IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION, CAPE TOWN

REPORTABLE

CASE NO: A150/2020

In the matter between:

ALAN ROBERT RAVES	Appellant
and	
THE DIRECTOR OF PUBLIC PROSECUTIONS, WESTERN CAPE	First Respondent
THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	Second Respondent

Bench: Goliath DJP, Gamble and Fortuin, JJ

Heard: 20 January 2021

Delivered: 3 February 2021

This judgment was handed down electronically by circulation to the parties' representatives via email and release to SAFLII. The date and time for hand-down is deemed to be 12h00 on Wednesday 3 February 2021.

JUDGMENT

GAMBLE, J:

MIS EN SCENE

1. There is an old proverb that warns that fact is sometimes stranger than fiction. In his latest thriller "Donkerdrif"[1], the celebrated South African crime fiction writer, Deon Meyer, weaves into the narrative of the story a situation in which a police officer, Col. Buddie Fick, who is stationed at Silverton outside of Pretoria facilitates the sale of an arsenal of confiscated firearms held in the police firearm registry to a fictional Cape Flats gang known as The Trojans. In the culminating scene at the end of the novel, Fick is arrested.

2. And in his 2016 futuristic novel "Koors"[2], Meyer presciently looks at a post-apocalyptic rural South Africa devastated by the consequences of an outbreak of corona virus. But, given that a judgment should be based on fact, it is to that that I turn.

INTRODUCTION

3. The South African Police Service ("SAPS") is the pre-eminent guardian of law and order in our country and is established in terms of s205 of the Constitution, 1996. In terms of s205(3) -

[1] Published in Afrikaans in 2020 by Human & Rousseau

[2] Published in Afrikaans in 2016 (and in English in 2017 as "Fever") by Human and Rousseau

"The objects of the police service are to prevent, combat and investigate crime, to maintain public order, to protect and secure the inhabitants of the Republic and their property, and to uphold and enforce the law."

It is thus anathema to our Constitutional order when members of the SAPS become involved in organized crime syndicates. Yet, that is precisely what is alleged to have occurred in this matter.

4. In the discharge of its constitutional mandate the SAPS is responsible, *inter alia*, for the disposal of illegal weapons and firearms, which have been abandoned or declared forfeited to the State. To this end it has established a specialised unit known as "The Firearms, Liquor and Second Hand Goods Division" (generally known by the acronym "FLASH") located at the Confiscated Firearms Store ("the Store") at Silverton near Pretoria.

5. In terms of police standing orders all such firearms are to be disposed of in terms of the Firearms Control Act, 60 of 2000 ("the FCA"). After a registration process, such firearms are allocated a unique serial number under a system known as "IBIS" and then retained under lock and key at the Store before being taken to a furnace and melted down in the presence of a senior police officer specifically designated under the FCA.

6. Two senior police officers employed at FLASH, Colonels Christiaan Prinsloo and David Naidoo, are alleged to have exploited a gap in the IBIS system and established a lucrative business in the trade of illegal firearms. Through the intercession of one Irshad Laher (conveniently hereinafter referred to as "Accused

no.1") a supply line was established in about 2006 to arm various of the notorious street gangs operating in the Cape Peninsula, who then sowed death and destruction amongst the communities in which they lived utilising firearms effectively supplied to them by the SAPS.

7. Prinsloo was arrested in 2015 and appeared in the Magistrates' Court, Bellville on 8 July 2015 to face a series of offences under the FCA, the Prevention and Combatting of Corrupt Activities Act, 12 of 2004 ("PACCAA") and the Prevention of Organised Crime Act, 121 of 1998 ("POCA"), as well as common law offences of dishonesty, to wit, fraud and theft. Naidoo and Laher were also arrested around that time.

8. The appellant is said to be a "Category A" firearms collector, licensed firearms dealer and the sole member of Gama Arms CC, a firm that operates from premises in Vereeniging, Gauteng. The appellant is evidently also a specialist in the collection of military and heritage weapons. He was arrested at Vereeniging on 19 August 2015 and transported in custody to the Western Cape where he appeared before the Magistrate, Bellville on 21 August 2015 and released on bail of R20 000. The matter was postponed until 11 September 2015 in order that the appellant could be joined with the other accused in the matter. The appellant's involvement in the case will be set out more fully hereunder. Suffice it to say that he faced similar charges to Accused No.1, Prinsloo and Naidoo.

9. The case was postponed on a number of occasions in the Magistrates' Court during 2015 and 2016 for purposes of further investigation and compliance with, inter alia, POCA requirements. On 22 July 2016, the first respondent ("the DPP")

served an indictment in respect of a High Court criminal trial (Case No. CC21/16) on the appellant at the Magistrates' Court. He was reflected as accused no 2 in the matter, with Laher as the first accused. It appears that Prinsloo had in the meantime concluded a plea and sentence agreement with the State under s105A of the Criminal Procedure Act, 51 of 1977 ("the CPA") and had agreed to become a State witness in the trial. The papers do not say what became of Naidoo but he was not indicted in the High Court matter.

10. In any event, the matter was then transferred to this Court where the first criminal pre-trail conference was held on 4 November 2016 before Dolamo, J. The appellant was hospitalised at the time and did not appear. Accordingly, a warrant of arrest was issued and held over until his next appearance. Thereafter, there were a number of pre-trial appearances before various judges during 2017. At a pre-trial conference before Henney J on 19 May 2017, Accused No 1 asked for an order directing the DPP to make available to him some 3028 police dockets relating to the firearms allegedly sold to him and linked through the IBIS system. Despite the concerns of the DPP that this was an impossibly onerous task, the Court gave such a direction.

11. On 22 September 2017, there was a further pre-trial conference before Steyn J where the DPP asked for more time to produce the dockets requested by Accused No.1. The DPP told the Court that she was experiencing difficulty in complying with the order of Henney, J in that only 2206 dockets could be traced. The matter was accordingly postponed to 16 February 2018.

12. Accused No. 1 and the DPP then became embroiled in a discovery battle relating to the aforesaid dockets. The appellant was not affected by this dispute and became the proverbial "ham in the sandwich" as the matter was postponed from one pre-trial to another. At an intended penultimate hearing on 12 October 2018 before Wille J, an order was granted which was designed to bring the pre-trial issues to finality. His Lordship ordered that the matter be set down for trial on Monday 6 May 2019 and that a final pre-trial be held on 5 April 2019. On that day, the State was to furnish the defence with all outstanding documentation.

13. But as I have said, fact is stranger than fiction and further delays followed when Accused No.1's counsel, Adv. Pete Mihalik, was assassinated on a spring morning on 30 October 2018 in the streets of Green Point. As a consequence thereof further delays ensued due to the withdrawal of Accused No 1's attorneys and his subsequent failure to timeously appoint a new legal team. Eventually, in early March 2019, Accused No.1 appointed Mr. Saliem Parker as his new attorney but Mr. Parker in turn needed time to familiarize himself with the matter.

14. During the pre-trial phase, both in the Magistrates' and High Courts, the appellant launched repeated applications under s342A of the CPA, asking for the matter to be struck off the roll on the basis of unreasonable delay on the part of the State. The last such application was dismissed by Wille, J at the pre-trial hearing on 12 October 2018.

15. By early 2019, the appellant had had enough of the delays and on 20 March 2019 his attorneys formally lodged an application under Rule 6 of the Uniform

Rules seeking the following relief against the DPP and the National Director of Public Prosecutions, as second respondent.

> "1. The prosecution against the Applicant under Western Cape High Court case number CC21/2016 is hereby permanently stayed; alternatively, case number CC21/2016 against the applicant is postponed to a date to be agreed to by the First Respondent on condition that the Applicant's trial be separated from that of Accused 1 Irshad Laher;
>
> ALTERNATIVELY
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> 2. That in terms of Section 157(2) of the [CPA] the Appellant's trial under case number CC21/2016 is separated from that of Accused No.1, and is it (sic) directed that the prosecution be instituted and continued in Vereeniging Regional Court *alternatively* the North Gauteng High Court in Pretoria.
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> 3. Costs of the application in the event of it being opposed to be borne by first and second respondents jointly and severally. No costs are sought against respondents who do not oppose this application; and
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> 4. Further and/or alternative relief."

16. The application was opposed by only the DPP, who filed two sets of opposing papers to which the applicant replied. The matter was heard on the semi urgent roll on 14 November 2019 by Slingers AJ (as she then was). Her Ladyship dismissed the application on 28 November 2019 and made no order as to costs. The appellant appeals now against the dismissal of the application with the leave of the Court *a quo,* which was granted on 27 February 2020.

17. The consequence of this application has been to bring a temporary halt to the proposed commencement of the criminal trial. During a virtual hearing of this appeal on 20 January 2021, we were informed from the Bar by Mr. de Jong of the Office of the DPP (and Ms. Killian SC, who appeared with Mr. Heyman for the appellant, confirmed) that the criminal trial currently stands postponed until 12 February 2021 in anticipation of this judgement, whereafter it is likely to be postponed until 2022 for hearing.

18. And, reverting once again to the proverb, a further strange but very real fact is that with effect from March 2020 the criminal roll in this Division has been severely impacted by the corona virus pandemic (Covid 19), with many new trials having had to be postponed and only partly heard matters being finalized.

19. Both counsel confirmed to us that the issue between Accused No.1 and the DPP relating to the outstanding discovery of dockets had been resolved and that there was nothing else from the side of the prosecution which stood in the way of the trial commencing. However, Mr. de Jong did inform us (and Ms. Killian once again confirmed) that the appellant has lodged a further procedural challenge relating to the decision of the second respondent ("the NDPP") in terms of s111 of the CPA to consolidate the charges in this Court. I shall deal with the import of that decision shortly. Suffice it to say that the papers in that matter are evidently still in the process of being exchanged and, to the extent that such application might result in any further delays in the prosecution of this case, the responsibility therefore lies at the door of the appellant.

AN OVERVIEW OF THE CHARGES CONTAINED IN THE REVISED INDICTMENT

20. To appreciate the purpose of the application which served before Slingers AJ it is necessary to delve into the structure of the charges somewhat. The thrust of the State's case against the two accused is one of racketeering in the form of a contravention of s2(1)(e) of POCA[3] in that the appellant and Accused No.1 allegedly participated in the affairs of an illegal enterprise as defined under POCA. In addition, each accused faces a separate charge of corruption under PACCAA and there are also individual charges of money laundering under POCA preferred against each of them. These main offences, (if I may term the racketeering charges as such without derogating from the gravity of the other offences) are said to have been committed, inter alia, "at or near Silverton/Germiston/Wynberg/Cape Town" and "at or near Silverton/Germiston and Vereeniging".

21. In prosecuting the POCA charge, the State relies on a series of subsidiary offences committed by each accused, which are intended to constitute the predicate offences for a conviction of racketeering. The predicate offences contemplate the theft of a sizeable number of firearms by each accused (on the basis that the theft thereof by Prinsloo and Naidoo were continuing offences) and a number of contraventions of the FCA. These offences are said to have been committed on different dates between 2006 and 2015 at a variety of places including Pretoria, Durban, Vereeniging, Germiston, Cape Town and Wynberg. It will thus be seen that the offences are spread over a number of jurisdictions in different provinces, which

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[3] S2(1)(e) reads as follows.

"Any person who, whilst managing or employed by or associated with any enterprise, conducts or participates in the conduct, directly or indirectly, of such enterprise's affairs through a pattern of racketeering activity, within the Republic or elsewhere, shall be guilty of an offence."

would otherwise require separate High Court trials to be held in Pretoria or Johannesburg, Durban and Cape Town.

22. In terms of s2(4) of POCA the prosecution of a person for an offence allegedly committed under s2(1) can only take place if the NDPP has authorized same in writing. It is common cause that this procedural step has been complied with in this matter. But what of the fact that the offences are alleged to have been committed across the country?

23. It is common cause that the erstwhile NDPP decided, in terms of s111(1)(a) of the CPA[4] to centralize all the charges which the two accused presently face on this Division's criminal roll. This then gives this Division extra territorial jurisdiction in respect of the up-country maters[5]. It is this decision, said Ms. Killian, that the appellant further intended challenging on the basis that the NDPP did not apply the *audi alteram partem* principle before making his decision under s111(1), but as matters presently stand there is no bar to the appellant being prosecuted in this Division under an array of POCA charges.

UNDERTSANDING THE POCA CHARGES

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[4] S111(1)(a) is to the following effect –

"The direction of the National Director of Public Prosecutions contemplated in section 179(1)(a) of the Constitution... shall state the name of the accused, the relevant offence, the place at which (if known) and the Director in whose area of jurisdiction the relevant investigation and criminal proceedings shall be conducted and commenced."

[5] In terms of s111(2) of the CPA, once the NDPP has directed in terms of s111(1)(a) where the proceedings are to be held -

"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."

24. Central to the POCA charges is the existence of an enterprise as defined under that Act[6]. Initially, the State presented an indictment in which it asserted that the enterprise was the Supply Chain Management system of the SAPS that was used to facilitate the illegal activities of Prinsloo and Naidoo. After an amendment to the indictment, it was alleged that FLASH was the enterprise and that allegation still stands.

25. As I understand the indictment, the State's case is that the enterprise had two distinct areas of operation. On the one hand, there was the aforementioned supply line to the Western Cape that enabled Accused No.1 to on-sell illegal firearms to gangsters. On the other hand, there was the supply of stolen military and heritage weapons to the appellant in Vereeniging.

26. After the defence had requested further particulars, it became apparent to the appellant, said Ms. Killian, that the DPP accepted that the appellant and Accused No 1 did not know each other and that neither supplied any firearms to the other. Each of the accused is thus alleged to have conducted his own illegal operation.

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[6] Under s1 of POCA, an "**enterprise**" is defined as "including any individual, partnership, corporation, association, or other juristic person or legal entity, and any union or group of individuals associated in fact, although not a juristic person or legal entity", while
"**pattern of racketeering activity**" means "the planned, on-going, continuous or repeated participation or involvement in any offence referred to in Schedule 1 and includes at least two offences referred to in Schedule 1, of which one of the offences occurred after the commencement of this Act and the last offence occurred within 10 years (excluding any period of imprisonment) after the admission of such prior offence referred to in Schedule 1." It is not in issue that the predicate offences resort under Schedule 1 of POCA.

27. Ms.Killian argued that the fact that the two accused did not know each other, or were unaware of the other's involvement in procuring stolen firearms from FLASH, lead to the conclusion that they were not part of the same enterprise. As the appellant's counsel would have it, the pattern of racketeering activity contemplated under POCA required all of the participants to be "in the know", to use the vernacular.

28. We expressed caution regarding the approach being adopted by the appellant, given that this is not the trial: it is not for this Court to determine the nature or extent of the alleged enterprise and we should thus not be seen in any way to be pronouncing on either the guilt of the appellant or on any of the other issues which fall to be determined by the trial court. What we have to determine, in order to address the issues of a permanent stay of the prosecution or the separation of the trials, is whether the indictment discloses an offence(s) under POCA in respect whereof the appellant is liable to be charged and subsequently convicted.

29. While submitting that POCA permitted a misjoinder of accused persons, counsel's complaint was that, given the common cause facts already established by the further particulars furnished by the State, the appellant would be subjected to an "impermissible" misjoinder in the case. Further, it was said that this "impermissible" misjoinder would cause irreparable prejudice to the appellant because he now has to sit through a trial in which the evidence can never sustain a conviction against him under POCA. This irreparable prejudice was said to be relevant to the application to stay the prosecution and the alternative application for a separation of trials.

30. Before either of the accused can be said to have contravened s2(1)(e) of POCA, it must be established beyond reasonable doubt that the conduct of each

such accused constituted a pattern of racketeering activity as defined in s1 of POCA. The provisions of each of these sections have been recited above and will not be repeated now.

31. The term 'racketeering' is derived from the American legislation on which POCA is based (The Racketeer Influenced and Corrupt Organizations Act of 1970 or 'RICO'). While the word as such is not defined in POCA, the Shorter Oxford Dictionary defines a 'racketeer' as "a person participating in or operating a dishonest or illegal business, frequently practicing fraud, extortion, intimidation, or violence." The essence of the dictionary definition then is a criminal business with the emphasis on the latter.

32. The offences which fall under the definition of "racketeering activity" for the purposes of POCA are listed in Schedule 1 thereto and include, under Item 17 theft, Item 19 fraud and Items 23 and 24 a variety of firearm-related offences. The predicate offences with which the appellant and Accused No.1 are charged are thus adequately listed under Schedule 1 of POCA.

33. Ordinarily, the State would have been entitled to adduce evidence to show that either of the accused had committed any number of offences in his capacity as a participant, that is a racketeer, in an illegal business involved in a "pattern of racketeering". However, POCA is intentionally structured in such a manner that the State is afforded a less onerous procedural basis to prove the criminal conduct of the racketeer. And so, in terms of Section 2(1)(e) a person commits an offence -

- by managing;

- being employed by; or

- being associated with;

an unlawful enterprise while

- conducting; or

- participating;

- either directly or indirectly in;

its affairs through what is termed 'a pattern of racketeering'.

34. At the very minimum then the State must allege that the appellant, while being associated with FLASH, participated indirectly with its affairs through a pattern of racketeering. Its evidential burden in this regard is assisted by the provisions of POCA that require it to prove the commission of at least two offences listed in Schedule 1 (e.g. theft of firearms) in the course of his association with FLASH.

35. The jurisprudence relating to POCA is still developing but there are fortunately already a number of Supreme Court of Appeal ("SCA") cases upon which a court of first instance can rely for guidance. In the only text book on the topic currently available in South Africa,[7] Albert Kruger notes, with extensive reference to the American jurisprudence on RICO, that the purpose of anti-racketeering legislation is to target the organisation rather than the criminal:

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[7] Organized Crime and Proceeds of Crime Law in South Africa at 24.

"The racketeering offence targets the organisation, not individual criminal acts (events). The accused must be found to have participated in the organisation (enterprise) by managing some aspect of it or by performing acts for the enterprise, by participation or involvement."

36. Kruger stresses the importance of continuity in determining whether there has been a pattern of racketeering activity that lies at the heart of the various offences contemplated under Section 2(1) of POCA.

"Although POCA does not require any relationship between the two predicate offences, in assessing whether the offences are "planned, ongoing, continuous or repeated' the court will have regard to the nature of the predicate offences. The nature of the predicate offences and the relationship between the offences will guide the court in determining whether there is continuity." [8]

37. Further, the author suggests what the elements of an offence involving a "pattern of racketeering activity" under POCA incorporate.

"In order to convict an accused of any contravention of Section 2 (1), the State will have to prove that: (a) at least two offences contemplated in Schedule 1 of POCA were committed (not necessarily by the accused) (b) at least one of those offences occurred after 21 January 1999, and (c) the last or second offence occurred within ten years of the first offence, and (d) participation must have been planned, ongoing or

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[8] At 22.

repeated, and (e) mens rea was present in the manner set out in Section 1 (2) and (3)."[9]

38. Certain broad principles have been laid down by the SCA concerning the approach to POCA prosecutions. In Eyssen[10] the court considered the criminal conduct of members of a street gang known as "The Fancy Boys" which was said to be habitually involved in housebreaking and robbery in the Cape Peninsula. The leader of the gang, Eyssen, was charged and convicted in this Division with contravening both Sections 2(1)(e) and (f) of POCA. He was acquitted on appeal on the facts but in so doing Cloete JA discussed the import of these sections and the interplay between them:

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

39. After reciting the definition of "enterprise", Cloete JA continued as follows:

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[9] At 23.

[10] Eyssen v The State [2009] 1 All SA 32 (SCA)

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

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

40. Turning to the definition of a "pattern of racketeering activity", Cloete JA commented as follows:

"[8] .....In my view, neither unrelated instances of proscribed behaviour, nor an accidental coincidence between them constitute a 'pattern' and the word 'planned' makes this clear.

[9] The participation must be way of ongoing, continuous or repeated participation or involvement. The use of the word 'involvement' as well as the word 'participation' widens the ambit of the definition. So does the use of the words 'ongoing, continuous or repeated'. Although similar in meaning, there are nuances of difference. 'Ongoing' conveys the idea of 'not as yet completed'. 'Continuous' (as opposed to 'continual') means uninterrupted in time or sequence. 'Repeated' means recurring.

[10] Some limitation is introduced into the definition by the requirement that the participation or involvement must be in any Schedule 1 offence. The limitation is, however, not substantial. Schedule 1 lists a considerable number of offences, both statutory and common law, and includes (as item 33): 'Any offence the punishment wherefore may be a period of imprisonment exceeding one year without the option of a fine.'"

41. More recently in Prinsloo[11], a case involving a so-called "Ponzi Scheme", the SCA (per Fourie and Eksteen AJJA) followed the interpretational approach suggested in Eyssen.

"[57] We are in agreement with counsel on behalf of the State that, in construing the provisions of POCA, and in particular Section 2(1)(e) and (f), a liberal or broad construction is to be preferred. This would be in accordance with the broad objectives of POCA set out in the preamble thereto. In National Director of Public Prosecutions and another v Mohamed NO 5 and others 2002(4) SA 843 (CC) para's 14 to 16, the Constitutional Court, with reference to its preamble, emphasised the importance of POCA to curb the rapid growth of organised crime, money laundering, criminal gang activities and racketeering which threatens the rights of all in the Republic and

[11] S v Prinsloo and others 2016 (2) SACR 25 (SCA)

presents a danger to public order, safety and stability, thereby threatening economic stability. To curtail the ambit of Section 2(1)(e) and (f), as suggested by counsel for the first accused, would in our opinion, be contrary to the intention of the legislature...

[61] This brings us to count 2 i.e. the contravention of Section 2(1)(e) of POCA. What the State was required to prove is that, whilst managing an enterprise (the scheme) the first accused directly or indirectly participated in the conduct of the scheme's affairs through a pattern of racketeering activity. As emphasised above, this court in Eyssen (para 5) held that the essence of the offence referred to in Section 2(1)(e) is actual participation (be it direct or indirect) in the enterprise's affairs, as opposed to knowledge, not participation, which is the essence of an offence in terms of Section 2(1)(f)....

[63] We should add that, as in the case of count one, counsel for the first accused submitted that the State failed to prove that she had the necessary criminal intent in the form of dolus to contravene the provisions of Section 2(1)(e) of POCA. In our view, this submission failed to take proper account of the definitional elements of this statutory contravention, i.e. participation in the affairs of the enterprise through a pattern of racketeering activity. As emphasised in Eyssen, participation in the affairs of the enterprise is the offence. Kruger at 13, observes that an accused "is guilty by virtue of (a) being involved in an enterprise being part of the group of racketeers, and (b) being involved in the commission of two or more predicate offences" listed in Schedule 1 of POCA.

[64] To summarise, it is now well-settled that the essence of the offence in terms of Section 2(1)(e) of POCA is participation through a pattern of racketeering activity and not knowledge. Once it is proved that the accused has participated in the conduct of an enterprise's affairs through a pattern of racketeering activity, i.e. by committing two

or more predicate offences listed in Schedule 1 of POCA, he or she is guilty of a contravention of Section 2(1)(e) of POCA. There is no need for a further enquiry as to an additional mens rea requirement over and above the mens rea required by the predicate offences. "

42. Dos Santos[12] concerned a diamond smuggling syndicate operating in the West Coast town of Port Nolloth. The main perpetrators were charged with various offences under the Diamonds Act of 1986 and POCA and duly convicted in this Division. On appeal to the SCA, a number of issues fell for determination by that court. In his judgment Ponnan JA commented as follows regarding the application of POCA to the facts before the court:

"[39] For a pattern of racketeering activity, POCA requires at least two offences committed during the prescribed period. In this court, as indeed the one below, counsel argued that the 'offence' in that context meant a prior conviction. Absent two prior convictions, so the submission went, POCA could not be invoked. Underpinning that submission is the contention that an accused person must first be tried and convicted of the predicate offences (here the charges in terms of the Diamonds Act) before he/she could be indicted on the racketeering charge in terms of POCA. Allied to that submission is the argument that in this instance there has been an improper splitting of charges, resulting in an improper duplication of convictions.

[40] In my view, whether to prosecute and what charge to file or bring before a court are decisions that generally rest in the prosecutor's discretion. Nor would it be necessary, it seems to me, for the court to return a verdict of guilty in respect of the predicate offences for the POCA racketeering charges to be sustained. It may well

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[12] S v Dos Santos and another 2010 (2) SACR 382 (SCA)

suffice for the court to hold that the predicate charge has been proved without in fact returning a guilty verdict. But that need not be decided here...

[43] Prosecutions under POCA, as also the predicate offences, would usually involve considerable overlap in the evidence, especially where the enterprise exists as a consequence of persons associating and committing acts making up a pattern of racketeering. Such overlap does not in and of itself occasion an automatic invocation of an improper splitting of charges or duplication of convictions. As should be evident from a simple reading of the statute, a POCA conviction requires proof of a fact which a conviction in terms of the Diamonds Act does not...

[45] [S v Whitehead and Others 2008(1) SACR 431 (SCA)] recognised that a single act may have numerous criminally relevant consequences and may give rise to numerous offences. Our legislature has chosen to make the commission of two or more crimes within a specified period of time, and within the course of a particular type of enterprise, independent criminal offences. Here the two statutory offences are distinctly different. Since POCA substantive offences are not the same as the predicate offences, the State is at liberty to prosecute them in separate trials or in the same trial. It follows as well that there could be no bar to consecutive sentences being imposed for the two different and distinct crimes, as the one requires proof of a fact, which the other does not. Although a court in the exercise of its general sentencing discretion may, with a view to ameliorating any undue harshness, order the sentences to run concurrently. Thus by providing sufficient evidence of the five predicate acts, the State has succeeded in proving the existence of the 'racketeering activity' as defined in POCA."

43. Finally, I must refer to the judgment of the SCA in De Vries[13]. The case involved a criminal syndicate which robbed delivery trucks of their valuable cargoes of cigarettes and then on-sold the bounty to other parties. After referring to the judgment in Dos Santos, Leach JA observed as follows:

> "[48] In order to secure a conviction under S2(1)(e) of POCA, the State must do more than merely prove the underlying predicate offences. It must also demonstrate the accused's association with an enterprise and a participatory link between the accused and that enterprise's affairs by way of a pattern of racketeering activity. In light of this, an offence under S2 (1) of POCA is clearly separate and discrete from its underlying predicate offences and in my view, the decision in Dos Santos in regard to this issue is undoubtedly correct...
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> [56] By receiving the cigarettes for himself well knowing they were stolen, the appellant made himself guilty of theft as it is a continuing crime. By proceeding to use the cigarettes as part of his stock in trade as a wholesaler as if they were goods lawfully acquired, and thereby disguising or concealing the source, movement and ownership of the cigarettes and enabling and assisting the robbers to either avoid prosecution or to remove property acquired in the robberies, the appellant clearly made himself guilty of a contravention of S4 [of POCA]. Doing so involved different actions and a different criminal intent to that required for theft. In these circumstances there was no improper splitting of charges."

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[13] S v De Vries and others 2012 (1) SACR 186 (SCA)

44. In the Court *a quo* in De Vries[14], Bozalek J discussed the interpretation of the term "associated" as used in s2(1)(e) in the course of dealing with the culpability of accused no 11 in that case, who had been the purchaser of large quantities of cigarettes on three separate occasions.

> "[409] What remains is the question of whether accused 11 was employed by or associated with the enterprise, bearing in mind that he did not manage the enterprise. Clearly, there is no evidence that the accused was employed by the enterprise in the sense that he was on its payroll. The concept of association is a wide one and is not limited by the Act. ***The Concise Oxford English Dictionary*** gives the meaning of association as *inter alia* to "*meet or have dealings, allow oneself to be connected with or seen to be supportive of, be involved with*". In my view, it is not necessary for the State, in order to secure a conviction against accused 11 to prove that he was part of the enterprise in some more formal or direct sense than is conveyed by the broad concept of "association". Nor do I regard it as necessary to prove that persons "associated with" the enterprise knew about all its activities. In my view, it is sufficient that the accused knows the general nature of the enterprise and that it extends beyond his individual role. See *United States v Rastelli*, 870F. 2d 822 827 – 28 (Second Circuit 1989)."

45. The involvement of accused No. 11 in De Vries was not unlike that of the appellant in the instant case given that his criminal culpability lay in the principle of theft as a continuing offence. As the judgment demonstrates, each case will turn on its own facts and, in particular, the knowledge of the particular accused in relation to the extent of the enterprise.

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[14] S v De Vries and others [2008] ZAWCHC 36 (10 June 2008).

"[410] In accused 11's case he was approached on three separate occasions in a period of approximately three-and-a-half months by accused 2 to purchase a very large consignment of cigarettes. On two occasions accused 2 was accompanied by Aspeling. On the first occasion accused 3 was also present. I am mindful that on the third occasion there is no direct proof that accused 11 in fact received the consignment and it is for this reason, *inter alia*, that he is acquitted on charges related to the third robbery. Even if this evidence is left out of account, accused 11 was approached on at least two occasions to purchase a large consignment of cigarettes. He must have realised, at the very least, that there was a larger group of persons involved in the operations necessary to steal from or rob a third party of such large quantities of cigarettes. In my view such knowledge, together with accused 11's own participation in purchasing the consignments, is sufficient to meet the requirements of "association with" the enterprise and his participation in the affairs of the enterprise "directly or indirectly" through a pattern of racketeering activities. Accordingly, I am satisfied that the State has proved its case against accused 11 on this count and he is found guilty on count 2. "

As I have demonstrated above, Bozalek J's findings in respect of Accused No 11 were upheld by the SCA.

46. In my respectful view, these authorities establish conclusively that a person's involvement in the affairs of a POCA enterprise may take place in a number of ways. On the one hand, the members of a street gang may act in concert with a common purpose, as was the case in the charges which the State sought to prove in the matter involving the Fancy Boys. And, provided they have knowledge of the

enterprise and collectively seek to advance its interests, the members of the gang may be liable for conviction under s2(1)(e).

47. On the other hand,, there may be any number of persons who are liable for conviction by virtue of their individual acts of association with the enterprise such as the scenario one finds in De Vries where the *modus operandi* of the criminal syndicate is similar, but where there are a number of participants performing differing functions in the advancement of the activities of the enterprise.

48. The evidence in that case was that a number of the accused acted in concert by stopping trucks transporting cigarettes in bulk under the guise that they were police officers. The cigarettes were then loaded into another truck and transported to a safe place where they were then distributed to willing buyers. As the court *a quo* found, there was no need for Accused No 11 to know how the cigarettes had been stolen or by whom. It was sufficient that he knew that in receiving loads of cartons of cigarettes these had been stolen by the enterprise, that he knew of the existence of the enterprise and that he associated himself therewith.

49. It must be borne in mind, as the SCA has repeatedly held, that the wording of POCA is, by design, very wide and intended to cover any number of situations, with the focus of the legislation being on the illegality of the enterprise. The State must establish such illegality as a matter of fact and once it has been shown that an accused has committed more than two predicate offences in relation to that enterprise s/he is liable to be convicted under s2(1)(e) by virtue of, at the very least, an indirect act of association.

50. I do not understand the reference in [43] of Dos Santos to "persons associating and committing acts of racketeering" to require that all the persons involved in those acts must be in association with each other. Rather, it seems to me that the learned judge of appeal was referring to the association which is required between the enterprise and the individual racketeers who commit the predicate offences.

51. This is demonstrated by the facts of the case in which the first appellant ran an illicit diamond dealing enterprise under the cover of his motor spares business in the town of Port Nolloth, a place well known for the legal exploitation of diamonds. The evidence adduced demonstrated that employees of such legitimate businesses were schooled by the appellant in the art of identifying diamonds, which they then illicitly sold to the appellant from time to time. The "association" in that matter was between the appellant and the individual illicit seller.

52. In the circumstances, I am of the view that, for present purposes, it is sufficient for the State to allege that the appellant committed any number of predicate offences (such as the possession of firearms originally stolen by Prinsloo and/or Naidoo and thus the theft thereof by virtue of theft being a continuing offence, as also the unlawful possession thereof under the FCA), that the business of the enterprise was the theft of such firearms by Prinsloo and/or Naidoo and that the appellant associated himself with the enterprise through a pattern of racketeering by continuously buying stolen arms from them. In such circumstances, his joinder in the case as an accused is manifestly warranted and thus permissible.

53. Put differently, the appellant is liable to be charged because the State believes it can demonstrate that he knew (or ought reasonably have known) that he was buying stolen firearms from the enterprise allegedly being run by Prinsloo and Naidoo at FLASH. Provided the State can demonstrate that in such circumstances FLASH was an enterprise as contemplated under POCA which had been established for purposes of racketeering, it does not matter that the appellant did not know of the similar involvement of Accused No.1 with FLASH.

THE APPLICATION FOR A PERMANENT STAY OF THE PROSECUTION

54. The primary relief sought by the appellant in the court *a quo* was for a permanent stay of the prosecution against him pursuant to the provisions of s342A(3)(a) of the CPA. This claim was based upon the repeated postponements in the prosecution resulting in what the appellant referred to as an unreasonable delay as contemplated under the subsection in question.

55. There can be no doubt that the appellant was inconvenienced by the circumstances relating to Accused No 1 - the death of his counsel of choice, the delays occasioned by the appointment of a new legal representative and the discovery dispute between him and the State. While any unnecessary delay in the prosecution of a criminal matter is a cause for concern, experience tells one that the wheels of justice grind slowly on occasion but they do grind nevertheless.

56. Slingers AJ carefully considered the law and the facts relevant to the application for the stay and correctly observed that such an order is granted sparingly and only for compelling reasons.[15] As Kriegler J pointed out in Sanderson -

> "[T]he relief...is radical, both philosophically and socio-politically. Barring the prosecution before the trial begins – and consequently without any opportunity to ascertain the real effect of the delay on the outcome of the case – is far-reaching. Indeed, it prevents the prosecution from presenting society's complaint against an alleged transgressor of society's rules of conduct. That will seldom be warranted in the absence of significant prejudice to the accused. An accused's entitlement to relief such as this is determined by s 7(4)(a) of the interim Constitution [the similarly worded precursor to s 38 of the Constitution]".

The learned judge continued at para 39:

> "A bar is likely to be available only in a narrow range of circumstances, for example, where it is established that the accused has probably suffered irreparable trial prejudice as a result of the delay."

57. The relief predicated upon the provisions of s342A(3) involves the exercise of a court's discretion. It is trite that a court of appeal will not likely interfere with the exercise of such discretion by the lower court, provided that the discretion has been properly exercised. I have carefully considered the reasoning of the court *a quo* and I am unable to find that Slingers AJ did not exercise her discretion properly. On the contrary, her decision is well founded on both the law and the facts. There is

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[15] Sanderson v Attorney-General, Eastern Cape 1998 (2) SA 38 (CC) at [38]; Zanner v Director of Public Prosecutions 2006(2) SACR 45 (SCA) at [10]

thus no basis for this court to interfere with the decision not to grant a permanent stay of prosecution.

SEPARATION OF TRIALS

58. The appellant's fallback position was to request a separation of trials in the event that the application for a permanent stay was unsuccessful. In this regard he relied upon the provisions of S342A(3)(b), alternatively s157(2) of the CPA. Not only did he request to be tried before a separate court, he asked for the prosecution to continue in the court of his choice - either the nearest High Court to his home or the local Regional Court. The appellant relied upon issues of personal convenience such as the fact that he exercises family responsibilities in respect of his children, the cost of traveling to and from Cape Town and the prospect of having to subpoena more than 100 witnesses who appear to reside upcountry.

59. The court *a quo* was effectively being asked to interfere with a prosecutorial prerogative. To take such a step would surely have involved that court preaching the separation of powers principle. But in any event, as Ponnan JA pointed out in the passage referred to above in Dos Santos at [40] and [43], the prosecution has a wide prerogative as to how and where it chooses to charge an accused person in a POCA matter.

60. Slingers AJ recognized that there were certain witnesses who would testify only against Accused No.1 and others who would only involve the appellant. She found, too, that there would be an inconvenience to the appellant if the trial were to be held in Cape Town as opposed to closer to his home. But, in exercising her

discretion to refuse to order a separation of trials, Her Ladyship observed that a separation would of necessity lead to the duplication of critical evidence which would be common to both trials - that pertaining to the existence, nature and operation of the criminal enterprise with which the two accused are charged. As the court *a quo* correctly pointed out –

> "This is inimical to the interests of the State and against the principle that this should not be a multiplicity of trials relating to essentially the same facts and body of evidence."[16]

61. Once again, I am satisfied that the court *a quo* properly weighed up all of the facts, considered the arguments for and against a separation and ultimately exercised its discretion judicially in refusing a separation of trials. There is therefore no basis to interfere with the order of that court in that regard.

ORDER OF COURT

Accordingly, I would dismiss the appeal with no order as to costs.

GAMBLE, J

[16] S v Maringa 2015 (2) SACR (SCA) at [20]

I agree and it is so ordered.

GOLIATH, DJP

FORTUIN, J:

I agree.

FORTUIN, J