considerably less than the market value of the cigarettes but the former figure was nonetheless presented by BATSA as being its “total loss”. The difference may well represent BATSA’s profit margin.

[23] In my view the quantum of BATSA’s losses are not relevant to the enquiry, only the market value of the consignments stolen and onsold. On behalf of the third respondent, Mr. Spangenberg argued that for the purposes of any confiscation order the value of the consignments must be reduced by the VAT component since no such tax would have been paid by either BATSA or the third defendant. It is not clear on what basis it is contended BATSA did not pay VAT and in any event I can see no point in rewarding the third defendant because either he or BATSA did not pay value added tax. Furthermore, since in all probability the third defendant would have sold the cigarettes as if he had paid value added tax, it is entirely appropriate that the value of the consignments for the purposes of a confiscation order must include the VAT component. No evidence was placed before the court in this enquiry suggesting that the market value assigned to the consignments by BATSA was less than the figures accepted in the criminal trial and thus I accept these for present purposes.

[24] BATSA’s representative explained further in his affidavit that since the value of the consignments in all three robberies fell within the excess

amount payable to its insurers, BATSA had submitted no insurance claim and had thus incurred a complete loss in each case. In the light of these facts, the State asked that any confiscation order be made in favour of BATSA. Section 18(1), however, provides only for orders against defendants "for the payment to the State of any amount". In the circumstances, and notwithstanding any practice in the courts of making confiscation orders in favour of private parties, I do not consider that it is competent to do so in terms of the Act.

THE KINKELBOS ROBBERY – SUFFICIENTLY RELATED CRIMINAL ACTIVITY?

[25] The next question to be addressed is whether, for the purpose of enquiring into any benefit which the third defendant may have derived, the court is entitled to take into account the consignment of cigarettes stolen in the Kinkelbos robbery in October 2003. The third defendant was acquitted of all charges in relation to the Kinkelbos robbery. There was evidence implicating him in the receipt of this consignment of cigarettes, albeit not direct evidence. The State's case in this regard is that the evidence led at the trial establishes, on a balance of probabilities, that the third defendant indeed purchased and received the stolen consignment. On this factual basis, it was submitted, he had derived a benefit from "*criminal activity*"… "*sufficiently related*" to the offences of which he had been convicted in terms of the Act. On behalf of the third defendant it is contended that the evidence does not establish the third defendant's involvement in the robbery or its aftermath on a balance of probabilities and furthermore that, even if it

does, that involvement is not "sufficiently related" to the third defendant's criminal convictions to qualify for the sanction of a confiscation order in terms of s 18(1)(c).

[26] Two issues arise then, the first being whether, on a factual basis, the third defendant's involvement in the robbery or its aftermath has been established on the appropriate onus. Assuming this to have been proved, the second issue is whether the third defendant's said involvement, falling short of a conviction relating thereto, is "sufficiently related" to those offences of which he was convicted with the result that he qualifies for the imposition of a confiscation order in respect of any benefits he derived from the Kinkelbos robbery.

THE FACTUAL ISSUE

[27] The chief state witness in the trial, Aspeling, testified that he had been present when the cigarette consignments stolen in the Rawsonville and Darling robberies had been delivered to the third defendant. However, he had not been present when the third consignment was delivered. Proof of the sale and delivery of this Kinkelbos consignment to the third defendant relies thus upon inferential reasoning.

[28] The evidence at the trial revealed that there had been a falling out between members of the enterprise prior to the third robbery. This took place when it was discovered that a sub-group of the enterprise, in which Aspeling himself played a prominent role, had jumped the gun

and staged the robbery of a BATSA vehicle in the Eastern Cape in the process excluding, amongst others, first and second defendants. The latter had gained wind of the sub-group's plans, however, and, after Aspeling and his accomplices had successfully staged the robbery, had in turn hijacked the consignment from Aspeling and forced him to drive the truck to Johannesburg at gunpoint. Upon arrival in Johannesburg, Aspeling was ordered to drive to a private residence and unload the consignment of cigarettes into the garage. At the time Aspeling overheard the second defendant speaking to the third defendant on the phone and instructing the latter to send his truck to come and collect the cargo.

[29] When Aspeling returned later in the day to the garage with his original accomplices the cigarettes were gone. They then drove to the third defendant's place of business and confronted him, stating they wanted the consignment or their share of what he had paid for it. The third defendant thereupon denied that he had received any such consignment but, significantly, stated that the second defendant had phoned him that morning to advise that he had a "parcel" for him and would deliver it during the course of the day. The third defendant then phoned the second defendant in the presence of Aspeling and his accomplices to explain the situation in which he found himself and then handed the phone to Aspeling. An arrangement was then made between the disputing parties to discuss the stand-off. Instead of a meeting a shoot-out took place. Eventually, however, negotiations took

place between the opposing groups and Aspeling and his accomplices received a share of the proceeds of the sale of the consignment. Prior to payment there were delays, some of which were ascribed by the first and/or second defendants to the third defendant's delay in paying for the cigarettes.

[30] The third defendant was acquitted of all charges relating to the Kinkelbos robbery on the basis that, even accepting Aspeling's evidence as recounted above, the inference that the consignment of cigarettes was indeed delivered to the third defendant and purchased by him was not the only one that could be drawn. It was found that it was "*possible, although not probable, that accused 1 and 2 (the first and second defendants) found another purchaser for the last consignment of cigarettes and used accused 11's (the third defendant's) name to disguise the true recipient of the cigarettes, thereby protecting the consignment from the attentions of …"* Aspeling and his accomplices.

[31] It is of course so that in criminal proceedings any inference sought to be drawn must be consistent with all the proven facts and must be the only reasonable inference which may be drawn therefrom. In civil matters, however, the test is less stringent and was laid down in *AA Onderlinge Assuransie Assosiasie Bpk v De Beer* 1982 (2) SA 603 (A) at 614 G – H as follows:

> **"…Dit is, na my oordeel, nie nodig dat 'n eiser wat hom op omstandigheidsgetuienis in 'n siviele saak beroep, moet bewys dat die afleiding wat hy die Hof vra om te maak die enigste redelike afleiding moet wees nie. Hy sal die bewyslas wat op hom rus kwyt**

> **indien hy die Hof kan oortuig dat die afleiding wat hy voorstaan die mees voor-die-hand-liggende en aanvaarbare afleiding is van 'n aantal moontlike afleidings…".** [4]

[32] I have no hesitation in accepting Aspeling's evidence regarding his dealings with the third defendant in relation to the consignment of cigarettes stolen in the Kinkelbos robbery. By the time of that robbery the third defendant had, in the preceding few months already purchased, taken delivery of and presumably disposed of two large consignments of cigarettes stolen by the enterprise. The scheme had apparently worked well and the only possible reason why the first and second defendants may have used a different middleman was in order to throw Aspeling and his accomplices off the scent of the last consignment. There was, however, no evidence that any other middleman was used. Indeed all the indications, most notably the telephone conversation overheard by Aspeling, were that the first and second defendants had again sold the consignment to the third defendant. In the circumstances I am satisfied that the State proved, on a balance of probabilities, that the third defendant indeed received the Kinkelbos consignment of cigarettes and, after paying a consideration to the enterprise, onsold it.

[33] I turn now to the second issue, namely, whether the third defendant's involvement in the Kinkelbos robbery renders him liable to a confiscation order in terms of s 18(1)(c) of the Act. One of the elements to be proved by the State for such an order is "criminal activity", a

[4] See also *Santam Bpk v Potgieter* 1997 (3) SA 415 (O) 423A – B; *Cooper and Another NNO v Merchant Trade Finance Ltd* 2000 (3) SA 1009 (SCA) 1028A – B; *Minister of Safety and Security v Jordaan t/a Andrè Jordaan Transport* 2000 (4) SA 21 (SCA) 26G.

concept both broadly stated and undefined in the Act. Support for the view that "sufficiently related criminal activity" may even amount to the subject matter of offences of which the accused has been acquitted is to be found in the matter of *National Director of Public Prosecutions v Philips and Others* 2002 (1) BCLR 41 (W) at 98 H – 100 C (para 75). Discussing the concept of "related criminal activity" Heher J stated:[5]

> **"On the contrary, it seems to me that 'related criminal activity' must be such that the Court can reach that conclusion upon the strength of the materials referred to in section 18(6). Each application will have to be decided on the facts proved to the satisfaction of the court by those means. The expression must ordinarily, therefore, have a fairly limited range, absent admissions by the defendant. Usually the time period of related activity would be within or close to the period of the charge and possess some connection with it (other than simply being an offence of the same nature). ..The related criminal activity may also be that of someone other than the defendant, for example a co-accused or a gang and may even relate to a charge of which the defendant himself has been acquitted."**

The learned judge expressed his views on the onus of proof in this area as follows at para 74:

> **"(P)resumably the onus must be on the prosecutor to prove 'related criminal activity' beyond a reasonable doubt since how else can it be labelled as 'criminal'?"**

For the purposes of this judgment I am prepared to accept this as the correct formulation of the onus in relation to proof of "criminal activity". But it is of importance in regard to the question of onus to note the provisions of s 13(1) which prescribe that, for the purposes of Chapter 5, proceedings on application for a confiscation order are civil proceedings, and s 18(5) which expressly stipulates that any question of fact to be decided in such proceedings shall be decided on a balance of probabilities. In my view, the civil onus is the standard which must be met in proving the other elements necessary for a confiscation order under the subsection, namely, that any benefit has been derived

[5] G – I.

and that the "criminal activity" is "sufficiently related" to the relevant conviction or convictions.

[34] On a proper analysis of the circumstances of the present case the "criminal activity" is the Kinkelbos robbery itself. That activity the State undoubtedly proved beyond reasonable doubt. It failed to prove, on the criminal onus, the third defendant's involvement in either the robbery itself or in receiving and purchasing the stolen consignment thereafter. However, its proof, on a balance of probabilities, that the third defendant again acted as the middleman in receiving the Kinkelbos consignment constitutes part proof of one of the remaining elements for the making of a confiscation order in terms of s 18(1)(c)) of the Act, namely the requisite relationship. The "criminal activity" was furthermore, in my view, directly related to the subject matter of the third defendant's convictions in relation to the two earlier robberies. Those convictions involved his receipt, purchase and subsequent re-sale of the cigarette consignments stolen in the Rawsonville and Darling robbery in June and August of the same year. The enterprise had clearly embarked upon a planned series of robberies of large consignments of cigarettes from BATSA vehicles throughout the country. The *modus operandi* in each case was the same, as was the enterprise's choice of middleman. The fact that the Kinkelbos robbery was initially carried out by a break-away sub-group of the enterprise does not, in my view, diminish the close relationship between the first, second and the third robberies. The core members of the original

enterprise, the first and second defendants, had originally planned the Kinkelbos robbery. They eventually gained control of the stolen consignment of cigarettes and, as they had done on two previous occasions in the preceding two months, sold it to the third defendant. As far as the latter was concerned this was the third such transaction in a relatively short period of time.

[35] Accordingly, I am satisfied that under the provisions of s 18(1)(c), and with a view to making a confiscation order in respect of any benefits which the third defendant may have derived from his role as a middleman in the robberies, I am entitled to take into account the consignment of cigarettes stolen in the Kinkelbos robbery.

THE EXTENT OF THE BENEFIT

[36] The third argument raised by Mr. Spangenberg was that in fixing any confiscation order, the court must take into account that the third defendant would have purchased the consignment from those of his co-accused who committed the robberies and therefore that the benefit which he derived was far less than the market value of the consignments.

[37] Neither in the trial nor in these proceedings was there any direct evidence as to what sum the third defendant had paid his co-accused for any of the consignments. The third defendant himself steadfastly denied any involvement in the purchase of the consignments.

However, his counsel, accepting for the purposes of these proceedings the evidence of the main state witness, Aspeling, attempted to reconstruct what might have been paid by the third defendant. This he did by utilising Aspeling's evidence as to what share of the proceeds individual enterprise members received after each robbery and also by bringing into account amounts which, according to Aspeling, were expended by the enterprise in respect of various expenses incurred and deductions made in each of the robberies. These included the hire of the truck used, hotel expenses and provision for legal costs. However, since Aspeling had only limited information and no other member of the enterprise volunteered anything in this regard, at best for the third defendant these calculations represent no more than an estimate of such expenses and deductions. Nonetheless, on this basis Mr. Spangenberg submitted that at the very most the third defendant might have bought the first consignment for R250 000,00 less than its market value and, in respect of the second consignment, at most R300 000,00. In respect of the third consignment he ventured no estimate arguing instead that it could not be taken into account for the purposes of the confiscation order.

[38] Ms Cronje, who appeared for the Asset Forfeiture Unit, contended that the full market value of the consignments could be used in arriving at the quantum of the confiscation order. Her argument was based on the *ratio* in *Shaik* (above) which concerned a confiscation order based upon the value of a shareholding in a company obtained through

corrupt means. The shareholding had been purchased through a loan which in turn had been repaid by dividends flowing from the shareholding. The appellants unsuccessfully contended that the value of the loan ought to be deducted in calculating the benefits which they had derived from the acquisition of the shareholding. It was further submitted on their behalf that the word "benefit" in s 18(1) of the Act must be read as limiting the broad language of the definition of "proceeds of crime" in s 1 to apply only to the net proceeds of a crime as opposed to the gross proceeds. It was further argued on behalf of the appellants that the confiscation order made by the High Court was disproportionate for the same reason, namely, a failure to make any deduction in respect of the loan.

[39] In rejecting the appellant's contentions, the Constitutional Court made certain key findings. The first was that the primary purpose of Chapter 5 of the Act, which contains the confiscation order provisions, is to ensure that criminals cannot enjoy the fruits of their crimes. In this regard the court found that whilst the achievement of this purpose might at times have a punitive effect, this was not its primary purpose. Concerning the question of whether the value of both the shareholding and the dividends could be confiscated, the court noted that what constitutes a benefit is defined by reference to what constitutes "proceeds of unlawful activities". This concept was broadly defined in the Act as being any property, advantage or reward derived, received or retained directly or indirectly in connection with or as a result of any

unlawful activity. In the light of this definition, the court held, it was not possible to give a narrower meaning to the concept of "benefit" in s 18. Furthermore, s 18 (2) expressly contemplates that a confiscation order may be made in respect of any property which falls within the broader definition and is not limited to a net amount.

[40] The Court referred with approval to the leading English case of *R v* May[6] where the House of Lords held that the "benefit" gained is the total value of the property or advantage obtained, not the defendant's net profit after deduction of expenses or any amounts payable to co-conspirators. This conclusion, I might add, is reinforced by the provisions of s 19(1) of the Act, which deals with the value of the proceeds of unlawful activities. The section defines this as "…the sum of the values of the property, services, advantages, benefits or rewards received, retained or derived by him or her…" and makes no allowance for acquisition costs. Significantly, it was also held in *May's* case that where a benefit is obtained jointly each of the beneficiaries has obtained the whole of the benefit and may properly be ordered to pay an amount equal to the whole benefit.[7]

[41] On the findings made by this court in the criminal trial and in these proceedings, the third defendant received the full value of the three consignments of cigarettes which he received and purchased. In the light of the Constitutional Court's reasoning and decision in *Shaik* it is

[6] [2008] UKHL 28.
[7] At page 28 para 43.

not possible, in my view, to hold that in determining the benefit which the third defendant received, the estimated or, for that matter, actual prices paid by him in respect thereof must be subtracted from the market value of the consignments.

THE APPROPRIATE AMOUNT

[42] This is not the end of the matter, however, since, in making the confiscation order, the court enjoys a wide discretion in fixing the appropriate amount to be paid by the defendant. In *Shaik's* case the Constitutional Court held that it was correct to characterise the discretion as being analogous to the discretion to determine the proper sentence to be imposed in criminal proceedings.[8] The Court also set out the considerations relevant to the exercise of the s 18 discretion. It first noted that the purpose of confiscating the proceeds of crime is primarily to ensure that criminals do not benefit from their crimes. A court exercising the discretion will first take into account all the circumstances of the criminal activity concerned. It will also take into account that the definition of "proceeds of unlawful activities" makes it possible to confiscate property that has been acquired not through the crimes of which the defendant has been convicted but through related criminal activity. In this regard one of the key considerations the court will take into account will be the extent to which the property to be confiscated derived directly from the criminal activity. On the other hand, the more removed the derivation of the property from the

[8] At page 859, para 65.

commission of the offence, the less likely it may be that it will be appropriate to order the full confiscation of the property. A third consideration mentioned by the court as being relevant to determining what constitutes "an appropriate amount" will be the nature of the crimes that fall within the express contemplation of the Act. The closer the crimes or criminal activity concerned to the ambit of organised crime, the more likely it will be that the appropriate amount will constitute all the proceeds of the unlawful activities as defined in the Act. The reason for this, the court held, is that the larger the value of the confiscation order the greater the deterrent effect of such an order. "…*The Act clearly seeks to impose its greatest deterrent effect in the area of organised crime; and so where organised crime is involved, the purpose of general deterrence will often be best achieved by a maximum confiscation order, although of course that will always be subject to a full consideration of all the relevant circumstances.*"[9]

[43] I proceed now to apply these considerations to the present case. The first of these are the circumstances of the criminal activity concerned. This was a series of bold and well-planned armed robberies carried out by the enterprise in which the third defendant played a limited but crucial role. He was the middleman to whom the consignments of cigarettes were sold and delivered and who, through the nature of his business, was able to dispose of the consignments swiftly and efficiently, in all probability through his existing network of customers. Without a middleman such as the third defendant the task of disposing

[9] At para 71.

of the proceeds of the crime would have been considerably more difficult, less lucrative and would have exposed the members of the enterprise to much greater risk of detection. Therefore, although the third defendant played no direct role in the robberies themselves, his role in facilitating them can hardly be underestimated.

[44] The next consideration in determining the amount of the confiscation order is the extent to which the property to be confiscated derived directly from the criminal activities. The circumstances of this case fall somewhere towards the middle of the continuum. There is no evidence that all or any of the third defendant's assets were acquired with his gains from selling the stolen consignments. He appears to have established himself as a successful businessman well before the robberies took place and quite possibly simply ploughed his windfall profits from the stolen consignments back into his existing business. It is no doubt correct that the third defendant must have paid a considerable price to the enterprise for the cigarette consignments. On the probabilities this would, nonetheless, have been much less than their market value in order to make the risk which he was taking in receiving the stolen goods worthwhile. In my view, however, in the exercise of the court's discretion in this matter, it is a pointless exercise to try and estimate, on the existing evidence, what the third defendant may have paid for the consignments and what his net profits may have been. In the first place the evidence is sketchy and the third defendant himself volunteers no information in this regard. Instead he both denies

the evidence of Aspeling and seeks to rely on it for the purpose of establishing the net benefit which he received. In all these circumstances it does not behove the court to sift through the welter of denials, sketchy evidence and supposition in order to arrive at an estimated figure of what the third defendant's actual profit was from his purchase and sale of the various consignments.

[45] The third consideration held to be relevant to the court's discretion in fixing the amount of the confiscation order is the nature of the crimes falling within the express contemplation of the Act. Here the Constitutional Court held that the closer the crimes or criminal activity concerned to the ambit of organised crime, the more likely it will be that the appropriate amount will constitute all the proceeds of the unlawful activities as defined in the Act, the reason for this being that the larger the value of the confiscation order the greater the deterrent effect thereof, particularly in the area of organised crime.

[46] The third defendant was convicted of theft, associating himself with the affairs of an enterprise through a pattern of racketeering activity (in contravention of s 2(1)(e) of the Act) and money laundering all flowing from his role in purchasing and re-selling the consignments of cigarettes stolen in the enterprise's first two armed robberies in Rawsonville and Darling. On an overview of the evidence led by the State at the trial, there is no doubt that the commission by the enterprise of three armed robberies in the period between June and

October 2003 was a prime manifestation of organised crime. Furthermore, the third defendant's involvement in the criminal activity was, for the reasons already expressed, closely linked to and an integral part of that pattern of organised crime. Given the crucial nature of the third defendant's role, the purposes of the Act and in particular a deterrent effect, will in my view best be achieved by a confiscation order in a substantial amount.

[47] Balanced against these considerations, however, are the factors that the third defendant did not play an active part in the robberies themselves and did not benefit, in the ordinary sense of the word, to the full value of the stolen consignments. The former factor can, however, only be given limited weight not least because one of the purposes of the Act is to ensure that those persons who are well aware of criminal activity and benefit therefrom, although not dirtying their hands with the actual commission of the crimes, must also be deprived of the benefits of such crimes. I regard the second factor, however, as carrying much more weight. As was made clear in *Shaik's* case the primary purpose of a confiscation order is not punitive. In my view to visit the third defendant with an order to pay the full value of the three consignments, well knowing that this amount far exceeds the actual benefit he received, would be both unfair and gratuitously punitive. In the circumstances of this matter it is not possible to determine with any accuracy the true extent of the benefits obtained by the third defendant. All things considered I doubt that this could ever have exceeded half of

the market value of the consignments. The value of the three stolen consignments amounted to R2 142 627,00 whilst the third defendant's assets comprise no less than R2 022 253,00. In my view, taking all the relevant factors into account, a confiscation order in the amount of R1 million would be appropriate and give proper effect to the purposes of the Act.

COSTS AND ORDER

[48] The applicant has been substantially successful in this application and there can be no reason why it should be denied those costs to which it is entitled. Ms Cronje appeared for the applicant in her capacity as a member of the Asset Forfeiture Unit and is accordingly not entitled to counsel's fees. In the result the following order is made:

1. In terms of s 18(1) of Act 121 of 1998, the third defendant is ordered to make payment of the sum of R1 million to the State;
2. The third defendant is ordered to pay the State's costs of this application, excluding counsel's fees.

LJ BOZALEK, J

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Instructing Attorneys:	State Attorney Mr. M Kagee
Counsel for 11th Respondent:	Adv. J Spangenberg
Instructing Attorneys:	Vally Chagan and Associates Mr. V Chagan
Dates of hearing:	1 and 2 December 2008
Date of judgement:	27 February 2009